

Chapter 1

New and ongoing matters

1.1 The committee comments on the legislative instrument, and seeks a response or further information from the relevant minister.

Legislative instruments

Social Security (Remote Engagement Program Payment) Determination 2023¹

FRL No.	F2023L01003
Purpose	This instrument determines the arrangement that is the remote engagement program; the part of that program that is a remote engagement placement; and the rate of payment of a remote engagement program payment
Portfolio	Employment and Workplace Relations
Authorising legislation	<i>Social Security Act 1991</i>
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and Senate on 31 July 2023). Notice of motion to disallow must be given by 14 September 2023 in the House and Senate) ²
Rights	Adequate standard of living; equality and non-discrimination; just and favourable conditions of work; social security; work

Remote engagement program

1.2 The *Social Security Legislation Amendment (Remote Engagement Program) Act 2021*³ amended the *Social Security Act 1991* (Social Security Act) to establish a new supplementary payment under the remote engagement program for people in remote areas receiving a qualifying remote income support payment, which includes JobSeeker Payment, Youth Allowance, Parenting Payment and Disability Support

¹ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Remote Engagement Program Payment) Determination 2023, *Report 10 of 2023*; [2023] AUPJCHR 100.

² In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

³ The Parliamentary Joint Committee on Human Rights considered the Social Security Legislation Amendment (Remote Engagement Program) Bill 2021 in its [Report 11 of 2021](#) (16 September 2021, pp. 42–53).

Pension (DSP).⁴ To qualify for the remote engagement program payment, a person receiving a qualifying remote income support payment must receive employment services from a remote engagement program provider; voluntarily participate in a remote engagement placement for between 15 and 18 hours per week; and satisfy any other qualification requirements determined by the minister by legislative instrument.⁵ The minister may, by legislative instrument, determine an arrangement to be the remote engagement program and a part of the remote engagement program to be a remote engagement placement under the program, as well as determine the rate of the remote engagement program payment (being not less than \$100 and not more than \$190).⁶ This instrument determines these matters.

1.3 In particular, the instrument determines the arrangements set out in Part G of Annexure 1 (the Annexure) to the Head Agreement for the Community Development Program 2019-2024 between the Commonwealth and Paupiyala Tjarutja Aboriginal Corporation and the Commonwealth and Ngaanyatjarra Council Aboriginal Corporation (the Agreements), as the remote engagement program.⁷ The remote engagement program placements are specified as the REP Placements set out in the Annexure to the Agreements.⁸ The Annexure details the REP Trial Services the remote engagement program provider must deliver.⁹ Section 7 of the Annexure appears to most directly relate to REP Placements.¹⁰ Paragraph 7.1(b) of the Annexure sets out the features of 'REP Placements', primarily by reference to what REP placements should and should not be. For example, REP Placements do not create an employment relationship between participants and the provider, are voluntary for REP participants, and participants must participate in the placement for at least 15 hours per week but not more than 8 hours per day.¹¹ Additionally, the determined rate of payment per fortnight is \$190.

⁴ *Social Security Act 1991*, sections 661A and 661B.

⁵ *Social Security Act 1991*, sections 661A and 661B.

⁶ *Social Security Act 1991*, subsections 661A(2) and 661E(2).

⁷ Section 5. [Part G of Annexure 1 to the Head Agreement for the Community Development Program 2019-2024](#) is available on the National Indigenous Australians Agency [website](#).

⁸ Section 6.

⁹ Annexure, section 2.

¹⁰ It is noted that neither the instrument nor the explanatory materials specify which section of the Annexure specifically relates to a REP Placement. Section 7 of the Annexure appears to be most directly relevant.

¹¹ Paragraph 7.1(b). Section 7 more generally relates to REP Placements and includes responsibilities of providers.

