

# Application of penalties under Welfare to Work

December 2007

Report by the Commonwealth Ombudsman,  
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **16|2007**

## Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

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## EXECUTIVE SUMMARY

A number of social security payments require recipients to satisfy an activity test. This may include looking for work, undertaking training activities, attending scheduled interviews, and undertaking a Work for the Dole program.

Failure to satisfy an activity test requirement can result in a payment being stopped for eight weeks or more.

Between the implementation of the Welfare to Work reforms on 1 July 2006 and 31 October 2007, the Ombudsman's office received 124 complaints about the application of the activity test requirements, particularly in relation to the imposition of non-payment periods. The complaints raised issues about how the new provisions are being administered by Centrelink.

In some cases payment was stopped before a decision was made about whether or not the penalty of non-payment should be applied. Decisions on whether or not the penalty should apply were then delayed for substantial periods. Because no decision was formally made, Centrelink customers did not have access to review and appeal rights, ongoing payment or financial case management.

At least some of the problems identified by the Ombudsman's office appeared to be systemic in that certain practices routinely implemented by Centrelink staff were not consistent with the social security law.

Set out below are the seven primary areas of inconsistency identified by the Ombudsman's investigation between Centrelink's existing processes with respect to non-payment periods, and the social security law or publicly stated policy.

- Centrelink's practice of withholding payment pending determination of a failure decision was not supported by the social security law.
- Centrelink's failure to notify customers of its intention to withhold their payment deprived them of the opportunity to query Centrelink's action, or to arrange their finances in anticipation of future payments not being made.
- Centrelink's refusal to accept or issue continuation forms did not authorise cancelling or suspending the jobseeker's Newstart Allowance (NSA).
- Centrelink's practice of waiting until a decision had been made on a participation or serious failure before assessing customers for financial case management prevented the Financial Case Management Scheme from achieving the Government's stated aim of providing 'case management and limited financial assistance where vulnerable people and third parties might be unduly affected by non-payment periods'.
- The current delays in decision making on participation and serious failures were not acceptable and, in many instances, compounded the difficulties faced by customers subject to a non-payment period.
- Centrelink's practice of adjusting the start date of non-payment periods was not supported by the social security law.
- The Guide to Social Security Law (point 3.2.13.20), in directing that a non-payment period be adjusted around payment pending review, was not in keeping with the social security law.

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The Ombudsman's office prepared this report to highlight these inconsistencies. The report discusses Centrelink's processing practices in the context of their consistency with the social security law and policy guidelines, as well as their impact on customers.

The three agencies involved in the implementation of the Welfare to Work reforms—Centrelink, the Department of Employment and Workplace Relations (DEWR) (as it then was) and the Department of Human Services—were provided with an opportunity to comment on the report.

Generally, all three agencies accepted that the Ombudsman's report had identified inconsistencies that needed to be rectified. DEWR and Centrelink have already taken steps to address these. In particular, the practice has been discontinued of withholding payment pending the determination of a participation failure, and steps have been taken to improve the timeliness of decision making. The policy agency responsible for the Welfare to work reforms, DEWR, whilst not agreeing with the seventh area of identified inconsistency, did indicate that it would nevertheless consider the matter further.

The Ombudsman's office welcomes the actions already undertaken, although some unresolved issues still remain and will require a collaborative approach by all three agencies to resolve them. For example, some of the procedural changes that have since been implemented need to be further considered so that they do not cause further inconsistencies or problems.

## PART 1—BACKGROUND

### Participation

1.1 The Welfare to Work reforms introduced on 1 July 2006 focused on NSA or mature age allowance and certain youth allowance payments, which generally require customers to actively look for work as one of the qualification criteria.

1.2 From 1 July 2007 the Welfare to Work reforms extended job seeking obligations—referred to as ‘participation requirements’—to a broader range of people including parents and those people with a reduced capacity to undertake paid employment. The reforms also imposed stricter rules for new claims for disability support pension and parenting payment. This has resulted in many people who would previously have received these payments now being required to claim NSA or youth allowance, and satisfy participation requirements.

1.3 People to whom participation requirements apply must:

- sign an activity agreement with Centrelink or with a provider of Australian Government employment services (PAGES)
- follow the activity agreement
- participate in mutual obligation activities for six months every year.

1.4 Activity agreements describe the specific activities that income support customers must undertake to meet their activity test requirements. These activities can vary from one customer to another, subject to certain restrictions applied on the basis of the customer’s circumstances. There are three main categories of people who are subject to activity testing:

- the general population of job seekers
- principal carers (including parents)
- people with partial capacity to work due to illness, disability or injury.

1.5 The level of activity expected of each category falls within broad parameters that appear to have been set in accordance with the limitations generally affecting that group’s capacity for work, such as the need to care for children. However, within the parameters set for each category, activity agreements take into account the circumstances of the individual and are negotiated between the individual and their assigned PAGES.

### Penalties

1.6 The Welfare to Work reforms ameliorated the activity test requirements in some important respects. The new provisions refer to relevant failures as either a ‘serious failure’ or a ‘participation failure’. (A full list of participation and serious failures as set out in the *Social Security Act 1991* is provided at Appendix 1.)

1.7 Serious failures result from more extreme circumstances, such as voluntary resignation from suitable employment, being dismissed from employment for misconduct, or failing to participate in a full-time Work for the Dole program. If Centrelink decides that a customer has incurred a serious failure without a reasonable excuse, a penalty of eight weeks non-payment will be applied.

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1.8 The consequences of a participation failure are less immediate. Under the current provisions, a jobseeker who incurs a first or second participation failure will suffer no financial loss if they satisfy certain ‘reconnection’ requirements as directed by Centrelink. It is only if the jobseeker incurs a third or subsequent failure within any 12-month period that a penalty, in the form of an eight-week non-payment period, will be applied.

1.9 In the Second Reading Speech to the Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005 (the Bill), which introduced the changes, the Minister for Employment and Workplace Relations described the changes as follows:

This bill abolishes the current breaching regime, under which job seekers can incur long-lasting financial penalties regardless of any subsequent efforts to meet their requirements.

The new compliance framework included in this bill will more clearly link participation to payment and will reward those who are willing to re-engage quickly. A job seeker without a record of repeated non-compliance who commits a participation failure, such as missing an interview with an employment service provider, will be given the opportunity to avoid any financial penalty by quickly re-engaging with that provider.

