COMMONWEALTH OMBUDSMAN

Submission by the Commonwealth Ombudsman

DEPARTMENT OF PRIME MINISTER AND CABINET CONSULTATION PAPER – CHANGES TO THE COMMUNITY DEVELOPMENT PROGRAM

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PART 1—INTRODUCTION

Background

The office of the Commonwealth Ombudsman was established by the *Ombudsman Act 1976* (the Ombudsman Act). The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability
- reviewing statutory compliance by agencies.

The Commonwealth Ombudsman's unique position in the Australian administrative law landscape provides us with an understanding of individual experiences of members of the public, who are dissatisfied with the way government has dealt with their issue. Parliament has given the Ombudsman's office the power to investigate those complaints by obtaining records and information from the agency that would not ordinarily be available to a person acting on their own behalf. Over time, through investigating complaints about the actions of a particular Commonwealth department or agency, the Ombudsman's office is able to build up a detailed picture of an agency's operations. This includes information about new complaint trends and also about the persistent problems that repeatedly arise, despite changes intended to address them.

Complaints provide an important opportunity to identify and correct mistakes and can be an early warning system for systemic or deeper problems. An accessible complaints process is particularly important for vulnerable or disadvantaged groups. Fair and transparent government administration depends on the capacity to identify and address complaints from these groups. In our experience, Indigenous people, and particularly those living in rural and remote regions, do not generally access existing review processes or complaints channels and their awareness of programs, services and decisions affecting them is often low.

Community Development Program Bill and consultation paper

The *Social Security Legislation Amendment (Community Development Program) Bill 2015* (the Bill) was introduced into parliament on 2 December 2015. The explanatory memorandum to the Bill states that it 'introduces more direct and immediate payment and compliance arrangements that will allow job seekers to easily understand and comply with their requirements and avoid financial penalties'. The Bill introduces measures for job seekers to receive their payments directly from a Community Development Program (CDP) provider, rather than through the Department of Humans Services (DHS) – Centrelink. The consultation paper deals with the details of the penalties scheme and compliance framework which will be set out in a legislative instrument.

This office agrees with the broad principle expressed in the consultation paper that the job seeker compliance framework should be simpler and easier for job seekers

and CDP providers to understand. We also support the retention of a flexible range of mutual activities (including activities that are relevant to the job seeker's personal circumstances, such as caring for the elderly), that are intended to improve the jobseeker's employment prospects and to benefit whole communities.

The proposed changes have the potential to impact significantly on vulnerable job seekers. It is therefore imperative that the framework supporting the measures and their administration is robust and well considered. It must include clear guidelines and quality review and evaluation processes which are accessible to job seekers and CDP providers.

Overview of this submission

This submission will focus on three areas:

1. lessons learned from the Commonwealth Ombudsman's oversight of the CDP and its predecessor programs

2. particular concerns about the proposed changes

3. key considerations in developing a new compliance framework.

PART 2 – LESSONS LEARNED

As part of its broad oversight role of Commonwealth government administration, the Commonwealth Ombudsman has had oversight responsibility for the CDP since its commencement on 1 July 2015. Prior to this, the Ombudsman's office had oversight of the Remote Jobs and Communities Program (RJCP) and the Community Development Employment Projects scheme (CDEP).

In addition to receiving and investigating individual complaints about these programs, our staff have consulted with community organisations and stakeholders and investigated systemic issues associated with the programs. This experience puts us in a strong position to comment on what has and has not worked well with the CDP and its related programs, and informs our submission on the proposed new compliance framework.

Our involvement with the CDP and its predecessor programs has identified a number of issues for individual job seekers and remote communities. We anticipate these issues could continue under the proposed compliance framework unless measures are taken specifically to address them. Based on our experience, effective delivery and administration of the new compliance framework will require:

- effective systems to monitor providers and their adherence to protocols and standards

- job seekers having a clear and accessible avenue for complaints about the various bodies working within the framework, addressing issues we have observed of discomfort with raising complaints in small, remote communities

- well-targeted information about how complaints and feedback can be made

- providers giving job seekers information about jobseeker rights and obligations, such as what to do if they are injured during a placement, in a way which is clear and addresses communication barriers (such as the need for interpreters)

- providers having adequate training, resources, support and internet access to use new information technology systems

- sufficient system access to allow providers to record and process participation failures in a timely way[1]

- providers, with adequate leadership, supervision and accessible staff, having a regular presence in remote communities to ensure that mutual obligation activities and compliance activities occur regularly

- sufficient mutual obligation activities being available during the transition to the new program.