Preliminary international human rights legal advice

Rights to adequate standard of living; equality and non-discrimination; just and favourable conditions of work; social security; work

Rights potentially promoted

1.4 To the extent that the measure provides opportunities for job seekers to develop employment skills with the aim of obtaining paid employment, it may promote the right to work. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.¹² The right to work also requires States to provide a system of protection guaranteeing access to employment, including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.¹³ This right must be made available in a non-discriminatory way.¹⁴ The statement of compatibility states that the measure, by facilitating the remote engagement program payment, promotes the right to work by strengthening existing incentives for remote jobseekers to actively engage with Commonwealth employment programs, which in turn will improve their skills and assist jobseekers to transition to, and remain in, paid work in the open labour market.¹⁵

1.5 Insofar as the measure facilitates the payment of a supplementary social security payment, thereby increasing the amount of social security benefits payable to those who participate in the remote engagement program, it may also promote the rights to social security and an adequate standard of living. The statement of compatibility acknowledges this and notes that the additional payment will allow participants to improve their standard of living while building skills and experience to support them to find a job and contribute to their community.¹⁶ The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the rights to an adequate standard of living and health.¹⁷ Social security benefits must be adequate in amount and duration.¹⁸ States must also

¹² International covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

¹³ International Covenant on Economic, Social and Cultural Rights, article 6(2).

¹⁴ International Covenant on Economic, Social and Cultural Rights, articles 6 and 2(1).

¹⁵ Statement of compatibility, p. 7.

¹⁶ Statement of compatibility, p. 7.

¹⁷ International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

¹⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22].

have regard to the principles of human dignity and non-discrimination so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.¹⁹ The right to an adequate standard of living requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.²⁰ Further, under the Convention on the Rights of the Child, children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.²¹ Noting that people receiving Parenting Payment are eligible to receive the remote engagement program payment, the rights of the child may also be promoted.

1.6 Further, the statement of compatibility states that the measure advances the right to equality and non-discrimination by facilitating the remote engagement program trial, which will explore ways to overcome the barriers faced by remote job seekers in reaching full economic participation and the differences in employment opportunities and consequential disadvantage experienced in parts of remote Australia.²²

Rights potentially limited

1.7 However, in other ways, the measure may engage and limit the rights to work, social security and an adequate standard of living. In particular, if work performed as part of the remote engagement program placement was characterised as a form of employment for the purposes of international human rights law, the measure may engage and limit the right to just and favourable conditions of work. The right to just and favourable conditions of work includes the right to fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living for the worker and their families; and safe and healthy working conditions.²³ The United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that '[f]or the clear majority of workers, fair wages are above the minimum wage' and 'should be paid in a regular, timely fashion and in full'.²⁴ It has stated that 'remuneration' encompasses a worker's wage or salary as well as additional direct or indirect allowances in cash or in kind that should be of fair and reasonable amount,

¹⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22].

²⁰ International Covenant on Economic, Social and Cultural Rights, article 11.

²¹ Convention on the Rights of the Child, articles 26 and 27.

²² Statement of compatibility, p. 8.

²³ International Covenant on Economic, Social and Cultural Rights, article 7.

²⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [10].

such as contributions to health insurance, on-site affordable childcare facilities and housing and food allowances.²⁵

1.8 The Annexure states that the REP Placements do not include paid employment and do not, in themselves, create an employment relationship between the REP Participant and the REP Host or Provider.²⁶ The explanatory statement states that an eligible participant must enter a Remote Engagement Program Placement Agreement (Placement Agreement), which is to be signed by the participant, the remote engagement program provider and the organisation hosting the placement.²⁷ The Placement Agreement will set out the hours and location of the placement; the duties and activities to be undertaken as part of the placement; and the circumstances in which the placement may be cancelled or amended.²⁸ The Annexure sets out some parameters with respect to the hours and conditions of the placement. It states that the placement must not be conducted for more than eight hours per day, but at least 15 hours per week, and must not be conducted on a public holiday without the agreement of the participant.²⁹ It also states that the Provider must ensure that each REP Placement meets Commonwealth, state or territory legislative requirements including work, health and safety laws and anti-discrimination laws.³⁰

1.9 Notwithstanding that the measure does not characterise individuals performing work-like activities under the program as employees or workers, the UN Committee on Economic, Social and Cultural Rights has emphasised that the right to just and favourable conditions of work is a right of everyone, without distinction of any kind, meaning that it applies to all workers in all settings, including unpaid workers.³¹ Depending on the nature and hours of work performed by the participant, if such work were to constitute a form of employment for the purposes of international human rights law (even if not characterised in this way under domestic law), there could be a risk that the amount of additional social security payable to the individual (that is, \$190 per fortnight for at least 30 hours work) may not amount to fair

²⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [7].