1.10 The Minister further noted:

The current review and appeals system will be retained. This allows any job seeker to ask Centrelink to review any adverse decision and, if not satisfied with the outcome of that review, to appeal the matter to an external tribunal.

### **Legislation, policy and service delivery**

1.11 The core legal requirements that apply to NSA are contained in ss 624–630 of the *Social Security Act 1991* (the Act). Corresponding provisions for parenting payment and youth allowance are found in Parts 2.10 and 2.11 of the Act respectively. Related legislation is also found elsewhere in the Act and in the *Social Security Administration Act 1999* (Administration Act).

1.12 Policy guidelines for the new compliance framework are provided in the Guide to Social Security Law (the Guide), which is prepared by the Department of Families, Community Services and Indigenous Affairs and DEWR. Additional policy and procedural guidance for decision makers is contained in the ‘Detailed Business Requirements’ under the DEWR–Centrelink Business Partnership Agreement 2006–09 and Centrelink’s e-Refs.

1.13 Primary responsibility for developing policy in this area rests with DEWR. Centrelink is responsible for service delivery.

## PART 2—ISSUES IDENTIFIED

2.1 In the course of its investigations over the past 15 months, the Ombudsman's office has identified a number of issues about Centrelink's administration of the new participation compliance framework. For the purposes of this report, the issues have been narrowed to three key topics.

### Cessation of payment

2.2 Since 1 July 2006 the Ombudsman's office has received a number of complaints from Centrelink customers whose payments have been 'held' pending a decision on a third (or subsequent) participation failure or serious failure. These complaints highlighted four major issues:

- lack of decision
- lack of notification
- non-acceptance of fortnightly continuation forms
- financial case management.

#### **Lack of decision**

2.3 In some complaints received by the Ombudsman's office, Centrelink had stopped payments to a person notwithstanding that a decision had not yet been made about the customer having committed a serious failure or a participation failure. The lack of a decision meant that the person could not initiate a review or appeal against Centrelink's actions. The following two case studies provide illustrations.

#### **CASE STUDY 1—Mr A**

For various reasons, Mr A had been the subject of ten participation reports between August 2006 and July 2007. Centrelink had rejected all but three alleged failures.

Until 26 July 2007, Mr A received NSA pending review of the three outstanding decisions by the Social Security Appeals Tribunal. Centrelink received further participation reports in respect of failures allegedly committed on 24 July and 6 August 2007.

As at 23 August 2007, Centrelink had not made a decision regarding either of the most recent alleged failures. Nevertheless, Centrelink had not paid Mr A any NSA since the fortnight ending 26 July 2007.

The Ombudsman's office asked Centrelink's Compliance Reporting and Financial Case Management Team to advise of the provisions from the social security law it had relied upon in withholding payment in this case. In its response dated 23 August 2007, Centrelink failed to cite any legislative provisions. Instead, it stated that:

*Centrelink is acting on policy advice from DEWR (Guide 3.2.13.20). Reconnection is not possible after a third or subsequent participation failure, as a job seeker cannot avoid their penalty through reconnection. Without connection it is not possible to process a payment.*



### **CASE STUDY 2—Mr B**

Mr B attended Centrelink on 18 April 2007 to lodge his NSA continuation form. At that time he was advised that a non-payment period had been applied from 4 April 2007 as a result of his voluntary resignation from employment.

Mr B approached the Ombudsman's office, stating he had requested a review of the participation failure decision but was told by Centrelink that he did not have a right of review.

When contacted by the Ombudsman's office, Centrelink confirmed that Mr B was not able to request a review because a decision had not yet been made by the National Participation Solutions Team to apply a serious failure.

The investigating officer queried the basis on which Centrelink could decide to withhold Mr B's payment if a decision had not been made to record a serious failure. Centrelink's Area Participation Solutions Team advised that no decision had been made to apply the non-payment period, as there was a payability issue that prevented payment while a third or serious failure was being investigated.

2.4 The Ombudsman's office has been unable to identify the legislative basis on which Centrelink ceases or 'withholds' payment in the absence of a decision to impose a participation or serious failure. Having regard to social security law, Centrelink could not be satisfied that the conditions giving rise to a non-payment period exist before investigating and deciding whether:

- the alleged failure(s) had occurred
- the jobseeker lacked a reasonable excuse
- there are no other reasons as envisaged in s 629(3) of the Act that would satisfy the Secretary that a non-payment period should not apply.

2.5 In the course of this investigation into the above complaints, the Ombudsman's office queried the legislative basis for ceasing a customer's payment pending determination of a participation or serious failure. Centrelink advised that, in withholding payment until a decision was made, it acted on policy advice from DEWR. Specific reference was made to paragraph 3.2.13.20 of the Guide, which is reproduced at Appendix 2.

2.6 The Ombudsman's office does not consider that the Guide authorises the withholding of payment prior to the making of a decision about a third or serious failure. Even taking into account the cancellation and suspension provisions at s 80 of the Administration Act and the automatic cancellation provisions in Divisions 7 and 8 of Part 3 of the Administration Act, such actions by Centrelink do not appear to be supported by the current social security law.

### ***Lack of notification***

2.7 It is a basic principle of good public administration that a person will be given notice of a decision that adversely affects them. This notice should generally explain the reasons for the decision and advise anyone affected of their rights of review. The following two case studies provide examples of where this did not occur.

### **CASE STUDY 3—Mr A**

The facts of Mr A's matter are set out in Case Study 1 above. As noted, Centrelink had not made a decision about the alleged participation failures of 24 July 2007 and 6 August 2007 by 23 August 2007. Consequently, Mr A was not notified of any decisions regarding these matters. Nevertheless, Centrelink refused to accept his continuation form for the fortnight ending 9 August 2007 until a decision was finally made toward the end of August. He was not paid until that time.

### **CASE STUDY 4—Mr C**

According to Centrelink, Mr C committed his second participation failure within a 12-month period on 9 November 2006. Centrelink say that he failed to reconnect when first required to but ultimately did so on 23 November 2006, at which point NSA became payable to him again.

