

Supplementary Submission to:

Senate Standing Committee on Community Affairs, Legislation Committee, Inquiry into the provisions of the Social Security (Administration) Amendment (Income Management Reform) Bill 2023

Professor Matthew Gray
Director

ANU Centre for Social Research and Methods
Australian National University

Dr J. Rob Bray PSM
Research Fellow

ANU Centre for Social Research and Methods
Australian National University

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There are two specific issues which were raised at the public hearings on 15 May 2023 which we would seek to address. These are: the relationship between human rights and income management; and the nature of income management under the Family Responsibilities Commission in Queensland.

Income Management and Human Rights

Senator Brockman asked a question of other witnesses along the line of whether any income management infringed human rights and Australia's human rights obligations.

Human rights and proportionality

This question cannot be answered in absolute terms. The reason for this is articulated, for example, in the 'Public Sector guidance sheet' issued by the Attorney-General's Department: "Very few human rights are absolute¹ and most rights can be subjected to permissible limits" (Attorney-General 2023). The question of 'permissible limits' is further detailed in this document as being determined by whether the limits: "Pursue a legitimate objective and [that they] be reasonable, necessary and proportionate". This is then illustrated in the document in a number of statements and questions. The statements are that the proposed restrictions:

- must be necessary to achieve a legitimate objective
- adopt a means that is rationally connected to that objective
- those means must be no more restrictive than required to achieve the purpose of the limitation.

While the questions which they identify as being needed to be answered are:

¹ These typically are limited to rights such as freedom from torture, slavery, retrospective operation of criminal law and the right to recognition as a person before the law (Australian Human Rights Commission 2023).

- Will the limitation in fact lead to a reduction of that problem?
- Does a less restrictive alternative exist, and has it been tried?
- Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?
- Has sufficient regard been paid to the rights and interests of those affected?

More generally the concept of proportionality has been presented by the Australian Law Reform Commission as follows: “a structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right” (ALRC 2015, 45). There is also an extensive and international literature on the concept of proportionality and its application to law, including human rights law².

Human rights and income management

The answer to the question of whether income management infringes human rights at an acceptable level hence needs to be addressed in terms of proportionality:

- We would consider that in this regard the mass implementation of compulsory income management to populations based on their location and form of income support fails any test of proportionality.
 - This can be seen on many grounds as the mass application involves the restraint being imposed on people who do not have problems with their financial management and do not inappropriately use their transfer payments (let alone spend more than half their income on proscribed items). It is an approach that ignores the use of less restrictive alternatives (such as targeting the measure only at those who have adverse behaviours and outcomes), and it fails to flexibly treat different cases. Additionally the targeting of the measure at Indigenous Australians clearly indicates an insufficient regard to their other rights including that of non-discrimination on the basis of race. At a broader level the failure of the program, as we have highlighted in our initial submission, to achieve improved well-being outcomes in the Northern Territory suggests a clear failure of the actual ‘means’ of income management relative to the objectives on which it is justified.
- In contrast, highly targeted income management interventions which seek to apply income management (or indeed other policies) to specifically identified individuals (through a valid process) who have, or create, particular adverse outcomes, and where these are related to their pattern of spending of transfer payments, might be considered as a proportionate, and hence a reasonable, limitation on their human rights.

This is the critical differentiation.

Parliamentary Joint Committee on Human Rights

We also note that the issue of proportionality is directly addressed in the Parliamentary Joint Committee on Human Rights, Human rights scrutiny report: Report 4 of 2023 (PJCHR 2023a). This specifically addresses the key issues identified above of:

² Not that there is not debate around the concept, see for example Tsakyrakis (2009) and Klatt and Meister (2012) and extensive discussion in Huscroft, Miller and Webber (2014).,

- Legitimate objective and rational connection, and
- Proportionality.

The report noted: “For many years the committee has raised concerns regarding the compatibility of compulsory income management with multiple human rights” and that “The committee considers further information is required to assess the compatibility of the measures contained in the bill and related instruments with multiple human rights” (p. 24).

Following on from this the Committee reported in Report 5 of 2023 (PJCHR 2023b) that:

it is not clear that expanding access to this regime, which effectively extends mandatory income management into the foreseeable future, is, for the purposes of international human rights law, a necessary measure that addresses a pressing and substantial concern. In the absence of adequate safeguards and sufficient flexibility to consider individual circumstances, as well as the potentially significant interference with human rights that may result from compulsory participation in the regime, the committee considers that the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. (p. 6)

As we have indicated in our initial submission to this Senate Committee we consider that the Committee should also seek from the Department the legal opinions upon which they make their claims in the Explanatory Memorandum.