²⁶ Annexure, subparagraph 7.1(b)(i).

²⁷ Explanatory statement, p. 2

²⁸ Annexure, section 9.

²⁹ Annexure, subparagraphs 7.1(b)(iii), (vi) and (vii).

³⁰ Annexure, paragraph 7.1(c).

³¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [5]. At [47] on p. 13, the committee observed that excessive use of unpaid internships and training programs is not in line with the right to just and favourable conditions of work.

renumeration, particularly where participants perform work of equal value to work performed by actual employees of the remote engagement program host.³²

1.10 The measure may also engage and limit the rights to social security and an adequate standard of living if the remote engagement program placement may be ended or cancelled and consequently the payment may be removed from a participant, resulting in a lower overall social security benefit.³³ The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, and States must guarantee the equal enjoyment by all of minimum and adequate protection.³⁴ The right also requires accessibility, which includes the requirement that qualifying conditions for benefits must be reasonable, proportionate and transparent.³⁵ The UN Committee on Economic, Social and Cultural Rights has applied similar criteria to the removal of social security benefits, stating:

The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.³⁶

³² It is noted that if a participant worked the minimum 15 hours per week, the remote engagement program payment would amount to \$6.30 per hour. The current national minimum wage is \$23.23 per hour. See Fair Work Ombudsman, [Minimum wages increase from 1 July 2023](#) (18 August 2023).

³³ It is noted that concerns have been raised, including by the Parliamentary Joint Committee on Human Rights, that some of the qualifying payments for the remote engagement program, such as the Jobseeker income support payment, may not in themselves be sufficient for a person to meet their basic needs. In April 2023, Australia's Interim Economic Inclusion Advisory Committee advised that the JobSeeker payment is not sufficient for a person to meet their basic needs. See Interim Economic Inclusion Advisory Committee, [2023–24 Report to the Australian Government](#). The Committee described the JobSeeker payment rate as 'seriously inadequate' when compared with pensions and other income poverty measures (p. 3). See also Parliamentary Joint Committee on Human Rights, Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188], [Reports 4 of 2023](#) (29 March 2023) and [5 of 2023](#) (9 May 2023).

³⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (2008)* [4] and [9].

³⁵ UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security (2008)* [24].

³⁶ UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security (2008)* [24].

1.11 The UN Committee on Economic, Social and Cultural Rights has further stated that '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.³⁷

1.12 The circumstances in which a REP Placement may be cancelled are to be set out in the Placement Agreement.³⁸ The explanatory materials do not provide any guidance as to the types of circumstances that may be included in a Placement Agreement. The Annexure also sets out some circumstances when a REP Placement must end, including when directed by the Department, when requested by the host or participant or when a participant ceases to be eligible for the program.³⁹ A provider may also end a placement if the terms of the Placement Agreement are breached by the participant or host.⁴⁰ As it is unclear what the terms of the Placement Agreement will be, including the circumstances in which a placement may be cancelled, it is difficult to assess whether the circumstances in which the social security payment may be removed would in practice be reasonable, proportionate and non-discriminatory.⁴¹

1.13 In addition, as the remote engagement program determined by the instrument involves two Aboriginal corporations, which provide services in the Ngaanyatjarra Lands in Western Australia, the measure has a disproportionate impact on First Nations people living in remote areas and so engages the right to equality and

³⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (2008) [78]. This approach has also been echoed in the European context. The European Committee of Social Rights has stated that the European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. See European Committee of Social Rights Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN. See also Magdalena Sepúlveda Carmona, Carly Nyst and Heidi Hautala, 'The Human Rights Approach to Social Protection' (Report, Ministry for Foreign Affairs of Finland) 1 June 2012, p. 49.