On 30 November 2006, however, Centrelink received a further participation report (PR), alleging that Mr C had failed again to attend Work for the Dole. Centrelink advised the Ombudsman's office that:

*The automatic process is that the PR sets up a hold on payments until the person contacts to discuss the possible failure. If the failure is a third participation failure in a 12-month period (which this was), DEWR does not allow Centrelink to reconnect the person with their provider (Guide 3.2.13.20).*

*Mr (C)'s Application for Payment, due 6 December 2006, was automatically sent on 23 November 2006, after the last form was processed. This form could not be processed due to the lack of reconnection with his provider. There is no notation on the record to indicate this form was lodged.*

*Mr (C)'s Newstart Allowance was automatically cancelled on 21 December 2006 as 2 consecutive Applications for Payment had not been processed (due to the outstanding decision about the third failure).*

Centrelink said that there was no record of Mr C lodging a form for the fortnight ending 20 December 2006, but explained that as the previous form was not processed, one would not have been sent.

2.8 In numerous cases similar to those above, Centrelink customers have complained to the Ombudsman's office that they were unaware their payment had been 'stopped' or 'held' until they attended Centrelink to lodge their continuation form.

2.9 Despite Centrelink's statements that 'no decision' had been made to cease payment, its actions undoubtedly had the effect of withholding payment. To do so without notification to the affected customer is to deprive the customer of the opportunity to query its basis or to arrange finances in anticipation of future payments being discontinued.

### ***Non-acceptance of fortnightly continuation forms***

2.10 Section 68 of the Administration Act provides for the Secretary to give an NSA customer a notice in writing requiring them to provide one or more statements about matters that might affect their payment. Most customers with participation requirements are issued such a notice on a fortnightly basis, which obliges them to report to Centrelink the activities they have undertaken to satisfy their activity test requirements. These notices are commonly referred to as 'continuation forms', 'SU19

forms', 'application for payment forms' or 'reporting forms'. Once Centrelink has received and accepted a customer's continuation form, it will then process their payment.

2.11 In the course of this investigation, the Ombudsman's office became aware of instances in which Centrelink had apparently advised customers that they were unable to lodge their fortnightly continuation forms while an alleged participation failure was being investigated. The explanation Centrelink gave to the Ombudsman's office for this position was that because the alleged participation failure was the third or subsequent failure in a 12-month period, reconnection was not possible until a decision was made on whether a failure had occurred.

2.12 The practice of refusing to accept a jobseeker's continuation form, or issue them with new forms until a decision has been made about the imposition of a participation or serious failure, does not appear to be required by social security law. Similarly, it is doubtful that Centrelink's refusal to accept such a form (or to issue a subsequent form) could provide a reasonable basis for stopping payment.

2.13 Where a jobseeker attends Centrelink and attempts to lodge their continuation form, it could hardly be said that they have failed to comply with their obligations simply because a Centrelink officer refused to accept it. Likewise, in the Ombudsman's view, if Centrelink advises a jobseeker prior to the due date that they are no longer required to lodge the form, this should be understood as a retraction of the requirement to lodge a form. In such circumstances it would be difficult to justify penalising a person for acting in accordance with the advice they were given.

2.14 The complaints investigated by the Ombudsman's office also suggest that there is inconsistent practice in Centrelink concerning the refusal to accept a customer's continuation form. The areas of inconsistent practice are:

- how and when a customer is notified
- whether a record is kept of the customer's attempt to lodge their form
- what steps the customer can take to remedy or improve their circumstances.

### Financial case management

2.15 Centrelink's current policy of withholding payment pending the determination of possible failures means that customers are often left for weeks without any form of income support. Similarly, it is not until *after* a decision has been made to apply a non-payment period that a customer's eligibility is assessed for 'financial case management'. The Financial Case Management Scheme (the Scheme) is not incorporated into the social security law. It is an administrative scheme delivered by Centrelink and contracted service providers.

2.16 Financial case management provides assistance to certain job seekers during an eight-week non-payment period by paying their essential expenses up to the amount of their income support payment. Once a decision is made to apply a non-payment period, Centrelink will consider whether the customer is eligible for assistance, by determining whether they:

- are 'exceptionally vulnerable' and/or
- have dependant children and/or
- have other vulnerable dependents.

2.17 As illustrated by Case Studies 5 and 6, a customer can lose the opportunity to obtain financial assistance under the Scheme as a consequence of payment being stopped before a decision is made and notified to the customer. This is at odds with a commitment by the Minister in his Second Reading Speech to the Bill:

There will be financial arrangements for vulnerable people, such as dependant children ... including case management and limited financial assistance where vulnerable people and third parties may be unduly affected by non-payment periods.

#### **CASE STUDY 5—Mr D**

Mr D approached the Ombudsman's office, advising he had incurred a third participation failure as a result of allegedly missing an appointment with his job network member. In essence Mr D disagreed that a third failure should be applied, resulting in an eight-week non-payment period.

Upon contacting Centrelink to discuss this complaint, the Ombudsman's office was advised that:

1. Mr D had subsequently incurred a fourth participation failure as a result of not meeting his participation requirements (ongoing requirements were being imposed on him because he was still in receipt of payment pending a decision on the third failure).
2. Mr D could continue to receive payments if he lodged the outstanding NSA continuation forms that would be issued to him.
3. If the third (or fourth) participation failure was imposed and Mr D had continued to receive payments, he would be deemed to have received amounts to which he was not entitled—this would presumably lead to a debt being raised against him.

Later, the same officer called back to advise she had been mistaken and, in fact, no payment could be made to Mr D until the third failure decision had been finalised. Payments were stopped from that date.

When the third failure was eventually imposed and an eight-week non-payment period applied (from the first day of the entitlement period following the failure), the National Participation Solutions Team assessed Mr D for financial case management. It was determined that he was eligible for assistance and monies were paid to him retrospectively for the non-payment period.

#### **CASE STUDY 6—Mr E**

Mr E received notification of a third participation failure, which was recorded as a result of him missing an appointment with Centrelink. He approached the Ombudsman's office to complain about this decision.

Our investigation identified that a non-payment period had been imposed on Mr E from 3 April 2007. This was despite the decision to impose the third failure not being made until 21 May 2007. This meant that Mr E effectively served seven weeks of non-payment before Centrelink determined that a third failure had occurred. He was not assessed for financial case management during that period.

2.18 The above case studies demonstrate that in these instances at least, the Scheme is not achieving its stated aim. As previously discussed, the legislative basis for withholding payment before a decision has been made remains unclear. Nevertheless, the fact that this apparently occurs as an approved practice, combined with delays in decision making, inevitably leaves exceptionally vulnerable people with no assistance for extended periods. Further, it must be remembered that some of

these customers will be found to have had a reasonable excuse for the alleged failure and, in these circumstances, their payment should not have been delayed or suspended.