Response

On this basis we would urge that the Committee recommend, as indicated in our verbal evidence that if this legislation is to proceed:

1. The inclusion of a one-year sunset clause in the legislation, and
2. Provision which restricts the ability to apply the legislation to any population other than that current subject to the policy.

Income Management and the Family Responsibilities Commission

The question of income management under the Family Responsibilities Commission (FRC) was raised in a number of questions.

This model was described by the Family Responsibilities Commission in their 2022 Submission to the Senate Standing Committee on Community Affairs Inquiry into the Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022, as follows:

The FRC model is unique, and unlike any other income management model in place in Australia. There is no blanket imposition of income management. It is applied flexibly, on a case-by-case basis by those with local authority (Local Commissioners) who are Elders and other respected community members. (FRC 2022, 5)

The FRC is a model of self-determination

The FRC provides Queensland's best example of shared decision-making – one that is institutionalised and enshrined in legislation. Through the Family Responsibilities Commission Act 2008 (Qld) (FRC Act), powers and responsibilities of the Crown have been shared with First Nations people, so they are not just advisers to other (usually non-Indigenous) decision-makers. They hold formal decision-making powers enabling them to respond to the needs of individuals and families in their own communities.

Since the appointment of Ms Tammy Williams, a Murri woman and barrister, as FRC Commissioner and CEO in September 2019, all FRC decision-makers under the FRC Act are First Nations people. The single exception is the Deputy Commissioner, whose powers as a decision-maker can only be exercised upon delegation by the FRC Commissioner. (p. 2)

Under the FRC model the Local Commissioners have been vested with powers to place an individual on income management. FRC data shows the power is used judiciously and in a proportionate manner. Data for the 2021-22 reporting period shows that of the range of decisions available ... only 10 per cent of all finalised outcomes from conference are for Conditional Income Management (CIM). (p. 4)

We commend a full reading of this submission to any members of the Committee who are uncertain about the FRC approach and its difference to compulsory income management as it operates in the Northern Territory. At the same time, we would emphasise that this is the model which has been developed for these communities, and not just a template to roll out more broadly.

In considering the model it is also appropriate to consider some of the evaluative material on the initiative:

- The FRC itself reports:

FRC communities ... reported significant gains in the following key areas:

- Child safety – Notices for child safety investigations decreased by 69 per cent contrary to the state-wide upward trend of notifications for Aboriginal and Torres Strait Islander children.
 - Housing – Notices about residential tenancy breaches decreased by 32 per cent demonstrating a measurable outcome toward improving housing stability in our remote Aboriginal communities....
 - Criminal Justice – There was a 23 per cent decrease in agency notices for convictions in the District and Supreme Courts. (p. 14)
- The Strategic Review of Cape York Income Management, undertaken by the Queensland University of Technology for the Department of Social Services in 2018, utilised both qualitative material – “primarily derived from the FRC (e.g. FRC reports, books, interviews with Local Commissioners and other FRC personnel)” (Scott et al. 2018, 5), along with offence, education,

child safety and FRC operational data. It reports that while there were some positive qualitative findings in the FRC material that:

Although these qualitative data indicate a largely positive view, they are not always supported by the available quantitative data. Analyses of aggregated data at the community level show mixed results, whilst analysis of the data records of individual FRC clients indicate that whilst CYIM did not eliminate further breaches, it extended the time between breach notifications. (p. xi).

- An earlier evaluation of the Cape York Welfare Reform program for the then Department of Families, Housing and Community Services and Indigenous Affairs reported in its overview that:
... the evidence suggests that the impact of the local FRC Commissioners is in their listening, guiding and supporting role, rather than in the exercising of their punitive powers to order income management. (Limerick 2012, 50)
- Similarly Katz and Raven (2013, 21) indicated that the Commission's 'support and guidance' made an important contribution to improvements in child outcomes outside any potential impact of any income management it may have imposed.

Again it is to be emphasised that not only is this a specific model developed within Cape York communities, but, as noted above, compulsory income management was only applied in 10 per cent of cases, and when applied it was part of a wider array of responses and supports – or to quote the Commissioner of the FRC (Tammy Williams).

conditional income management, CIM, is applied as a decision of last resort. It is an extraordinary decision. It is an extraordinary power to intervene and to say, 'Part of your money should be protected under the technology of a card.' It has always been applied as a decision of last resort but the number of times it was applied was greater historically. What we have seen—and we document it in our operational analysis and we even referenced it in our annual reports—is a decrease in the number [of] instances of FRC imposing income management on community members. (Queensland Parliament 2023, 7)

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