Submission on the Social Security Legislation Amendment (Community Development Program) Bill 2015

Dr Kirrily Jordan, Australian National University[1]

Summary

This submission is based on my experience researching remote Indigenous employment services since 2009. Increasing engagement with productive activity and paid work in remote Australia are laudable goals, but the proposed Bill is not the appropriate mechanism to achieve them. I have grouped my concerns into three main areas, summarised here and explained more fully below.

Proper consultation based on free, prior and informed consent

- Most fundamentally, we need proper consultation in remote communities based on the free, prior and informed consent of the people most affected by the changes.
- Vague statements in the supporting documentation that there will be 'extensive consultation' are totally inadequate, as are current methods of 'consulting' with remote (mostly Indigenous) communities.
- Failure to adequately consult is leading to resentment, frustration and disengagement. Outcomes will not substantially improve until this changes.
- There are practical resources for developing proper consultation strategies in guides for the implementation of free, prior informed consent.

Appropriate protections and parliamentary scrutiny

- There are too few checks on Ministerial discretion in the proposed legislation. This is particularly so because this Minister, or any future Minister, could amend the instrument 'at any time' without any apparent requirement for consultation.
- The decision to remove remote income support recipients from the standard social security legislation removes them from the protections built into that legislation over decades.
- Determining social security provisions for these income support recipients in a legislative instrument also removes the protection of adequate parliamentary scrutiny.

Reproducing the positive features of CDEP

- The measures proposed for the legislative instrument appear to be an attempt to resurrect some of the more positive features of CDEP. However, they are not adequate for that task.
- Giving CDP providers control of social security payments is not commensurate to the old system of CDEP wages and 'no work no pay'. Many providers are non-Indigenous organisations controlled from outside the service region, many have high staff turnover, and some are driven more by profit motives than client needs. It cannot be assumed they 'know and understand the job seeker and the community'[2] well.
- The proposed new incentive structures are far too simplistic and must be redrafted based on free, prior and informed consent. Local people know much better what incentives and penalties will work.
- The proposed income thresholds are described as being more generous but will actually increase penalties applied to many people if they take on paid work.

[1] Research Fellow, Centre for Aboriginal Economic Policy Research.
[2] Explanatory Memorandum p.8.

Summary of Recommendations

Recommendation 1. That passage of this Bill is rejected pending genuine consultation in remote communities based on the principle of free, prior and informed consent.

Recommendation 2. That any future version of this Bill details the proposed consultation on related legislative instruments, including specification of the model of consultation that will be used, a justification of how that model meets the requirements for free, prior and informed consent, and how the government will be held to account for a failure to adequately consult.

Recommendation 3. That any future version of this Bill includes provisions ensuring measures determined in a legislative instrument will be subject to appropriate independent review. This should include a public and independent 'net benefit' assessment prior to the implementation of the instrument and then at intervals throughout its operation. Such assessments should include appraisals from residents in the regions affected by the changes as well as public submissions.

Recommendation 4. That any future version of this Bill includes provisions detailing the process by which the legislative instrument can be varied or revoked by the Minister, and that this process includes the free, prior and informed consent of those affected by the changes.

Recommendation 5. That consideration is given to a return to the equivalent of CDEP wages as a scheme separate to the social security system.

Recommendation 6. That more detail is provided about the process of merits review, including explanation of how independence and expertise will be maintained and the bases upon which adverse or favourable findings can be made.

Recommendation 7. That genuine consultation is undertaken on a community-by-community basis to determine appropriate penalties for non-participation in agreed activities. The effectiveness and appropriateness of penalties should be periodically reviewed, with reference to feedback from communities. There should be flexibility to determine different penalties for different communities.

Recommendation 8**.** That additional resourcing and training is provided to ensure appropriate diagnosis of underlying health problems, and appropriate determinations of work capacity, for work for the dole and CDP participants.

Recommendation 9**.** That there be appropriate resourcing for work for the dole and CDP activities in remote communities, and better accountability for the quality and suitability of activities on offer. This should include a stronger emphasis on ensuring community input into the types of activities delivered.

Recommendation 10**.** That, if there is no return to CDEP wages, additional income rules are reworked to ensure no penalty for people choosing part time or casual paid work over some of their work for the dole commitments.