2.19 Making assistance available under the Scheme retrospectively, as in Case Study 5, does not provide an adequate outcome, particularly where accounts have gone unpaid in the meantime. Landlords and other creditors are unlikely to be forgiving of a debtor who defaults for reasons that may be difficult to understand, let alone explain. Default is likely to damage the relationship between the jobseeker and their creditors and, in the longer term, may affect their credit rating or their reputation as a reliable tenant. Ultimately it may lead to the loss of essential services, accommodation and health.

### Timeliness of decision making

2.20 In undertaking this investigation the Ombudsman's office sought from DEWR details of any key performance indicators set for Centrelink by DEWR regarding the timeliness of decision making about third and subsequent failures and serious failures. Although none of the performance indicators address the specific circumstances, the most relevant in the DEWR 'Business Partnership Agreement 2006–07' with Centrelink appears to be:

6.1 Timeliness of participation reports (submitted by all ESPs using EA3000) actioned

- 80% actioned within 16 working days (including suspension).

2.21 Based on existing complaints data, the Ombudsman's office has noted that Centrelink's decisions on participation failures and serious failures often take more than four weeks to be finalised. Centrelink's Customer Relations Unit staff have confirmed that this is due to current workloads.

2.22 Given the implications of these decisions for customers, and Centrelink's current practice of holding payments until a decision is made, it is the Ombudsman's view that such delays are not acceptable. Indeed, these delays would seem to compound the difficulties faced by customers for whom a failure is pending.

### Imposition of non-payment periods

#### **Timing**

2.23 The Social Security Act sets out that a customer who incurs a third (or subsequent) participation failure or serious failure without a reasonable excuse, will be required to serve a penalty of eight weeks without payment. In the course of considering complaints on this topic the Ombudsman's office has become aware of inconsistencies in the way non-payment periods are imposed. This is illustrated in Case Studies 7 and 8, in which there was inconsistent practice in Centrelink applying a non-payment period.

### **CASE STUDY 7—Mr F**

Mr F attended Centrelink on 21 June 2007 to lodge his NSA fortnightly continuation form. At this time Mr F was advised that his NSA payment was being 'held' as a result of a third participation failure, which meant Centrelink could not accept his continuation form.

Mr F requested a review of the decision to 'hold' his NSA, but was told that because a decision had not yet been made to apply the third failure, there was nothing to be reviewed.

Mr F approached the Ombudsman's office on 25 June 2007, advising he had not received payment in almost three weeks. He requested the assistance of the Ombudsman's office to obtain payments while his participation failure was being decided.

In response to our investigation Centrelink advised that a decision had been made to apply the third participation failure and impose an eight-week non-payment period. The non-payment period was applied from 8 June 2007, being the day after Mr F last received payment of NSA. This meant Mr F had already served 19 days of non-payment before a decision was made by Centrelink to impose the third failure.

### **CASE STUDY 8—Mr H**

Mr H incurred a third participation failure for missing an appointment with his job network member. In making his complaint to the Ombudsman's office, Mr H acknowledged he would be subject to a non-payment period and said he understood this would commence on the first day of the following payment period, being 22 April 2007.

Despite this Mr H advised that he had continued to receive and lodge his NSA continuation forms for a further three fortnights. When he attempted to lodge the fourth continuation form, this was refused and he was advised the third participation failure had been applied and a non-payment period imposed from 26 May 2007.

2.24 The current legislation specifies the date on which a non-payment period will commence by making reference to particular events such as the date Centrelink became aware of the alleged participation failure and when the jobseeker's next allowance fortnight commences (ss 627 and 630 of the Act). These provisions do not appear to allow for any variation to the commencement of the non-payment period on the basis that Centrelink's decision on the participation or serious failure has taken some time to be made (or, in fact, for any other reason). It seems that once a decision is made, the period *must* be applied retrospectively from the commencement date determined under the legislation.

2.25 This suggests that debts would arise in relation to payments received before a decision is made about whether or not a non-payment period should apply. For example if it is decided that a non-payment period should apply and the decision is made five weeks after the triggering failure occurred, the customer's payment would stop only when the decision had been made. This would mean that the customer would only serve the last three weeks as a non-payment period, and payments received during the initial five weeks of the eight-week non-payment period would probably give rise to a debt. Although there may be some valid concerns around the effects of applying the law in this way, the fact remains that there does not appear to be any legal justification for shifting the start date of the period such as occurred in Case Study 8.

***Impact of payment pending review***

2.26 The Administration Act provides for payment pending review of a decision by an Authorised Review Officer (ARO) where, among other things, the decision would result in the application of a compliance penalty period. Under s 131(5), a declaration granting payment pending review comes into effect on the day it is made, or such earlier day as specified in the declaration. It ceases to have effect upon withdrawal of the appeal, finalisation of the review or the day on which it is otherwise revoked.

2.27 The Administration Act does not, however, address when a non-payment period is to commence once the declaration is no longer in effect. At point 3.2.13.20, the Guide states:

Once all the review activity has been finalised, if the non-payment period still applies and no party is taking further appeal or review action, then the non-payment period re-commences from the entitlement period following the decision to affirm the decision.

The above rules for the application of PPR are set out in a Ministerial Determination.

2.28 The relevant Ministerial Determination, which is authorised by s 132 of the Administration Act, is the *Social Security (Payment Pending – ARO Application for Review) (DEWR) Guidelines 2007*. However, that determination does not appear to support the statement in the Guide that, once all review activity is finalised, then the non-payment period re-commences from the entitlement period following the decision to affirm the decision. Although this issue is not entirely clear, the Ombudsman's office is of the view that the policy and practice in this regard is probably not in keeping with social security law.

2.29 This gives rise to a number of questions about how the provisions regarding payment pending review should be implemented. On the face of it, it appears that the eight-week non-payment period must be taken to have commenced on the date determined in accordance with s 627 and s 630. It follows that once the review is finalised, the non-payment period must be imposed retrospectively to the eight weeks commencing on that date. It should be acknowledged that this would probably give rise to a debt under social security law.