PART 3 — CONCERNS ABOUT THE PROPOSED COMPLIANCE FRAMEWORK

This office has concerns about several aspects of the proposed compliance framework and how it will be administered. Our main concerns relate to:

- CDP providers applying mandatory No Show penalties based on hourly non-attendance

- penalties being redirected into a Community Investment Fund

- CDP providers having the power to determine reasonable excuses and exemptions and to undertake compliance reviews

- The creation of a new internal review framework separate to the DHS internal review framework.

The consultation paper proposes mandatory No Show penalties unless the CDP provider is satisfied a person has a reasonable excuse or is exempt from attending an activity. Under the current system, CDP providers have a discretion whether or not to report non-compliance to DHS. Providers can use other, non-punitive strategies to re-engage job seekers, such as discussing the possible reasons for non-compliance, giving them another chance to attend an appointment and letting them make up time missed from an activity. The revised CDP approach is premised on clear, mandated application of penalties motivating greater compliance. The more flexible options in the current systems, however, may be more effective than financial penalties in some cases and we believe the option to use them should be retained.

Even with providers having an option *not* to refer jobseekers to DHS for penalties under the current system, Department of Employment compliance data shows that

[1] We are aware, for instance, of one instance in which providers recorded a large number of non-compliance incidents as soon as they could access systems on their return from a remote community. This resulted in many job seekers in the same community being suspended from payment at the same time, compounding the negative effects of the penalty.

Indigenous job seekers are penalised far more often than non-Indigenous job seekers.[2] The explanatory memorandum to the Bill also states that while the CDP caseload represents only five per cent of all job seekers, it accounts for over 60 per cent of all reported No Show No Pay failures. Data from DHS indicates that since the commencement of the CDP in June 2015, participation reports have significantly increased.[3] The consultation paper proposes that the threat or experience of a mandated penalty will increase compliance and therefore reduce penalties overall. However this assumed beneficial correlation should be closely monitored. Where penalties continue to be higher or increase, that is, where the evidence does not support the approach, the instrument should be amended accordingly.

Community Investment Fund

The discussion paper proposes that a new Community Investment Fund be established, so that income support monies withheld from job seekers can be redirected to assist local economic and community development initiatives.

We are concerned at the impact this approach may have on both providers and job seekers. Where financial penalties sit alongside other remedies in the provider 'engagement toolkit', the 'upside' for the community of applying a financial penalty which results in an increase to the Community Investment Fund may skew a provider's approach to finding the best way to support a job seeker. Similarly, the desired motivational effect of a penalty on a jobseeker may be muddied or diminished by their understanding that 'their payment', at least in part, will be redirected to their community. It is not clear what will happen if a job seeker successfully appeals a penalty decision and the funds have already been committed to the Community Investment Fund.

Assessment of reasonable excuse by CDP providers

The consultation paper proposes that CDP providers will have the power to determine whether a job seeker has a reasonable excuses or is subject to an exemption.

We have some concerns about whether providers have the opportunity, information, knowledge and skills to thoroughly assess whether a job seeker's excuse is reasonable and/or they should be granted an exemption.

Complaints to this office have shown that some job seekers may not engage with their provider due to factors beyond their control, such as an undiagnosed medical condition. They can easily fall through the cracks and have their payments suspended without information about their particular vulnerability being available and properly assessed. For instance, during outreach visits our office conducts, some communities advised us that job seekers do not raise their personal issues directly with providers because they are not comfortable in doing so.