³⁸ Annexure, paragraph 9.2(c).

³⁹ Annexure, section 11.

⁴⁰ Annexure, subsection 11.3

⁴¹ More generally, the UN Committee on Economic, Social and Cultural Rights has expressed concern about conditionalities such as mutual obligations in Australia's social security system on the basis that they may have a punitive effect on disadvantaged and marginalised families, women and children (including Indigenous families). See UN Committee on Economic, Social and Cultural Rights, *Concluding observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) [20]. See also, *Concluding observations on the fifth periodic report of Australia* E/C.12/AUS/CO/5 (11 July 2017) [31] and [32(c)], where the UN Committee recommended that Australia review its existing and envisaged conditionalities for eligibility to social assistance and unemployment benefits and penalties for non-compliance, and ensure that all beneficiaries receive adequate benefits, without discrimination.

non-discrimination on the basis of race and place of residence.⁴² The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.⁴³ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).⁴⁴ Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute (including race and place of residence).⁴⁵ Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.⁴⁶

⁴² The majority of the population of the Ngaanyatjarra Lands are Aboriginal and/or Torres Strait Islander. See Australian Bureau of Statistics, [Ngaanyatjarra-Giles](#) and [Ngaanyatjarraku](#) (2016) and the Ngaanyatjarra Land School, [The Ngaanyatjarra People](#). The Ngaanyatjarra Lands is currently a Community Development Program (CDP) region. It is noted that the CDP has previously been criticised for its discriminatory impact on First Nations people. The former Special Rapporteur on the rights of indigenous peoples has observed that the requirements of the CDP are 'discriminatory, being substantially more onerous than those that apply to predominantly non-indigenous jobseekers', namely those not in remote areas: UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (2017) [58].

⁴³ International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. See also UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [7].

⁴⁴ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

⁴⁵ *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39]. Regarding place of residence, see *Lindgren et al v Sweden*, UN Human Rights Committee Communications Nos. 298/1988 and 299/1988 (1991).

⁴⁶ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13] and UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [13]. See also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

1.14 As noted above, the statement of compatibility states that the measure advances the right to equality and non-discrimination.⁴⁷ However, the statement of compatibility does not acknowledge the disproportionate impact of the measure on First Nations peoples. Rather, it states that the program will be developed in partnership with First Nations peoples and will therefore promote the right to self-determination by facilitating the making of the payment to participants, thereby allowing them to freely pursue economic and cultural development.⁴⁸ However, the right to self-determination is a right of 'peoples' rather than individuals and includes 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.⁴⁹ The provision of a social security payment, conditional on the fulfilment of certain obligations, to eligible individual participants would therefore not appear to promote the right to self-determination.

1.15 Additionally, when the remote engagement program was first introduced, the Parliamentary Joint Committee on Human Rights noted that because the qualifying payments for the program include JobSeeker Payment, Youth Allowance, Parenting Payment and the DSP, it may have a disproportionate impact on people with certain protected attributes, including people with disability, young people and mothers.⁵⁰ The Annexure states that the provider must ensure that each REP Placement complies with anti-discrimination laws.⁵¹ It also states that the provider must use a case management approach, whereby adjustments are made for the differing needs and strengths of each participant, and provide adequate and timely support to participants based on their individual circumstances.⁵² These requirements appear designed to facilitate the provision of reasonable adjustments for people with disability and other accommodations and supports to ensure that the placements are made available in a non-discriminatory way. As such, if the placements adhere to these requirements it appears they would likely be accessible to people with certain protected attributes, including people with disability, thus mitigating the risk that the measure would unlawfully discriminate against such groups.

Assessment of potential limitations on rights

1.16 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare

⁴⁷ Statement of compatibility, p. 8.

⁴⁸ Statement of compatibility, p. 8.

⁴⁹ International Covenant on Civil and Political Rights, article 1; and the International Covenant on Economic, Social and Cultural Rights, article 1; See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

⁵⁰ Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Remote Engagement Program) Bill 2021, [Report 11 of 2021](#) (16 September 2021) pp. 42–53.