## PART 3—SUMMARY

3.1 This investigation was prompted by complaints received by the Ombudsman's office about Centrelink's application of activity test requirements following the implementation of the Welfare to Work reforms on 1 July 2006. Most of those complaints focused on the imposition of non-payment periods following third (or subsequent) or serious failures.

3.2 The investigation identified seven primary areas of inconsistency identified by the Ombudsman's investigation between Centrelink's existing processes with respect to non-payment periods and the social security law or publicly stated policy.

1. Centrelink's practice of withholding payment pending determination of a failure decision was not supported by the social security law.
2. Centrelink's failure to notify customers of its intention to withhold their payment deprived them of the opportunity to query Centrelink's action, or to arrange their finances in anticipation of future payments not being made.
3. Centrelink's refusal to accept or issue continuation forms did not authorise cancelling or suspending the jobseeker's NSA.
4. Centrelink's practice of waiting until a decision had been made on a participation or serious failure before assessing customers for financial case management prevents the Financial Case Management Scheme from achieving the Government's stated aim of providing 'case management and limited financial assistance where vulnerable people and third parties may be unduly affected by non-payment periods'.
5. The current delays in decision making on participation and serious failures were not acceptable and, in many instances, compounded the difficulties faced by customers subject to a non-payment period.
6. Centrelink's practice of adjusting the start date of non-payment periods was not supported by the social security law.
7. The Guide to Social Security Law (point 3.2.13.20), in directing that a non-payment period be adjusted around payment pending review, was not in keeping with the social security law.

### Agency responses

3.3 On 29 October 2007, the Ombudsman sent copies of the draft report to Centrelink, DEWR and the Department of Human Services for comment. Copies of the responses from each agency are at Appendixes 3, 4 and 5. Generally all agencies accepted the issues summarised above. Two points in particular should be noted. It was accepted that the practice should be discontinued of withholding payment pending the determination of a participation failure. Secondly, it was accepted that there was a need to improve the timeliness of decision making, with a view to a failure being determined prior to a job seeker's next payment falling due. The Ombudsman is encouraged by the procedural changes already implemented by Centrelink and its ongoing commitment to address all of the issues raised.

3.4 The three issues below remain unresolved. It will require a collaborative approach by all agencies to resolve those outstanding matters.



***Issue 1—Withholding payment pending determination of a failure decision***

Centrelink has advised in response to Issue 1 that it has offered customers whose payments have been withheld a choice of having their payment re-instated or stopped. It will be necessary to clarify the legal basis for stopping payment, concerning the process used to re-claim payment after it has been surrendered, and for suspending payments on the basis of 'whereabouts unknown' after two failed attempts to contact a person by phone.

***Issue 4—Assessing customers for financial case management***

Centrelink notes in response to Issue 4 that a customer will continue to receive payment until a determination to the contrary is made. At that time a person will be advised if they are eligible for Financial Case Management. If there is a delay in determining that a person's payment should be suspended because of a participation failure, there could be a consequential impact on the person's eligibility for Financial Case Management. For example, unless proper processes are implemented, a person could face disadvantage if they are required to repay a debt for a non-payment period, yet would have been eligible to receive Financial Case Management during that period.

***Issue 7—Adjusted non-payment period***

The Ombudsman's office has established in this report that the commencement date for non-payment periods is clearly legislated. DEWR has indicated its support for Centrelink's current practice of altering the commencement date where the customer has received payment pending a review of the decision to apply a penalty. The Ombudsman's office considers that there does not appear to be any basis in the social security law for departing from this date for reviews (either internal or by a tribunal). DEWR has indicated it will give further consideration to this issue. The Ombudsman's office urges DEWR to examine the legality of its position as a matter of priority and liaise with this office on its findings.

## APPENDIX 1—PARTICIPATION FAILURES

### Participation Failures (subsection 624(1) of the *Social Security Act 1991*)

- (a) failing to comply with a requirement that was notified to the person under subsection 63(2) or 64(2) of the Administration Act. Such requirements include contacting or attending Centrelink, undergoing a medical examination or attending an appointment elsewhere, among other things. The requirement must be reasonable and the jobseeker must have been notified that a failure to comply with the requirement could constitute a participation failure;
- (b) failing to satisfy the activity test;
- (c) failing to comply with a requirement to enter into a Newstart Activity Agreement;
- (d) failing to comply with a term of a Newstart Activity Agreement;
- (e) failing to attend a job interview;
- (f) failing to commence, complete or participate in a work for the dole program that the person is required to undertake or to comply with the conditions of such a program;
- (g) voluntarily ceasing to take part in a labour market program or being dismissed from the program for misconduct;
- (h) failing to comply with a notice issued under subsection 625(1) requiring the jobseeker to apply for a particular number of advertised job vacancies within the period specified in the notice;
- (i) failing to provide statements from prospective employers, regarding applications for job vacancies, in accordance with subsection 625(2);
- (j) failing to comply with a requirement included in a Newstart Activity Agreement to:
- (i) undertake a certain number of job searches per fortnight; and
  - (ii) keep a record of the job searches in a job seeker diary; and
  - (iii) return the job seeker diary to Centrelink by a particular date;
- (k) failing to comply with a requirement to undertake a new reconnection activity following the imposition of a participation failure as referred to in paragraph 626(1)(b).

### Serious failures (subsection 629(1) of the *Social Security Act 1991*)

- becoming unemployed due, either directly or indirectly, to a voluntary act;
- becoming unemployed due misconduct as a worker;
- refusing or failing, without reasonable excuse, to accept a suitable offer of employment;
- failing, without reasonable excuse:
  - to commence, complete or participate in an approved program of work for income support payment that the person is required to undertake; or
  - to comply with the conditions of such a program.

## APPENDIX 2—GUIDE TO SOCIAL SECURITY LAW

### 3.2.13.20 Rules for Applying Penalties

#### First or second participation failures

Not all participation failures are immediately reported to Centrelink. Providers are required to follow specified procedures prior to reporting non-compliance. However, once Centrelink is advised or becomes aware of a potential participation failure, they must make 2 attempts over 2 days to talk to the jobseeker.