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1. Free, prior and informed consent

Changes to the social security system for remote regions are needed, but they must be based on the free, prior and informed consent of those most affected by them. As the Aboriginal and Torres Strait Islander Social Justice Commissioner has stated: "If our people are to have confidence in policies that affect us, we must be able to understand and be involved in the process."[3]

There are several reasons why such proper consultation is needed:

First, governments need the insights of those directly affected by the changes. Both ALP and Coalition governments have shown that they do not adequately understand the reasons for low rates of participation in mutual obligation schemes and paid employment in remote regions, nor do they understand the incentive structures that will contribute to positive change. We have repeatedly been told that program and policy changes will increase employment and participation in remote communities,[4] and yet outcomes have continued to decline.

My research in remote central Australia suggests that governments continually misunderstand or misrepresent the realities on the ground, and hence design incentive structures inappropriate to the context.[5] In contrast, local people often have good ideas about what incentive structures could improve outcomes in their communities, but are rarely heard by policy-makers. It is my view that, however well intentioned, another externally devised program change that fails to adequately engage remote Indigenous communities in its design will not achieve its intended outcomes.

Second, a lack of consultation is contributing to widespread resentment, frustration and disengagement, which undermines the policy intent. In my experience researching these issues in remote and regional Australia since 2009, Aboriginal people have become increasingly frustrated that program changes are continually forced upon them with inadequate consultation and no substantial

[3] M Gooda (2015) *Social justice and native title report 2015*, p.54. The Explanatory Memorandum states that the proposed Bill would not discriminate on the basis of racial or cultural status, but it is likely that the large majority of people affected would be Aboriginal and Torres Strait Islander (as are over 80 per cent of participants in CDP, who this Bill is clearly designed to address).

[4] See for example J Macklin, T Plibersek & M Arbib (2010) Increasing employment and participation in remote Indigenous communities, http://www.nesa.com.au/media/23297/mr_arbib;macklin;plibersek_increasing%20employment%20and%20participation%20in%20remote%20indigenous%20communities%2009.12.10.pdf; J Macklin, K Ellis & J Collins (2013) Transitioning to the new Remote Jobs and Communities Program; https://ministers.employment.gov.au/macklin/transitioning-new-remote-jobs-and-communities-program; N Scullion (2013) Immediate changes to the Remote Jobs and Communities Program, http://www.nigelscullion.com/media-hub/indigenous-affairs/immediate-changes-remote-jobs-and-communities-programme; A Forrest (chair) (2014) The Forrest Review - Creating Parity https://indigenousjobsandtrainingreview.dpmc.gov.au/cdep-wages

[5] This research is currently with reviewers, for intended publication in 2016.

benefit. A common response in the communities where I have worked is resentment, disengagement and despondency: this actually undermines participation in mutual obligation activities and paid work. I do not believe this situation will be resolved until responsibilities to consult adequately with Aboriginal and Torres Strait Islander people are taken seriously.

The current model of fly-in fly-out 'consultation' sessions in remote communities and formal written submission processes are woefully inadequate: the former often leave residents bewildered about what the supposed consultation was actually about and give very little opportunity for informed engagement[6]; the latter exclude anyone without high level English language literacy.

In designing appropriate consultation strategies the right to free, prior and informed consent is crucial. This right is entirely overlooked in the Explanatory Memorandum's Statement of Compatibility with Human Rights. It is, however, enshrined in Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples—which the Australian Government has officially supported since 2009.

Article 19 states that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

There are a number of resources describing what free, prior and informed consent should mean in practice.[7] To paraphrase from these,

> ***Free*** means that communities must be free to participate in decision-making processes that affect them without coercion, manipulation or pressure. They must have the option of saying either 'yes' or 'no' to proposals without penalty.
>
> ***Prior*** means that communities must be given adequate time to consider all relevant information prior to making a decision. 'Adequate' time should be determined by the community, reflecting their own decision-making processes. (In my experience, a one day fly-in fly-out consultation session will rarely be enough).
>
> ***Informed*** means that relevant and complete information must be provided to the community in an appropriate format. This will usually involve translations and access to qualified interpreters; it may also require presentation in various media, the opportunity for small group discussions, and access to independent advice.
>
> ***Consent*** means the community must have the option of saying either 'yes' or 'no' to the proposed measures before implementation begins. They must have the right to identify conditions upon which consent would be withdrawn. While not every single member of a community needs to agree, the consent process must be undertaken through procedures and institutions determined by the community.