⁵¹ Annexure, paragraph 7.1(c).

⁵² Annexure, subsections 5.2 and 5.3.

in a democratic society),⁵³ is rationally connected to that objective and is a proportionate means of achieving that objective.

1.17 The stated objective of the measure is to trial ideas and understand barriers to employment in remote areas.⁵⁴ The statement of compatibility states the remote engagement program placement and payment will trial an incentive for eligible participants to participate in a placement designed to build skills that will support them to find and maintain employment and contribute to their community.⁵⁵ The explanatory statement elaborates on this, stating that the remote engagement program trial, which is operating in the Ngaanyatjarra Lands, provides an opportunity to test whether receiving an additional \$190 a fortnight is an incentive for jobseekers to participate in a placement for at least 15 hours per week.⁵⁶ In general terms, facilitating a program that is designed to build skills and support employment opportunities and enabling the payment of a supplementary social security benefit, is capable of constituting a legitimate objective for the purposes of international human rights law.

1.18 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to (that is, is effective to achieve) the objective sought to be achieved. The explanatory materials emphasise that the program is intended to trial ideas and test whether participants are incentivised by the \$190 remote engagement program payment to participate in a placement. As the program is evidently in the trial phase, it is not yet clear whether it is effective to achieve the stated objective. In general terms, it appears that providing participants with an opportunity to build employment-related skills could assist to achieve the objective of helping participants to secure employment. However, where there are minimal or no prospects of local employment, noting that a key barrier to employment in remote and very remote areas, such as the Ngaanyatjarra Lands, is limited labour market opportunities, questions arise as to whether the measure would be effective to achieve the stated objective in such circumstances.⁵⁷ In addition, the Community Development Program (CDP), a remote employment and community development service, has had mixed findings regarding its effectiveness in achieving employment outcomes for participants. As such, further information is required to assess how the

⁵³ International Covenant on Economic, Social and Cultural Rights, article 4.

⁵⁴ Statement of compatibility, p. 6.

⁵⁵ Statement of compatibility, p. 6.

⁵⁶ Explanatory statement, p. 1.

⁵⁷ In its evaluation of the Community Development Program, which is intended to be replaced by the Remote Engagement Program, the Department of the Prime Minister and Cabinet stated that many CDP participants face moderate to extreme barriers to employment based on the Job Seeker Classification Instrument, reflecting the high share of CDP participants living in very remote areas with limited labour market opportunities – the majority of whom are Aboriginal or Torres Strait Islander people. See [The Community Development Program: Evaluation of Participation and Employment Outcomes](#) (2018) pp. iv, 63, 67–78

remote engagement program will differ in practice from the CDP and be effective to achieve its stated objectives, which are framed in similar terms to those underpinning the CDP (namely, to improve employment outcomes in remote communities by increasing participation in work-like activities, improving employability and increasing sustainable work transitions among CDP participants).⁵⁸

1.19 In assessing proportionality, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and accompanied by sufficient safeguards. Much of the operational detail of the measure is to be set out in the Placement Agreement and non-legislative material. The explanatory statement notes that participants will be provided with information about the payment and the placement, including how they can access or change a remote engagement placement, participation requirements, and how remote engagement placements may be brought to an end, by way of fact sheets that will be made available to participants through their remote engagement program provider.⁵⁹ Without this operational detail, it is difficult to assess whether any potential limitation on rights will be proportionate in practice.

1.20 The explanatory statement states the measure has been informed by co-design and consultation with the providers (the Paupiyala Tjarutja Aboriginal Corporation and the Ngaanyatjarra Council Aboriginal Corporation) and the broader communities.⁶⁰ It noted that the providers engaged with communities regarding the program and sought agreement from their respective community boards. It stated that such consultation informed the design of the program, including the rate of payment. The statement of compatibility also stated that First Nations individuals and communities will have a say in the development of the new program.⁶¹ Co-designing the program with communities that are to be affected by the measure is an important aim. Indeed, as part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with indigenous peoples in relation to actions which may affect them.⁶² The right of indigenous peoples to be consulted is a critical component of free, prior and

⁵⁸ Department of the Prime Minister and Cabinet, [The Community Development Program: Evaluation of Participation and Employment Outcomes](#) (2018) pp. iv. Regarding evaluations of the CDP, see Australian National Audit Office (ANAO), [The Design and Implementation of the Community Development Programme](#) (2017) [4.38]–[4.45]. At [4.42], the ANAO noted that 'the proportion of participants placed in at least one job was almost unchanged but there was a small increase in the total number of job placements (mostly casual jobs), particularly Indigenous jobseekers'.