If these contact attempts are unsuccessful and:

- the jobseeker's lodgement day is more than 5 working days away, Centrelink sends a letter advising that the jobseeker has failed to meet their requirements and must contact Centrelink before (or at the latest on) their next lodgement day to avoid delaying their CURRENT payment (if the jobseeker is not on fortnightly lodgement, the letter includes an Application for Payment form and the jobseeker reverts to fortnightly lodgement),
- the jobseeker's lodgement day is 5 or fewer working days away, Centrelink sends a letter advising that the jobseeker has failed to meet their requirement and must contact Centrelink immediately on receipt of the letter to avoid delaying their payment for the period immediately following the period in which Centrelink was advised of the potential failure, or
- the jobseeker lodges electronically or via telephone (regardless of when their lodgement day is), the jobseeker is advised at lodgement that a personal (telephone or face-to-face) interview is required before their CURRENT payment can be made.

#### Contact prior to lodgement day

If contact with the jobseeker occurs prior to the jobseeker's Application for Payment form (SU19) lodgement day, Centrelink assesses the jobseeker's reason for failing to meet their requirement. If the jobseeker had a reasonable excuse for doing so, an appointment is made to reconnect the jobseeker with their employment service provider or programme, there is no impact on the jobseeker's payment and no failure is recorded.

If the jobseeker did not have a reasonable excuse, a reconnection appointment is arranged for the earliest available time before the next payday and a failure is recorded.

If the jobseeker misses the reconnection appointment, no further action is taken at this stage. No further failure will be recorded as the reconnection appointment is not treated as a new requirement and because a jobseeker cannot be taken to have committed more than one participation failure in a single payment period if they have not committed one in the immediately preceding period. If the jobseeker contacts Centrelink, another reconnection appointment can be scheduled but Centrelink will not initiate further contact prior to the SU19 lodgement day.

#### Contact on or after lodgement day

If contact occurs either on or after their SU19 lodgement day, if the jobseeker did not have a reasonable excuse for not meeting their requirement and has not yet attended a reconnection appointment (with or without a reasonable excuse), then a reconnection appointment will be rescheduled within the next 48 hours and the jobseeker will be warned that, although they will be paid for the period in which the participation report (PR) was received, if they do not attend the reconnection appointment without a valid reason no further allowance will be payable until they do attend. They should also be warned that every time they miss a reconnection appointment, without a reasonable excuse, between now and when they do re-connect, will be counted as a new failure and that 3 such failures will result in loss of payment for 8 weeks.

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This means that if the jobseeker attends the reconnection appointment, there will be no impact on their next payment.

If they do not attend the reconnection appointment without a reasonable excuse this will be counted as a further failure. Another appointment will be booked within 48 hours and the jobseeker will only be paid from the date they attend this appointment.

If they do have a reasonable excuse for non-attendance at the reconnection appointment, they are given a further opportunity to attend an appointment within 48 hours and if they do so there will be no impact on their next payment. If they subsequently fail to attend without a reasonable excuse, they will lose payment from their last payday until they do attend.

If the jobseeker fails to contact Centrelink on their lodgement day, they will not be paid for the period immediately preceding their lodgement day. If they have not lodged their application for payment form their payment will not be processed. If they do lodge their form without discussing their outstanding PR or potential failure their payment will be held until they do.

### **Participation failures where compliance with the original requirement may not be possible**

The process outlined above relates to failures where compliance with the original requirement—generally through immediate reconnections—appropriate and possible. In some circumstances, such as failure to attend a job interview or failure to attend a course or programme which is now finished, compliance with the original requirement is not possible. Where a jobseeker has committed such a failure without a reasonable excuse, a participation failure should be recorded and they should be immediately reconnected with their employment service provider. If it is the jobseeker's first or second participation failure, they can avert a financial penalty by doing so.

### **Third or subsequent participation failures**

If the original failure was a third or subsequent failure in the past 12 months, an 8 week penalty applies from the start of the NEXT pay period. The jobseeker is not to be given an opportunity to avert this penalty through reconnection (as they are for a first or second failure).

If, following an SU19 contact following a second failure, the jobseeker is given an opportunity to reconnect and does not do so without a reasonable excuse then that failure is their third failure and an 8-week penalty applies from the start of the current pay period.

If a jobseeker delays contacting Centrelink following a third failure, any period of non payment prior to contact is included in the non-payment period.

Note that prior serious failures do not count for the purposes of determining whether or not a jobseeker has incurred a third or subsequent participation failure in a 12-month period.

### **Job seeker diary failures**

A jobseeker who, without a reasonable excuse, submits an unsatisfactory job seeker diary will receive their payment for the current period the following day. They will be issued with ECCs equal to their normal fortnightly job search requirements, to be returned as soon as possible, and allowance will only become payable from the day the ECCs are returned, filled in satisfactorily. A failure will also be recorded.

If the failure to return a satisfactory job seeker diary was the jobseeker's third participation failure (of any kind), an 8-week non-payment period is applicable, starting from the day after the job seeker diary was due to be returned (in which case ECCs will not be issued).

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### **Serious failures**

A person who, without a reasonable excuse, voluntarily leaves full-time employment or is dismissed for misconduct when not on payment cannot be paid for 8 weeks, commencing from the day after they left their employment. If the jobseeker is still receiving some payment and leaves work voluntarily, then the penalty starts from the next instalment period after the failure is determined.

An 8 week non-payment period also applies where a very long-term unemployed person is referred to full-time WFD but fails to commence or complete the programme, or fails to participate according to the requirements of the programme without a reasonable excuse. The penalty period starts from the next instalment period after the failure is determined.

An 8 week non-payment period also applies if a person refuses an offer of suitable employment without a reasonable excuse. The penalty period starts from the next instalment period after the failure is determined.

### **Reviews and appeals of penalties**

A person subject to a penalty must be advised of the following:

- that they are taken to have failed the activity test, or to comply with a requirement, and
- the intention to record a failure, hold payment pending compliance and, if intended, to impose a period of non-payment,
- the reason for the penalty and the date the penalty will commence,
- the right to seek a review from the original decision maker and the authorised review officer,
- the right to appeal to the SSAT and the AAT if not satisfied with the original decision maker or authorised review officer review, and
- the right to apply for payment pending review.

### **Payment pending review**

If a jobseeker disagrees with a decision to impose a non-payment period they can apply for a review of that decision. If a jobseeker applies for a review of a decision to apply an 8 week non-payment period, their payment can be continued as normal until the review of the decision is finalised. This is called payment pending review (PPR).