The supporting documentation for this Bill makes several references to consultation with communities. However, it is not made clear what this will involve, nor whether there will be any accountability about the quality and nature of consultation processes, nor whether there will be regard to the principle of

[6] This has been my experience as an observer of several government 'consultation' sessions in remote communities. Although I have not documented these experiences, I am happy to talk about them. A very clear example is given in Murray Garde (2014) 'Lost without translation: what the Bininj missed', *Lands Rights News*, Northern Edition, October, pp.4-5 http://www.nlc.org.au/files/various/LRNOct2014v2.pdf

[7] See for example Australian Conservation Foundation (2011) Policy Statement No.75, Free, Prior and Informed Consent https://www.acfonline.org.au/resources/75-free-prior-and-informed-consent-jul-2011; United Nations Office of the High Commissioner for Human Rights (2013) Free, Prior and Informed Consent of Indigenous Peoples http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf

free, prior and informed consent.[8] Further, it is disingenuous to first identify the proposed measures and then assume consultation will lead to community willingness to adopt them.[9]

This is not just a matter of principle. As noted above, in my view genuine consultation based on free, prior and informed consent is a necessary first step to improving outcomes in practice.

Recommendations

Recommendation 1. **That passage of this Bill is rejected pending genuine consultation in remote communities based on the principle of free, prior and informed consent.**

Recommendation 2. **That any future version of this Bill details the proposed consultation on related legislative instruments, including specification of the model of consultation that will be used, a justification of how that model meets the requirements for free, prior and informed consent, and how the government will be held to account for a failure to adequately consult.**

2. Appropriate protections and parliamentary scrutiny

The decision to table the measures as a legislative instrument may provide flexibility but it also removes them from adequate parliamentary and public scrutiny. While legislative instruments are disallowable by either house of parliament, they are not normally subject to the same measure of parliamentary debate that is the principle form of scrutiny for proposed legislation.

This is of particular concern in this instance because the proposed Bill would remove a group of people (those in declared remote regions) from the normal protections that have been built into social security legislation over decades. For example, current social security legislation provides some protections for people who are deemed vulnerable (such as due to financial hardship) and those with limited capacity to work.

This Bill would give the Minister very wide scope to determine the social security rules for all social security recipients in the declared regions, and to vary these rules at any time. The list of matters that could be dealt with in a determination is very broad (eg. obligations of social security recipients, conditions upon which exemptions can be made, penalties for non-compliance). Moreover, this list is non-exhaustive, meaning that while existing protections are swept aside it is not at all clear how the new arrangements would work in practice nor whether there would be sufficient protections against inappropriate obligations and penalties.

Under these arrangements, any future Minister could vary or revoke the legislative instrument with no apparent requirement for consultation, parliamentary debate, free prior informed consent of those affected, or public 'net benefit' assessment.[10] Presumably the usual 10 year sunset provision would

[8] The Legislative Instruments Handbook of the Australian Government's Office of Parliamentary Counsel details the formal requirements for consultation before making a legislative instrument, including that "persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content" and that the explanatory statement provides an "adequate" description of the consultation process, ie. more than simply a "superficial description" (v.2.1, pp. 22-23). There is no adequate description in the supporting documentation for this Bill.

[9] The supporting documentation for the Bill states that the measures will be introduced to trial locations "following extensive community consultation" (Second Reading Speech p.9658) and then "carefully phased in based on community and Provider willingness and readiness" (Explanatory Memorandum p.4). This wording appears to assume that communities will want to adopt the predetermined measures; this raises questions about whether any proposed consultation would be genuine.

[10] The Explanatory Memorandum (p.20) states that the Minister would have "the power to vary or revoke a determination made under subsection 1061ZAAZA(1) at any time," and places no conditions on this.

apply, but this is insufficient to ensure that the legislative instrument operates to the benefit of remote social security recipients in that period.