⁵⁹ Explanatory statement, p. 3.

⁶⁰ Explanatory statement, pp. 2–3.

⁶¹ Statement of compatibility, p. 8.

⁶² See Parliamentary Joint Committee on Human Rights, [Report 4 of 2017](#) (9 May 2017) p.122–123; [Report 15 of 2021](#) (9 December 2021) pp. 9–26.

informed consent.⁶³ However, it is unclear whether communities have been genuinely consulted about the proposed measure in this instrument, as opposed to the broader policy underpinning the remote engagement program. While the explanatory materials state that community consultations informed the rate of pay, it is noted that under the Social Security Act, the rate of pay must be between \$100-\$190. Given these legislative limits on the rate of pay, it is not clear that the rate of pay could be said to be co-designed, noting that the obligation to consult under international human rights law includes the right of indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.⁶⁴

1.21 Further, it is not clear whether review is available for certain decisions made in relation to this measure, such as where a person's placement is cancelled, and their payment is removed. It is also not clear whether the measure is accompanied by any other safeguards, noting that the statement of compatibility does not acknowledge that the measure may limit human rights and therefore provides no information regarding accompanying safeguards.

Committee view

1.22 The committee notes the intention behind the remote engagement program is to replace the Community Development Program (CDP) with a new program with 'real jobs, proper wages and decent conditions – developed in partnership with First Nations peoples'.⁶⁵ The committee considers that to the extent that the measure provides opportunities for job seekers to develop employment skills and facilitates the payment of a supplementary social security payment, this promotes the rights to work, social security, an adequate standard of living, and equality and non-discrimination.

1.23 However, the committee notes that these rights may also be limited, depending on how the program operates in practice (including if a person's placement were to be ended or cancelled). While noting that the remote engagement program

⁶³ United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [14].

⁶⁴ UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]-[16]. The UN Human Rights Council further advised that the obligation to 'consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation involves 'a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up'. In the context of special measures, the UN Committee on the Elimination of Racial Discrimination has stated that special measures should be 'designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'. See United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32* (2009) [16]-[18].

⁶⁵ Explanatory statement, p. 1.

payment is in addition to the participant's other social security entitlements, the committee holds concerns that the rate of payment if a participant worked the minimum 15 hours per week would amount to \$6.30 per hour, which is significantly less than the minimum wage of \$23.23 per hour (also noting, this rate would decrease further if the hours worked were greater). The statement of compatibility does not acknowledge that the measure may limit human rights and so provides no assessment as to the permissibility of such limitations. The committee therefore considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) what are the types of circumstances in which a placement may be cancelled (and thus the payment removed);
- (b) noting that the work performed by a participant may constitute a form of employment for the purposes of international human rights law, is the rate of remote engagement program payment (that is, \$190 per fortnight for at least 15 hours work) compatible with the right to fair remuneration (noting participants could work up to 8 hours per day);
- (c) how is the measure effective to achieve the stated objectives and in particular, noting the mixed findings of the CDP regarding its effectiveness in achieving employment outcomes for participants, how is the remote engagement program different from the CDP such that it is more likely to achieve the stated objectives;
- (d) whether communities were consulted about the proposed measure in this instrument, as opposed to the broader policy underpinning the remote engagement program, and if so, what were the outcomes of those consultations;
- (e) whether review is available for certain decisions made in relation to this measure, such as where a person's placement is cancelled, and their payment is removed; and
- (f) what other safeguards accompany the measure.