PPR only applies pending a review by either an authorised review officer (ARO) or the SSAT of a decision to apply an 8 week non-payment period for a third or subsequent failure in a 12 month period or a serious failure. It does not apply pending a review of a first or second participation failure or pending a review by the AAT. PPR commences from the date of decision or, if the ARO has re-applied the non-payment period following their review, and the jobseeker has requested an SSAT review, then PPR would commence from the date the non-payment period was re-applied. PPR is not applicable if the non-payment period has already finished.

Once all the review activity has been finalised, if the non-payment period still applies and no party is taking further appeal or review action, then the non-payment period re-commences from the entitlement period following the decision to affirm the decision. If the decision that was affirmed was a decision to impose a non-payment period for voluntary unemployment or unemployment due to misconduct prior to the jobseeker claiming payment and the jobseeker had 'self-served' part of the non-payment period prior to claiming payment, then only the balance of the 8 week non-payment period is to be served.

The above rules for the application of PPR are set out in a Ministerial Determination.

**Act reference:** SS Act section 500ZA to section 500ZF Parenting payment participation failures, section 550 to section 551A Youth allowance participation failures, section 624 to section 630 Newstart participation failures, section 740 to section 745 Special benefit participation failures.

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Last reviewed: **4 June 2007**

## APPENDIX 3—DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS RESPONSE

Thank you for your letter of 29 October 2007 providing the opportunity to comment on your draft report on your investigation into the application of penalties under Welfare to Work.

You identify seven areas of inconsistency between Centrelink's current processes and social security law or public stated policy. The first six of these stem directly from Centrelink's practice of withholding payment pending the determination of a failure that may result in an eight week non-payment penalty. As you suggest, there is no clear legislative basis to support this practice and section 3.2.13.20 of the *Guide to Social Security Law*, which was written by DEWR, does not authorise the withholding of payment *prior to* the determination of a failure. Indeed my Department was very disappointed to learn of Centrelink's practice in this regard. For this reason we have reinforced to Centrelink our direction that payments are not held pending the determination of failures.

Centrelink has acted upon this direction and at the same time has taken steps to improve the timeliness of decision-making to ensure that, wherever possible, failures are determined prior to the job seeker's next payment falling due, which is crucial to reduce the instance of overpayments where a penalty is subsequently imposed. More timely decision making will also ensure that eligible job seekers are able to access Financial Case Management during their non-payment period, as intended under this policy.

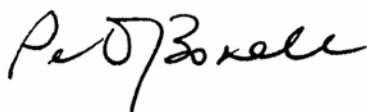
The last of the seven areas of inconsistency between Centrelink's current processes and social security law that you have identified concerns the direction in the *Guide to Social Security Law* that, following a period of payment pending review, if a penalty is to be imposed it should commence from the entitlement period following the decision to affirm the decision under review.

While you identify this as an area of inconsistency and suggest that the re-applied penalty should commence in accordance with the start date provisions of the compliance legislation, in the body of your draft report you acknowledge that this issue is not entirely clear. In fact the legislation is silent on when a penalty should start if it is to be re-applied following a period of payment pending review. Applying the penalty from the entitlement period following the decision to affirm the original decision, as Centrelink currently does, ensures

that the job seeker actually serves a non-payment period, which is consistent with the policy intention, and that those eligible are able to access Financial Case Management. Nonetheless, as this is something of a legislative grey area, we will give further consideration to your comments.

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Yours sincerely



Peter J. Boxall AO

23 November 2007

## APPENDIX 4—CENTRELINK RESPONSE

### Response to Draft Paper Investigation Into Application Of Penalties Under Welfare To Work

Thank you for the opportunity to comment on your draft paper dated 29 October 2007, regarding your investigation into the application of penalties under the Welfare to Work Initiative. During our earlier discussions on this issue I advised you that we had already commenced work on addressing some concerns we had identified with our practices and procedures in this area. Your report assisted with clarifying some key areas of focus for us.

Direct responses to the issues identified in your draft paper are included at **Attachment A**. Additionally I would like to provide the following comments in relation to specific aspects of your draft paper.

As you are aware, Centrelink delivers the Welfare to Work Initiative on behalf of the Department of Employment and Workplace Relations (DEWR). By way of background, across the 2006-07 financial year 525,654 participation failures were submitted to Centrelink for investigation. This represents a significant workload for Centrelink in investigating the circumstances to ensure that any application of a non-payment period occurs after careful and thorough consideration of the customer's circumstances. These investigations resulted in less than half of the submitted failures being applied by Centrelink.

I note your comments regarding adverse customer impacts, in particular due to the cessation or holding of payment prior to a decision regarding the imposition of a non-payment period. I agree that the timeliness of some of these decisions also places customers in a difficult position. I share your concern about these impacts and I have asked my staff to clarify the application of the compliance legislation. Centrelink has been conscious from the outset of the complexity of the legislation and interaction with the DEWR policy framework from a quality service delivery perspective.

I understand that in their response to your draft report, DEWR indicated that they did not authorise the withholding of payments, prior to the determination of a failure. Centrelink agrees that Section 3.2.12.20 of the Guide to Social Security Law does not provide any authority in this area and I understand that DEWR now also holds this view.

Further, Centrelink's business processes, training material and E-reference files in relation to the application of the compliance framework (which necessitated the holding of payments prior to a decision) were vetted, endorsed and cleared by DEWR.

Centrelink has recently been advised by DEWR that payments to a job seeker are to continue pending a decision and whilst the raising of debts is not ideal, this is appropriate given that the start date of a non-payment period is legislated.


Underpinning the development of the compliance business processes was a view that decisions would be made quickly and that the consequence of non-payment pending a decision would not arise. The number of participation failure decisions increased dramatically over the course of the first financial year and our ability to make quick decisions was severely tested.

In relation to your comments regarding the application of the penalty start date following a period of payment pending review, DEWR has advised Centrelink that the current practice of payment pending the outcome of customer initiated review is correct and in accordance with the Social Security Law, subject to further consideration by DEWR, which I believe is underway.

I acknowledge that the number of customer complaints you have received on these issues has represented an increased workload for your office. I am confident that the revised processes Centrelink has implemented will reduce this workload for your office and represent an improved level of service for our customers.

...

Yours sincerely

  
Jeff Whalan  
Chief Executive Officer



**Attachment to Centrelink response**

Attachment A

**Identified Areas of Inconsistency Between Processes and Policy**

**1. Centrelink's practice of withholding payment pending determination of a failure decision is not supported by the Social Security Law**

**Response:** As of 19 November 2007 Centrelink has implemented amended processes in this area to ensure customers retain payment until the decision regarding the application of the participation report is made. This means that customers who incur a third or serious participation failure after this date, will not have their payments withheld pending a decision.

