



**Australian
Human Rights
Commission**

**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

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Committee Secretary
Senate Standing Committees on Community Affairs
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Dear Secretary

Senate inquiry into Social Security Legislation Amendment (Debit Card Trial) Bill 2015

The Commission welcomes the opportunity to make comments to the Community Affairs References Committee in relation to the above inquiry.

The Bill responds to a key recommendation from Mr Andrew Forrest's Review of Indigenous Jobs and Training to introduce a 'Healthy Welfare Card'.¹ Under the Bill, a legislative instrument can be made to prescribe locations, or locations and classes of persons, in three trial areas that would trial cashless welfare arrangements. People who are in receipt of particular social security payments (trigger payments) in these locations will have 80% of their income support as non-discretionary spending (though can be reduced to 50%) and 20% available to be 'spent on alcoholic beverages, gambling and illegal drugs'.²

The Commission notes that the Parliamentary Joint Committee on Human Rights (PJCHR) has provided its initial assessment of the Bill.³ The PJCHR has requested further information from the Minister on issues such as the existence of a rational connection between the limitations on the rights to privacy, social security and the right to equality and non-discrimination and the objective of the Bill. In particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving a reduction in hardship, deprivation, violence and harm and encourage socially responsible behaviour. The Committee has also sought advice on whether the limitations are reasonable and proportionate including monitoring and access to review.⁴ The Commission concurs with the PJCHR assessment of the Bill.

The Commission also notes the Hansard Report of the single public hearing day held on 11 September.⁵ Many of the issues raised in this letter were also raised by participants in the public hearing.

Human Rights Framework

The Commission considers that the Bill directly engages the following human rights treaties:⁶

- *International Covenant on Civil and Political Rights* (ICCPR)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)
- *Convention on the Rights of the Child* (CRC).

Specifically, it engages the following human rights:

- Right to non-discrimination and equality
- Right to social security
- Right to privacy.

The Bill also affects rights as set out in the Declaration on the Rights of Indigenous Peoples.⁷ The Declaration provides how the human rights principles contained in the key human rights treaties apply to Aboriginal and Torres Strait Islander peoples. These principles include:

- Non-discrimination and equality
- Self-determination
- Participation and free, prior and informed consent.

To be consistent with these principles, laws and policies should be non-discriminatory and promote Aboriginal and Torres Strait Islander peoples' choice, participation and control. Articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples provide for the inclusion of Indigenous peoples in decision-making processes. The articles place a duty on government to consult and cooperate with Aboriginal and Torres Strait Islander people in good faith to give effect to their right to free, prior and informed consent. Aboriginal and Torres Strait Islander peoples should therefore be actively involved in the making of policy and legislative decisions, and actively engaged in the implementation and delivery of the mechanisms that arise from the legislative changes.

This approach not only reflects Australia's human rights obligations as they apply to Aboriginal and Torres Strait Islander peoples but is also consistent with the evidence base on what works to overcome Indigenous disadvantage.

Income management

The Commission considers the cashless welfare arrangements to be a form of income management. Although the arrangements introduced by the Bill do not quarantine a proportion of payments explicitly for priority items, they are directed toward similar objectives to income management (i.e.: ensuring welfare payments are spent responsibly by restricting how people are permitted to use their income). In this sense, the Commission looks to the experience of people under income

management for guidance about the effectiveness of this proposal in practice as well as for assessment of any discriminatory effects. It is with this interpretation in mind that the Commission makes the following comments.

The Commission has previously noted that there has been significant debate about whether income management is an effective policy tool for supporting the welfare of disadvantaged individuals and families, and in particular, Aboriginal and Torres Strait Islander peoples.⁸

Evaluations have reported mixed impacts for recipients and communities.⁹ Some evidence suggests that the measure has potential benefits for people with demonstrated financial management and substance abuse problems.¹⁰ It may also assist people who experience financial harassment from family or friends ('humberging').¹¹ For some, it has led to increased harassment for money and food due to reduced levels of cash in the community.¹² The cashless welfare arrangement, by its nature, will lead to reduced levels of available cash.

Where benefits have been experienced, the benefits are modest when compared to income management's stated objectives¹³ and need to be weighed against significant drawbacks.

For many, income management results in few, or no, benefits and 'a sense of loss of control, shame and unfairness'.¹⁴ Feedback from stakeholders has included concerns that people on income management find it disempowering¹⁵ and have difficulty managing their own income if they move from welfare to paid employment.¹⁶ The *Evaluating New Income Management in the Northern Territory report*, commissioned by the Department of Social Services found no "substantive evidence of the program having significant changes relative to its key policy objectives, including changing people's behaviours".¹⁷

Voluntariness appears to be a significant factor. Income management was introduced in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) at the request of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPY Women's Council) and is generally viewed positively.¹⁸ This has been attributed to community consultation and people engaging income management voluntarily.¹⁹

In some cases people on voluntary income management experienced significant reductions in tobacco and alcohol consumption and improved financial management. In contrast, those placed on income management generally did not show positive improvements in these areas.²⁰

The Commission has previously stated and confirms that its preferred features of an income management measure are:

- an approach that enables participants to voluntarily opt-in, rather than an automatic quarantining model (which then relies upon individual applications for exemptions)
- an approach that utilises income management as a 'last resort' for targeted risk areas such as child protection (that is supported by case management and support services), similar to the Family Responsibilities Commission

model in Queensland or a process that provides for individual referral to income management.