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2 For example in the quarter April to June 2015, Indigenous job seekers received 39.8% of all financial penalties compared to 60.2% for non-Indigenous job seekers. Indigenous job seekers incurred 30.27% of non-payment period penalties compared to 69.73% for non-Indigenous job seekers – Department of Employment, Job Seeker Compliance Data June Quarter 2015; https://docs.employment.gov.au/system/files/doc/other/job_seeker_compliance_june_quarter_2015_data_d15-592217.pdf; accessed 11 April 2016.

3 For instance in September 2015, there were 7 864 participation reports applied under the CDP, compared to 59 reports 63 reports in April 2015 under the previous RJCP – Department of Human Services, CDP Participation Reports applied by DHS over the period 1 October 2014 to 30 September 2014. Provided to the Ombudsman's office by PM&C on 12 January 2016.

In contrast, DHS staff can currently access a broad range of information about a job seeker in assessing whether they have a reasonable excuse or should be subject to an exemption. This information is not restricted to their contact with the CDP provider and includes whether a job seeker has particular vulnerabilities which indicate that they may have difficulty complying with their mutual obligation[4] or whether their past history indicates that another payment type (such as disability support pension) may be suited to their circumstances. DHS can refer job seekers for a social work assessment where appropriate.

If CDP providers are given the power to assess whether a job seeker has a reasonable excuse and/or is subject to an exemption, it is important that they:

- subject to privacy considerations, have access to relevant and appropriate information held by DHS that would assist in flagging or determining a jobseeker's vulnerabilities
- are trained in assessing a job seeker's vulnerabilities
- are trained in referring job seekers for social work assessment, other forms of assistance or assessment for alternative payment types
- can elicit information from job seekers in a flexible way. For instance, if the job seeker does not feel comfortable discussing their circumstances with a provider, they should be able to do so with a trusted third party
- give job seekers clear information about what exemptions/reasonable excuses are acceptable and what supporting evidence they need
- consider a broad range of factors in determining whether a person has a reasonable excuse. Subsection 42U(2) of the *Social Security Administration Act 1999* states that the determination under s 42U(1) does not limit the matters that the Secretary may take into account in deciding whether the person has a reasonable excuse. This flexibility should continue to apply under the new framework.

Proposed internal review framework

The paper proposes new internal review and appeal processes for all decisions made by CDP providers, including for reasonable excuse determinations, exemptions and penalty decisions. Steps in the review process include reconsideration of the original decision by the CDP provider, internal review by a PM&C officer and external review by the Administrative Appeals Tribunal. The current review framework will remain for decisions made by DHS, including qualification, payability, income test and rate of payment decisions.

We have concerns about the introduction of a new internal review framework for remote job seekers for the following reasons:

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[4] A Vulnerability Indicator is a flag placed on a jobseeker's record. It alerts delegates to personal circumstances that could potentially explain a job-seeker's non-compliance and should be considered by delegates in determining whether a jobseeker has a reasonable excuse: Guide to Social Security Law, 3.1.13.90 Reasonable Excuse; http://guides.dss.gov.au/guide-social-security-law/3/1/13/90 , accessed 15 April 2016.

- two parallel review frameworks (one through DHS and one through PM&C) may be confusing and overly complex for Indigenous job seekers. Our stakeholder engagement and outreach have shown that Indigenous people are less inclined to appeal unfavourable decisions, and this tendency is likely to increase if the system is complex and involves multiple agencies. There is a particular risk of this occurring at the transition stage to a new framework.

- providers and PM&C officers may not (at least initially) have the necessary skills and experience to conduct robust internal reviews. The DHS ARO network is established and is generally skilled and experienced in conducting job seeker compliance reviews. AROs have access to DHS systems and have a more complete picture of the person's circumstances (such as whether a person might be eligible and better suited to an alternative payment or should be referred to a social worker)

- Outcomes of ARO internal reviews are systematically collected and fed back to DHS to inform service delivery improvement.

Given these concerns, we consider that the current DHS internal review framework should be retained for CDP compliance decisions.