Where a decision results in the imposition of a non-payment period after the legislated start date of the non-payment period, a debt will be raised for this period of time and the customer will serve the remainder of the non-payment period. Where a decision is appealed payment will continue pending the outcome of the review as outlined in Issue 7.

Additionally, Centrelink has contacted, or attempted to contact, all customers who previously had their payments withheld pending a decision on a third or serious participation failure prior to this date. This contact resulted in one of three outcomes that have been documented on the customer record:

- Where customer contact was successful, and they indicated that they wished to continue to receive payment pending finalisation of a decision, payment has been restored.
- Where customers declined to have their payments reinstated, decisions have been made as to whether or not the participation failure should be imposed and implemented accordingly.
- Where customers could not be contacted after a second attempt, payment has been suspended and a letter requesting contact has been sent to the customer's last known address. The basis for this suspension is that their whereabouts are unknown. If a customer in this situation makes contact with Centrelink, their current circumstances will be immediately re-assessed, a decision about the relevant participation failure made, and payments restored or cancelled as appropriate.

**2. Centrelink's failure to notify customers of its intention to withhold their payment deprives them of the opportunity to query Centrelink's action, or to arrange their finances in anticipation of future payments not being made**

**Response:** As Centrelink is now continuing payment until the decision is made, there is no requirement for notification until this has occurred. Once the decision is finalised, Centrelink provides the customer with a notice of the decision, the conditions of the non-payment period, information regarding financial case management and information about their review and appeal rights.

3. **Centrelink's refusal to accept or issue continuation forms does not authorise cancelling or suspending the jobseeker's NSA**

**Response:** As per the response to Issue 1 above, Centrelink is continuing payment until a decision is made; therefore continuation forms are being distributed, returned and processed until the decision regarding the application of a non-payment period is known.

4. **Centrelink's practice of waiting until a decision has been made on a participation or serious failure before assessing customers for financial case management prevents the Financial Case Management Scheme from achieving the Government's stated aim of providing 'case management and limited financial assistance where vulnerable people and third parties may be unduly affected by non-payment periods'**

**Response:** As per the response to Issue 1 above, Centrelink is continuing payment until a decision regarding the application of a non-payment period is made. When the decision is made, all customers are contacted. Where customers are assessed as eligible, the availability of Financial Case Management (FCM) is discussed and offered as appropriate. Additionally, FCM is also highlighted in the notice of decision. This ensures that eligible customers are able to take up FCM from the start of the non-payment period.

Where customers are not eligible for FCM in the first instance, it is further emphasised to the customer that they should contact Centrelink if their circumstances change, in order to check whether they subsequently become eligible for FCM.

5. **The current delays in decision making on participation and serious failures are not acceptable and, in many instances, compound the difficulties faced by customers subject to a non-payment period**

**Response:** Centrelink's revised processes as outlined above have been implemented to ensure that customers are not placed in a difficult position as a result of delays in decision making. While Centrelink has consistently met the agreed performance indicators as set by DEWR for speed of decisions, we are of course always concerned about those cases where decisions extend beyond agreed timeframes. Centrelink has significantly reduced the number of cases that are awaiting decisions. Centrelink is confident that the new practices, which have been implemented, will continue to ensure that the flow of failures submitted to Centrelink (average of 11,500 per week) will be decided in a timely manner.

Additionally, the management of the work related to non-payment period decisions has now been placed under the responsibility of a single SES officer. This has resulted in the centralisation of all administrative resources associated with this work, a sharper focus on building and maintaining efficient processes and improving the speed of decision making.

**6. Centrelink's practice of adjusting the start date of non-payment periods is not supported by the social security law**

**Response:** As per the response to Issue 1 above, Centrelink is continuing payment until a decision regarding the application of a non-payment period is made. This means that the relevant event is generally when the notification of a potential third participation failure was provided to Centrelink from the PAGES. Depending on the length of time taken to make a decision, all or part of the eight week non-payment period may in fact result in a debt instead.

**7. The Guide to Social Security Law (point 3.2.13.20), in directing that a non-payment period be adjusted around payment pending review, is not in keeping with the social security law**

**Response:** DEWR has advised that the current practice and the Guide to Social Security Law 3.2.13.20 are in accordance with the Social Security Law. DEWR has directed Centrelink to continue with the current practice of adjusting the non-payment period around payment pending review following the decision of the Authorised Review Officer (ARO) or Social Security Appeals Tribunal (SSAT). This means that where a customer appeals a decision regarding the application of a non-payment period, and the decision is upheld, the non-payment period will generally commence from the next available payment period. DEWR have also advised that they are reviewing this issue. Centrelink will review its current practice following any further advice and instructions from DEWR.

## APPENDIX 5—DEPARTMENT OF HUMAN SERVICES RESPONSE

Thank you for the opportunity to review your draft report on *Investigation into Application of Penalties under Welfare to Work*. ...

I commend the efforts of your staff in their very comprehensive investigation of this important issue and its effects on a vulnerable group of income support customers, including people with mental illness and people in crisis.

I understand that Centrelink has been working closely with you on this issue, and has made some significant changes to current processes and governance arrangements in response to your concerns.

The increasing load on Centrelink in this area is a concern, with Centrelink having advised us today that the number of customers referred for participation failure now exceeds 12,100 a week.

The Department has been working with Centrelink to improve service delivery in this area, and would appreciate any further suggestions as to how we could best assist with this work.

Currently good progress is being made on approaches to identify at-risk customers on referral to Job Capacity Assessment.

We currently have agreement with the Department of Education, Employment and Workplace Relations and Centrelink to implement new systems codes in the March 2008 release to identify customers at risk of participation failure. We are also working with Centrelink and service providers to improve communication about these customers and identification of risk factors in Assessment reports.

We hope that this approach will not only reduce participation failures, but also make the best use of the allied health professional expertise of Job Capacity Assessors and funding for specialist assessment, to identify and understand customer difficulties with compliance, such as mental health problems.

The Human Services Portfolio agencies look forward to continuing to work with your office to improve service delivery, particularly for these vulnerable customers. ...

Yours sincerely

Helen Williams