The Explanatory Memorandum argues that an appropriate balance is struck between flexibility and restrictions on the delegation of legislative power to the executive. However, the reasoning provided—that this is so simply because the legislative instrument would only apply to remote income support recipients—is totally inadequate. Just because non-remote social security recipients would still be afforded the protections of existing social security legislation (and parliamentary scrutiny of any changes to that legislation), this does not mean that removing these protections from remote social security recipients is less concerning.

It is encouraging that the Minister is seeking to ensure flexibility in the provisions for employment services across remote regions: the 'one size fits all' nature of previous policy approaches has been to the detriment of many communities that have very diverse histories, socio-economic circumstances and contemporary needs. However, in seeking to promote flexibility, accepted standards of protection in existing social security legislation and parliamentary process must be maintained.

Recommendations

Recommendation 3. **That any future version of this Bill includes provisions ensuring measures determined in a legislative instrument will be subject to appropriate independent review. This should include a public and independent 'net benefit' assessment prior to the implementation of the instrument and then at intervals throughout its operation. Such assessments should include appraisals from residents in the regions affected by the changes as well as public submissions.**

Recommendation 4. **That any future version of this Bill includes provisions detailing the process by which the legislative instrument can be varied or revoked by the Minister, and that this process includes the free, prior and informed consent of those affected by the changes.**

3. Reproducing the positive features of CDEP

Many Aboriginal and Torres Strait Islander people do lament the closure of CDEP, and this Bill seems to be an attempt to resurrect some of the more positive features of that scheme. This sentiment is commendable, but the Bill and proposed regulations are not adequate to the task.

Direct payments from providers

In my research in central Australia on the move from CDEP wages to Centrelink payments, a common concern was that CDEP providers no longer had direct control over 'no work no pay' provisions. Applying penalties for non-attendance at CDEP activities became the responsibility of Centrelink but, in practice, penalties were often delayed or not applied at all. One outcome was that participation in CDEP activities was much lower among participants on Centrelink payments as compared to those on CDEP wages.[11] To this extent I appreciate the sentiment in returning control of 'no work no pay' provisions to providers.

However, there are fundamental differences between the old CDEP organisations and most CDP providers that I believe raise substantial risks. In the past, CDEP organisations were usually local Indigenous community councils or incorporated organisations. They had local boards and extensive local knowledge, typically had a commitment to improving socio-economic circumstances in their

[11] K Jordan (2011) 'Work, Welfare and CDEP on the Anangu Pitjantjatjara Yankunytjatjara Lands: First stage assessment', CAEPR Working Paper 78/2011, http://caepr.anu.edu.au/Publications/WP/2011WP78.php

communities, and were grant funded such that there was usually continuity in servicing arrangements over time.

In contrast, most CDP providers today have won their position based on competitive tender and in some regions the providers have changed several times in reasonably rapid succession. Many have high rates of staff turnover, are based outside the local region (even if they have local offices), and are staffed by those from outside the area who may have little knowledge of the local community or experience working with Indigenous people. It should not be assumed that providers "know and understand the job seeker and the community."[12]

In addition, while some providers are genuinely committed to improving the lives of their clients, there is now a mix of Indigenous community, not-for-profit and for-profit providers, and some are driven more by a profit motive than genuine concern for client wellbeing. References in the Explanatory Memorandum to providers being "local" and "community based" are highly misleading.[13]

This model of servicing means that providers may make decisions about enforcing 'no show no pay' penalties on the basis of their own fee structures rather than the best interests of their clients. In addition, staff may not have appropriate training or adequate local knowledge to make appropriate decisions on the application of income penalties. This is of particular concern for two reasons.

First, while CDEP operated largely as an 'opt in' program quite separate to the social security system, in the proposed model staff of CDP providers will be making decisions about peoples' social security entitlements without sufficient experience or expertise. This is of substantial concern given that social security is a basic minimum safety net and a fundamental right of all Australians.

Second, although there is a process for review outlined in the Explanatory Memorandum, it is troubling that once escalated beyond the provider this review will be carried out by the Secretary or their delegate in the first instance. This removes the principle of independence in the review structure and there is no guarantee the review will be tasked to individuals who are properly qualified or experienced in understanding remote Indigenous community or client circumstances. In addition, because remote income support recipients will be removed from the provisions of standard social security legislation, the basis for making either favourable or adverse findings is not clear.

