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NEWS

An error in the interpretation of welfare legislation has led to the unlawful cancellation of payments, as the department fails to manage its own compliance system. By *Rick Morton*.

Exclusive: Welfare payments cancelled unlawfully

Minister for Employment and Workplace Relations Murray Watt. CREDIT: MICK TSIKAS / AAP

Rick Morton is *The Saturday Paper's* senior reporter.

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The Department of Employment allowed the incorrect cancellation of welfare payments in the privatised employment services caseload because it failed to read properly new legislation when it began in April 2022.

It is the latest in a series of bungles by human decision-makers that have infected departmental IT systems and other compliance work.

This issue – discovered during an "end-to-end review" sparked by a separate failure where 1326 people were wrongfully suspended from income support due to computer code – has prompted Minister for Employment and Workplace Relations Murray Watt to demand a full external audit.

A draft media statement was prepared internally ahead of Senate estimates earlier in November but the discovery of the unlawful cancellations was not noted at the hearing and so the statement was never released publicly.

The Saturday Paper has obtained a copy.

"As part of the department's work reviewing business rules, legal advice was sought on the application of certain payment cancellations that impact around 1000 people," the draft statement says.

"In July 2024, it appeared that these payment cancellations may be being applied incorrectly. The department immediately stopped the cancellation of the payments. The extent of the potential impact is being investigated and people who have been impacted will be contacted as soon as this information is available."

Three weeks later, this still does not appear to have happened. A spokesperson for the Department of Employment and Workplace Relations told *The Saturday Paper*: "Affected participants are expected to be contacted as part of this process."

DEWR remains far more tight-lipped about a different IT error, discovered after this one was picked up in July, which also affects payment cancellations under the Targeted Compliance Framework (TCF) introduced by the Coalition government in 2018 and continued under Labor.

The draft statement prepared for Minister Murray Watt says: "It is vital that a solution is found to these issues quickly ... Impacted payment cancellations remain passed until a new process can be implemented that ensures decisions are robust and operating effectively. Other requirements and forms of compliance will continue to apply."

It is the complexity of these mutual obligation requirements that has led to these human and computer failures – twinned with an employment services system now called Workforce Australia that outsources the vast majority of work to privatised providers with minimal oversight from public officials.

When the *Social Security (Administration) Act* was amended in April 2022, some of these changes were set in law and then apparently never communicated to the frontline workers making the decisions.

DEWR officials told a briefing of advocacy groups that in this case the amendments to the law took what the secretary *must* do in considering financial penalties and payment cancellations for people in the Targeted Compliance Framework and changed the language to give them discretion: what they *may* do in the same scenario.

In practice, welfare recipients in the so-called "penalty zone" were subject to financial penalties and payment cancellations for "committing mutual obligation failures" but only if the secretary, or a delegate, was satisfied doing so would not place the person in severe financial hardship.

This test is usually that cancellations should not be made if a person has less than two weeks' payment in their bank account.

For these 1000 people, their life support system was cut off, and the government's own legal advice says it should never have happened.

> *"I think that, in our effort to make sure people were not going to be impacted, we sent out something that, in retrospect, we probably should have taken a bit more time to carefully curate..."*

It is not clear if the problem goes even further back, to the introduction of the Targeted Compliance Framework in 2018, as provisions for financial hardship have always been available under the law but may not have been made available in rules and processes associated with the new compliance system.

If so, many more than 1000 people may have been affected.

The costs are measured first in the lives of people on the so-called "compellable caseload" of employment services: jobseekers who have been measured to have at least a partial capacity to work and therefore must perform a certain number of activities each month to satisfy the government that they are model welfare recipients.

Compliance rules are so microscopically specific, however, and tangled together in a series of context-dependent referential loops, that not even the department charged with administering them can get them right.

In October there were 634,000 people on the DEWR Workforce Australia caseload. More than 100,000 are Indigenous, 167,000 have disabilities, 114,000 are from non-English speaking backgrounds and 220,000 completed their education below Year 12.

These numbers are large, but the number of those who actually end up facing penalties is relatively small. As a proportion of all of these penalty decisions, the errors already disclosed by DEWR represent a significant chunk: almost 10 per cent for those affected by the third penalty zone IT glitch from late last year.

The cost of remediating that coding error was already at close to $1 million just in repayments to affected individuals – although this money did not include any compensation for the downstream consequences of bureaucracy-induced poverty.

Harm done to a person who is rendered homeless or unable to attend medical appointments, feed themselves or pay bills on time is serious but not so easily quantified in administrative decision-making.

When a welfare recipient's payment is cancelled under the Targeted Compliance Framework, they remain without it for at least four weeks and must reapply to receive income support again after that date. These decisions cannot be waived, so in the past the Department of Employment has referred people to the Scheme for Compensation for Detriment caused by Defective Administration to facilitate some restitution payments.

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Often, these people did not know enough to complain.

In July, Economic Justice Australia issued a paper on the previous IT problem that affected 1326 people and found none of them had ever complained.

"There were inadequate checks in the process of administering payment penalties to ensure that all the criteria for the penalty were met," the paper says.

"There also appears to have been inadequate explanations provided to the people affected that would have enabled them to understand the complex rules relating to the penalty.