- measures that are applied for a defined period and in a manner proportionate to the context.²¹

An income management measure with these features can be justified as consistent with international human rights standards.

The ICESCR provides for a right to social security (Art.9). The right to social security has been interpreted as requiring that eligibility conditions for unemployment benefits are reasonable and proportionate and the benefit is not provided in a form that is onerous or undignified.²²

The Bill is an automatic quarantining model. Section 124PG provides that trial participants will be determined based upon a combination of factors rather than voluntary opt-in. A person who is of a particular class, in receipt of particular welfare payments and living in a particular trial area will automatically become a trial participant. This is irrespective of whether or not they effectively manage their private family affairs.

The Bill contains no provision for review of automatic participation nor consideration of individual requirements. The Commission highlights the importance of ensuring the participation of affected people in all aspects of the design, delivery and monitoring of the income management measures. This would enable individuals and communities to decide on the most appropriate measures to meet their particular needs and the Government to respond to the specific circumstances of individual people and communities.

As the PJCHR observed, there is also no explanation as to whether there are effective safeguards or controls over the measure, including procedures for monitoring the operation and impact of the measure and the possibility of a review process.²³ The latter is particularly important should there be an adverse impact from the trial.

Neither the Explanatory Memorandum nor the Statement of Compatibility to the Bill provide an explanation of how the measure is rationally connected to the objectives of the Bill. In view of the inconclusive and somewhat negative evaluation research findings regarding non-voluntary participation in income management, it is important that this explanation of expected effectiveness be provided.

Trial sites and non-discrimination

The Bill may be contrary to the *Racial Discrimination Act 1975* (Cth) (RDA), sections 9 and 10. The RDA incorporates the rights contained in the ICERD into domestic law.

The Statement of Compatibility provides that trial sites will be selected on the basis of high levels of welfare dependence and where unacceptable levels of harm are being caused by gambling, alcohol and/or drug abuse.²⁴ The Statement of

Compatibility also provides that the trial is not targeted at people of a particular race, but to welfare recipients who meet particular criteria.

The Commission considers that due to the Bills general application to all recipients of trigger payments in the trial areas,²⁵ the income management measure is not expressed to be intended to operate as a special measure under the RDA and does not raise issues of direct discrimination.

In order to be consistent with the RDA, it only remains to identify whether it raises concerns of indirect discrimination and engages section 9 (1A). Section 10 (1) of the RDA may also be engaged if there is unequal enjoyment of rights between racial groups by reason of the Bill. It is not necessary to show that this effect is the intention or purpose of the Bill. The focus is on its practical operation and effect. The central issue is whether the Bill has a disproportionate impact upon people of a particular racial group.²⁶

The Commission understands that Ceduna will be selected as a trial site,²⁷ and that consultations were ongoing with community leaders in Kununurra, and Halls Creek.²⁸ In the 2011 Census, around 24 % of the Ceduna population identified as Aboriginal and Torres Strait Islander,²⁹ in Kununurra the percentage was 34.8%,³⁰ and 78.3% in Halls Creek.³¹

The Commission considers that in view of these percentages, the trial may have a disproportionate impact upon Aboriginal and Torres Strait Islander people in these localities. This opinion is supported by the explanation in the Statement of Compatibility that the trial is in response to a key recommendation from Mr Andrew Forrest's Review on Indigenous Jobs and Training and the research on income management referred to above. Measures that disproportionately impact upon the ability of a particular racial group to enjoy their rights (such as the right to social security) may raise issues of indirect discrimination.

Privacy

The Commission refers the Committee to the PJCHR's succinct analysis of the right to privacy (ICCPR Art 17).³² The Statement of Compatibility does not set out whether the Bill engages the right to privacy. Accordingly, there is no analysis of whether the Bill places limitations on this human right.

The PJCHR considers that while the objective of the Bill is likely to be a legitimate objective for the purposes of human rights, it is incumbent on the proponent of the Bill to provide an explanation of how the measures are likely to be effective and how it is proportionate to the stated objective.³³ The Commission concurs with the PJCHR assessment of the right to privacy.

Conclusion

Human rights protections are insufficiently addressed in the Bill, the Explanatory Memorandum and in the Statement of Compatibility. The Commission is particularly concerned about the non-voluntary participation and the absence of monitoring and review processes in the Bill. In view of these issues, the Commission considers that the Bill should not be passed in its present form.

I hope this submission assists in your consideration of the Bill. Please do not hesitate to contact the Commission should you have any queries about this submission.