PART 4—KEY CONSIDERATIONS FOR A NEW COMPLIANCE FRAMEWORK

The remainder of this submission deals with areas which were not discussed in detail in the consultation paper, but which this office considers are essential to ensure adequate safeguards for job seekers and an effective compliance framework. These areas are:

- integration of a robust complaints and feedback process within the compliance framework

- rigorous record keeping by CDP providers to monitor job seeker compliance and record financial penalties

- clear communication to job seekers about the compliance framework, using interpreters if required

- effective monitoring and evaluation of the new compliance framework by PM&C.

These issues will now be discussed in more detail.

Integration of a robust complaints framework into the compliance framework

While the consultation paper discusses a new internal review framework, it does not specifically reference any proposed complaints framework. We consider collection, investigation and analysis of complaints to be essential to good administration.

In October 2014 this office released a report into Complaint Management by Government Agencies.[5] The report identified three priority areas where complaint management could be improved:

- Complaints systems should be tailored, responsive and flexible enough to deal with the needs of disadvantaged and vulnerable groups
- Complaints systems should focus on the resolution of the dispute for the client
- Complaint information should be integrated into business improvement.

In our view, Indigenous individuals and communities, (particularly those living in remote communities), are among the most vulnerable and disadvantaged groups when it comes to accessing government services and making complaints about their experience of them. This is due to the broad range of limitations and challenges, ranging from language and literacy barriers, to geographical remoteness, cultural and confidence barriers, and lack of access to support mechanisms.

These barriers are often compounded by the procedural hurdles embedded in complaint handling systems, such as lengthy wait times, multiple referrals, a requirement that people complain in writing, use of bureaucratic language, or a failure to use interpreters or provide material in language. In many cases, these barriers make it difficult or impossible for Indigenous individuals and communities to effectively raise complaints or concerns with government agencies when things are not going right.

PM&C and CDP providers should view complaints as a free and valuable resource for informing service improvement, particularly when significant changes are being implemented. In this context, 'complaints/feedback' is a broad concept which should include any information about how programs or services are working.

Taking these considerations into account, CDP complaint systems should:

- make it easy for people to make complaints and provide feedback
- promote the message that feedback is welcomed and valued
- clearly advertise complaint and feedback processes and procedures
- capture complaint and feedback information at the first point of contact
- keep complainants informed of the progress and outcomes of their complaints, including systemic improvements
- feed complaint information back to providers and the PM&C program oversight areas to improve service delivery, either through front line staff or through advocates, community leaders and intermediaries.

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5 *Complaint management by government agencies: An investigation into the management of complaints by Commonwealth and ACT government*, Report 02/2014, October 2014 – available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0011/30017/October-2014-Complaint-management-by-government-agencies.pdf

Information about act of grace payments is provided to job seekers

A robust complaints framework should also give job seekers information about act of grace mechanisms. The Department of Finance (Finance) has advised this office that job seekers seeking who suffer financial loss as a result of poor administration by contracted employment service providers can make a request for an act of grace payment. A Finance delegate will then consider whether it is appropriate to make a payment due to special circumstances.[6]

Monitoring and record keeping by CDP providers

The consultation paper proposes that providers impose financial penalties on job seekers based on hourly attendance. Many providers are small organisations with limited resources and capacity to keep detailed records. Our investigations and stakeholder engagement have previously raised concerns about providers not having adequate training, resources, support and internet access to use IT systems. Lack of system access has resulted in the aggregation of reporting penalties and loss of community access to funds referred to above. Ability to monitor attendance in remote communities and in a variety of CDP activities – such as looking after an elderly person – must be difficult in those circumstances.

In its 2009 report on the CDDA scheme[7], this office highlighted that good decision making must be underpinned by good record keeping. The report recommended that all agencies adopt a rigorous approach to records management, including encouraging staff to maintain accurate records, providing staff with guidance on records-management processes, supporting an agency culture of compliance and applying effective quality assurance mechanisms.

Given that the financial penalties will have serious consequences for job seekers, it is imperative for providers to keep accurate records of all their contacts with job seekers to support any findings of non-attendance. This includes all details of face to face and telephone conversations, emails, text messages, any concerns raised by the job seeker about their ability to comply, and evidence provided by the job seeker. There should be sufficient notes to explain and support the decision making process applied at each stage of the compliance framework. It is important that rigorous procedures, practices and provider training on record keeping are in place, alongside the new compliance framework.