There would be less risk in allowing direct payments from providers if there was a return to a system of CDEP wages or their equivalent, as separate to the social security system. Failing that, more substantial protections for remote social security recipients need to be written into the Bill or explanatory statement, including a clearer explication of independent review.

Compliance arrangements

The Explanatory Memorandum argues that the proposed changes will make compliance arrangements simpler to understand, and therefore that the behaviour of remote income support recipients will change in the desired way.[14]

There are major problems with this reasoning. First, as I have argued above, governments have shown that they do not adequately understand the appropriate incentives to encourage particular behavioural changes. Second, the reasoning assumes that the crux of the problem is behavioural. I address these issues briefly in turn.

[12] Explanatory Memorandum p.8.
[13] Explanatory Memorandum p.3.
[14] For example, it suggests that "A simplified compliance framework, with immediate No Show No Pay penalties" will "promote work-like behaviours"; and that "stronger" incentives will "drive the behavioural changes needed to get people active, off welfare and into work."

The notion that remote income support recipients will respond in simple and predictable ways to financial penalties (if you change X people will do Y) is unsubstantiated. My research in central Australia suggests that while people do often respond to financial penalties and incentives, it may not be in the ways the government predicts.

Almost universally residents of remote communities (both Indigenous and non-Indigenous) have told me there needs to be some penalty for not fulfilling work commitments. However, almost universally they have also told me that income penalties cannot be seen as the whole solution. For example, there were non-monetary features of CDEP that inspired engagement including that it was widely seen as employment and as benefitting the community, including in business development. This engendered a sense of pride, as opposed to Centrelink 'sit down' money and work for the dole which are often looked upon negatively and with a sense of shame, frustration or resentment, particularly since 'pay per hour' has fallen so far below minimum awards. Real consultation at the community level is vital to establish ways of encouraging engagement that are appropriate to the local context; this is also crucial to encourage community buy-in to the scheme.

Too much focus on income penalties also assumes that the problem is behavioural. There are many other factors at play that need to be addressed. These obviously include structural labour shortages that necessitate investment in small enterprise development. But another very common concern of residents in the regions I have researched is that the activities on offer under CDP are dull and pointless and do not help to build skills or generate employment or business opportunity. Anecdotally there are also concerns that some providers are underspending on delivering activities in order to increase their own profits (for example, refusing to spend money on materials, which means that only very basic activities such as yard tidying can be delivered). The work activities offered under CDP must be attractive and meet community expectations and needs. In my experience 'community action plans' were inadequate for this purpose as they could be written by providers with almost no community input.

In addition, in some communities where I have worked there are insufficient resources to make adequate diagnoses of serious mental health issues and therefore appropriate determination of work capacity. Some individuals who are not meeting their CDP work requirements simply cannot do so because of functional impairment. To penalise people for not participating in pointless or poorly managed activities, or because of undiagnosed conditions, is grossly unfair.

New income thresholds

The removal of CDEP wages, and therefore 'top up', removed a significant financial incentive to do additional work. However, while the proposed arrangements would increase the income free area and change the taper rates, the interaction with current work for the dole obligations would still unduly penalise many people for undertaking paid work.

It is very likely that many people choosing to undertake paid work would do this instead of their work for the dole activities, and would therefore be penalised via a reduction in their income support payments. This could mean an even greater penalty than would be the case under existing income free area and taper rules, such that for many people the proposed arrangements would make them even worse off financially if they took on temporary or casual paid employment. (It should be noted that CDEP required around 15 hours of weekly activities, allowing more time for additional paid work, while CDP currently requires 25).

The problems with the proposed additional income rules are clearly demonstrated in the submission to this inquiry by my colleague Lisa Fowkes.

If there is no return to a system like CDEP wages, alternatives to the current proposal include reducing work for the dole requirements for all participants from 25 to 15 hours (a well-established principle under CDEP to ensure an approximation of minimum award wages); reducing work for the dole requirements only for those individuals undertaking paid work; or making individuals exempt from 'no show no pay' penalties if they miss work for the dole activities because they were undertaking paid work.

Recommendations

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