Yours sincerely

Mick Gooda
**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

¹ Andrew Forrest, *The Forrest Review: Creating Parity* (Commonwealth of Australia, 2014), Recommendation 5. At <http://indigenousjobsandtrainingreview.dpmc.gov.au/> (viewed 21 September 2015).

² Section 124PC(a).

³ Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament*, p 20. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-seventh_report_of_the_44th_Parliament (viewed 21 September 2015).

⁴ Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament*, p 24. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-seventh_report_of_the_44th_Parliament (viewed 21 September 2015).

⁵ Senate Community Affairs Legislation Committee, Proof Committee Hansard *Social Security Legislation Amendment (Debit Card Trial) Bill 2015 Public Hearings and Reports*. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Debit_Card_Trial/Public_Hearings (viewed 21 September 2015).

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4

January 1969). The Bill indirectly engages the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981) and the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). At <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (viewed 17 September 2015).

⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007). At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 11 September 2015).

⁸ Australian Human Rights Commission, Submission No 351 to Senate Community Affairs Legislation Committee, Parliamentary, *Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills*, 6 February 2012, 27.

⁹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report*, Social Policy Research Centre UNSW, Australian National University and Australian Institute of Family Studies (2012) p xviii; Deloitte Access Economics, *Place Based Income Management – Process and short term outcomes evaluation* (2014); I Katz and S Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands*, UNSW Social Policy Research Centre (2014).

¹⁰ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report*, Social Policy Research Centre UNSW, Australian National University and Australian Institute of Family Studies (2012) 254.

¹¹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report*, Social Policy Research Centre UNSW, Australian National University and Australian Institute of Family Studies (2012) 254; I Katz and S Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands*, UNSW Social Policy Research Centre (2014) 39-40.

¹² I Katz and S Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands*, UNSW Social Policy Research Centre (2014) 39-40.

¹³ Department of Social Services, *Guide to Social Security Law* [11.1.1.30]. At <http://guides.dss.gov.au/guide-social-security-law/11/1/1/30> (viewed 23 September 2015).

¹⁴ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report*, Social Policy Research Centre UNSW, Australian National University and Australian Institute of Family Studies (2012) 257.

¹⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation: Eleventh Report 2013* (2013) para 1.193 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/112013/~/_/media/Committees/Senate/committee/humanrights_ctte/reports/2013/11_2013/pdf/report.ashx (viewed 23 September 2015).

¹⁶ Reference Group on Welfare Reform, *A New System for Better Employment and Social Outcomes* (2015), 114.

¹⁷ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, Social Policy Research Centre UNSW, Australian National University and Australian Institute of Family Studies (2014), p xxi. At <https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/income-management/income-management-evaluations/evaluation-of-new-income-management-in-the-northern-territory> (viewed 1 October 2015).

¹⁸ I Katz and S Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands*, UNSW Social Policy Research Centre (2014) 1-2.

¹⁹ I Katz and S Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands*, UNSW Social Policy Research Centre (2014) 41.

²⁰ Deloitte Access Economics, *Place Based Income Management – Process and short term outcomes evaluation* (2014) 103-104.

²¹ Australian Human Rights Commission, Submission No 76 to Senate Standing Committees on Community Affairs, *Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), 26.

²² For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 271-277. At http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html#part3 (viewed 23 September 2015).

²³ Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament*, p 24. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-seventh_report_of_the_44th_Parliament (viewed 21 September 2015).

²⁴ Social Security Legislation Amendment

(Debit Card Trial) Bill 2015 Statement of Compatibility with Human Rights, p 1. At

http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r5520 (viewed 21 September 2015).

²⁵ Section 124PD.

²⁶ Committee on the Elimination of Racial Discrimination, General Recommendation 32 - *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 8: The CERD Committee has noted 'The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration'. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 14 September 2015).

²⁷ Department of the Prime Minister and Cabinet, 'Ceduna to trial cashless debit card', (Media Release, 5 August 2015).

²⁸ N Scullion, Minister for Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Commissioner, Australian Human Rights Commission, 7 July 2015; 'Prime Minister Tony Abbott backs welfare card trial in northern Western Australia' *ABC News* (online), 24 August 2015. At <http://www.abc.net.au/news/2015-08-24/pm-backs-welfare-card-trial-in-northern-western-australia/6719104> (viewed 24 September 2015).

²⁹ Australian Bureau of Statistics, 2011 Census QuickStats: Ceduna, Code SSC40097 (SSC), 28 March 2013,

<http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/SSC40097?opendocument&navpos=220>.

³⁰ Australian Bureau of Statistics, 2011 Census QuickStats: Kununurra Code 508041208 (SA2), 28 March 2013,

<http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/508041208?opendocument&navpos=220>.

³¹ Australian Bureau of Statistics, 2011 Census QuickStats: Halls Creek Code 508041207 (SA2), 28 March 2013,

<http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/508041207?opendocument&navpos=220>.

³² Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament*, p 21-24. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-seventh_report_of_the_44th_Parliament (viewed 21 September 2015).

³³ Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament*, p 23. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-seventh_report_of_the_44th_Parliament (viewed 21 September 2015).