Communication and use of interpreters

The consultation paper states that simplifying the penalty rates and penalty types may make it easier for job seekers to understand the compliance framework. This will only occur if providers have adequate resources and training to explain mutual obligations and financial penalties to job seekers in a way they understand, using interpreters if required.

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6 http://www.finance.gov.au/resource-management/discretionary-financial-assistance/act-of-grace-mechanism/information-for-applicants-act-of-grace-requests.html

7 *Putting things right: compensating for defective administration: Administration of decision-making under the scheme for compensation for detriment caused by defective administration*, August 2009 – available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0014/26213/investigation_2009_11.pdf

In 2011, this office released a report highlighting the lack of awareness of the need for, and skills in working with, Indigenous language interpreters.[8] The report also recommended that the then Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA) "should further explore whether the (former) CDEP program could be better utilised as a training tool for potential Indigenous language interpreters" to increase the number of Indigenous language interpreters in remote communities.[9]

Through our complaint investigation and own motion work, the report identified a number of occasions in which government agencies did not use interpreters when they should have. Complaints to this office continue to highlight that culturally appropriate communication and the provision of clear information are paramount in ensuring that people understand government schemes that affect them, how they will be affected, and what process they should undertake if they wish to challenge a decision or exercise their review. Information about the new compliance framework needs to be accessible, available in appropriate languages and through a variety of methods. When something changes, people should be advised of the changes and be given the opportunity to ask questions and seek further information.

The new compliance framework will affect a high proportion of people from linguistically diverse backgrounds. Given the potentially harsh consequences of the financial penalties, it is critical for CDP providers to use interpreters, if required, at all stages of the compliance process, including when:

- developing job plans
- explaining mutual obligations and financial penalties
- explaining exemptions and reasonable excuses
- explaining other rights and obligations, such as workplace health and safety rights and duties
- assessing whether the job seeker has a reasonable excuse
- when financial penalties are applied, explaining the amount, duration, reasons and consequences of those penalties
- conducting internal reviews.

Having regard to the recommendations we made in the 2011 Indigenous language interpreters report,[10] we consider that:

- CDP providers should continue to have clear obligations to use interpreters specified in their funding agreements. Provider compliance with these obligations should be monitored by PM&C

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8 *Talking in language: Indigenous language interpreters and government communication*; Report 5/2011, April 2011 – available at http://www.ombudsman.gov.au/files/Talking_in_Language-Indigenous_Interpreters_REPORT-05-2011.pdf

9 Ibid, Recommendation 4, p.25

10 ibid, Recommendations 1 and 4, pp.23, 25

- Providers should keep clear records on whether job seekers need to access interpreters

- Provider staff should be trained in working with Indigenous language interpreters

- PM&C should engage with Indigenous language interpreter services early in the design and implementation of the program changes so interpreters are trained in the broader context of specialist terms and concepts

- PM&C could explore whether the CDP program could be better utilised as a training tool for potential Indigenous language interpreters.

Monitoring and evaluation of the compliance framework

Complaints to our office and information obtained through outreach and stakeholder engagement indicates that PM&C has not always had effective systems in place to monitor problems with providers. Based on our discussions with PM&C, we understand that PM&C staff will work with providers to train them in the new compliance framework. It is important that this is followed up with monitoring and training at regular intervals throughout the CDP trials. If providers are not complying with their obligations, PM&C needs to take action and where necessary, impose appropriate sanctions against the provider.

An effective compliance framework requires regular monitoring from PM&C on all aspects, including whether:

- the new framework and financial penalties is achieving the stated outcomes of increased job seeker compliance

- providers clearly communicate with job seekers about their rights and obligations

- providers are properly assessing reasonable excuses and eligibility for exemptions

- providers are using interpreters to communicate with job seekers when required

- providers have adequate complaints and feedback systems

- information about the right to review and the right to complain is readily available and in appropriate forms

- information collected from internal reviews and complaints is fed back to providers in a systematic way to improve service delivery.