"It is also concerning that at the time of writing there is an automated process that enables people to accept penalties without a full explanation of the reasons for it, and this has further limited that ability to understand whether the penalty is justified."

Large chunks of the employment services system runs on some degree of automation. The internal review of the Workforce Australia IT system has so far examined more than 350 "business rules" and the work to update or fix them is ongoing.

Between October and November another issue, separate to all of the above, was revealed when jobseekers who report their job search requirements via a dedicated Workforce Australia email inbox were told the system was processing these "slower than usual". Despite this, those same jobseekers were told they had to check to make sure the system was functioning correctly, otherwise they would be penalised.

"If job applications aren't processed by the end of a participants [sic] reporting period their payments could be put on hold, reduced or cancelled," the email said.

On November 6, in estimates, Greens Senator Penny Allman-Payne asked why the "workaround" transferred the onus onto participants.

The Workforce Australia for individuals first assistant secretary, Melissa Ryan, told the hearing that "in retrospect, it wasn't a very clear message".

"I read it the other day, and I said, 'That's not a particularly helpful message', so we've added more information there," she said.

"I think that, in our effort to make sure people were not going to be impacted, we sent out something that, in retrospect, we probably should have taken a bit more time to carefully curate to improve the message so that the onus wasn't just on the individual."

Under the Targeted Compliance Framework's traffic light system, all employment service participants start out in the "green zone" and stay there unless they accrue so-called "demerits" through "mutual obligation failures".

Demerit points are assigned by outsourced job providers and logged in departmental systems. These demerits, however, are not counted as a "decision made under Social Security Law, and as such, participants are not able to ask for a review of the decision under Social Security Law, or appeal this decision to a court or tribunal".

The fact that a person may end up in the "penalty zone", where their payments can be suspended or cancelled, is the result of unreviewable decisions made by private for-profit and non-profit companies who know even less than the government about the complex laws under which they operate.

A review of automated decision-making (ADM) across the Commonwealth may change that.

The Attorney-General's Department is currently running a consultation on such automation and its discussion paper notes there are a "number of risks which agencies using ADM must manage, including algorithmic bias, coding errors, inaccuracy and inconsistency with administrative law requirements".

"Coding errors, including algorithms that misrepresent, oversimplify, or misunderstand the law, may be built into ADM systems and lead to legal error," it says.

"These can arise from a range of errors in code, ranging from typographic errors through to errors in the logic of code that lead to incorrect implementation of business rules.

"Use of ADM for decisions which require a decision-maker to exercise discretion may result in the inflexible application of pre-determined criteria to decisions that should have been made on the merits of an individual case. Use of ADM can also contribute to the de-skilling of human decision-makers and increase reliance on, and default to, ADM."

The irony in the latest bungle at DEWR is that the decision to cancel a person's welfare payment is quite deliberately the preserve of human beings, but whatever process documents they were using to make these decisions were not updated from April 2022.

"The department regularly tests its systems and processes to ensure we act in accordance with legislation and policy," a spokesperson told *The Saturday Paper* in a statement.

"An issue was identified with the TCF that suggested some decisions may not have been made correctly. This relates to the process for third financial penalties in the Penalty Zone, and dates back to April 2022 and the changes to the social security law introduced at that time.

"When IT issues that impact participants' payments are identified, we act swiftly to prevent further adverse impacts, and work quickly to rectify the issues."

Following robodebt, a program designed explicitly against legal advice, government agencies have discovered more unlawful interpretations of policy that have gone unnoticed or unprobed. On Wednesday, Services Australia released a stunning document under freedom of information that contained the latest estimate – from October – of its historic "income apportionment" problem.

In that matter a type of technical income-smoothing between Centrelink income fortnights – as opposed to the wildly inaccurate annual lump sum averaging under robodebt – was found to be unlawful. It was first identified internally in October 2020 but kept quiet until Services Australia and the Department of Social Services told the Commonwealth Ombudsman in February last year.

The errors still gave rise to the possibility of artificially inflated and deflated debts – which the agencies believe may go back as far as 1993.

"Best estimates to date ... is at least 5.3 million debts held by 2.9 million Australians, totalling $4.3 billion, may be impacted by income apportionment," the document says.

"This estimate does not include debts attributed to deceased persons [or] debts that have been overturned in full.

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"Notably, the 5.3 million figure is not an estimate of the number of debts affected by income apportionment. Rather, it reflects those debts that may be impacted by income apportionment. It is not possible to know whether a debt is affected by income apportionment without a manual investigation of the debt."

Such a manual investigation on older files, even going back a decade, is likely to be impossible because there is simply no evidence left to interrogate.

The full Federal Court of Australia will hear an appeal in one such matter that will have significant implications for whether the Australian government needs to take substantial steps to investigate and remediate historic debts or whether it can escape serious consequences for improper administration over three decades.

In the meantime, Australians with the fewest resources are penalised for their own and their government's mistakes.

This article was first published in the print edition of The Saturday Paper on November 30, 2024 as "Exclusive: Welfare payments cancelled unlawfully".

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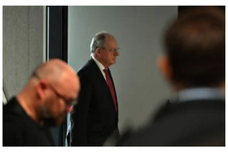

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