Law Council
OF AUSTRALIA

Family Assistance and Other Legislation Amendment (2008 Budget Measures) Bill 2009

Senate Community Affairs Committee

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Introduction and background

1. The following submission concerns Schedule 2 of the *Family Assistance and Other Legislation Amendment (2008 Budget Measures) Bill 2009* (the Bill), which will amend the *Social Security (Administration) Act 1999* (the SSA Act) to enable appeals to the Social Security Appeals Tribunal against determinations that a person will be subject to compulsory income management. The submission does not consider Schedules 1 or 3 of the Bill.

2. Schedule 2, if enacted, will slightly amend the Northern Territory Emergency Response income management regime, which was implemented in 2007 in response to reports of child abuse and neglect in Aboriginal communities in the Northern Territory. The income management regime is one of the most contentious aspects of the NT Intervention. It was intended to impact upon Aboriginal communities in the Northern Territory and is therefore almost certainly inconsistent with the *Racial Discrimination Act 1975* (Cth) (the RDA) and Australia's obligations under international law, including the *Convention on the Elimination of All Forms of Racial Discrimination* and the *United Nations Charter*.

3. The Explanatory Memorandum accompanying the *Social Security and Other Legislation Amendment (Welfare Payments Reform) Act 2007* (Cth) ("the Welfare Reform Act) notes that the income management regime in fact recognises Australia's important obligations under other international instruments, including the *Convention on the Rights of the Child* and suggests that the measures are aimed at balancing competing obligations to protect children and prevent racism.[1]

4. The Law Council has consistently stated that it is wrong to suggest that protecting women and children and eliminating racial discrimination are competing objectives. All human rights are indispensible, indivisible, interdependent and related at international law[2] and Article 5 of the International Covenant on Civil and Political Rights (ICCPR) binds State parties to the principle that implementation of laws protecting certain human rights cannot be used as justification for offending, repudiating or failing to observe other human rights.

5. The Explanatory Memorandum to the Welfare Reform Act and the Second Reading speech from the former Minister for Indigenous Affairs, Mal Brough, also indicates that, whilst the RDA is suspended, the measures are intended to be "special measures" for the improvement of the lives of Aboriginal people. Such a statement was regarded at the time of enactment of the measures, and continues to be regarded, as incorrect. At the very least, "special measures" must be supported by the majority of those affected. Given the lack of any consultation which preceded the implementation of income management in Aboriginal communities and the findings of the 12-month review into the Intervention, there is little basis on which the measures could be characterised as "special measures". This view has also been recently supported by the United Nations Human Rights Council in its Concluding Observations on Australia's performance under the ICCPR.[3]

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[1] Social Security and Other Legislation Amendment (Welfare Payments Reform) Act 2007 Explanatory Memorandum, page 2.

[2] *Vienna Declaration and Programme of Action 1993*; and confirmed by the resolution adopted by the General Assembly at the 2005 United Nations World Summit, UN Doc. A/res/60/1 (24 October 2005), New York, paragraph 121.

[3] Concluding Observations of the UN Human Rights Committee of Australia's Compliance with its Obligations under the ICCPR, 2 April 2009, CCPR/C/AUS/CO/5, Paragraph 14.

6. The Law Council's primary submission is that, while the measures in Schedule 2 of the present Bill are welcome, the income management regime will continue to be contrary to Australia's international obligations in its present form. It is also unclear what the practical effect of allowing persons to appeal on the merits against a decision to apply income management to them, if the only basis for the decision was that the person stayed overnight in a designated area (such as in or close by a prescribed Aboriginal community. Applying mandatory income management on the basis of race or geographical location is arbitrary and discriminatory. The Law Council considers that the better approach would be to implement the recommendation of the NT Emergency Response Review Board, that compulsory income management be removed and replaced with voluntary income management, or income management applicable only on certain triggers – including school enrolment and attendance, child safety etc.

Legislative framework

7. The relevant provision, s 144(ka), was incorporated into the SSA Act in September 2007 under the Welfare Reform Act was enacted, together with two other enactments to implement the so-called "Northern Territory National Emergency Intervention".

8. The Welfare Reform Act established an income management regime for Aboriginal people who are welfare recipients in the Northern Territory. [4] Under s 123UB of the SSA Act, a person will be subject to income management if they stay overnight in a 'relevant Northern Territory area' at any time from 21 June 2007. A 'relevant area' generally covers Aboriginal communities in the Northern Territory specified under the *Northern Territory National Emergency Response Act 2007* (Cth) (NTER Act).

9. A person may also be subject to income management if the Minister or delegate is satisfied that the person, who is in receipt of welfare or income support, has a child in their care who is not enrolled in school (SSA Act, s 123UD) or has a poor attendance record (s 123UE), or has had a notice issued against them by child protection services ordering that the person be subject to income management (s 123UC). Persons in receipt of income support may also voluntarily request that their welfare payments be subject to income management (s 123UFA). The Explanatory Memorandum indicates that the measures apply only in the Northern Territory, however s 123UF also enables income management in Queensland where requested by the 'Queensland Commission'.

10. A person may be exempt from income management if the Secretary issues a notice declaring the person to be exempt from income management under s 123UG.

11. The operative provision will remove ss 144(ka) of the SSA Act, which provides:

    Section 144 – Non-reviewable decisions

    The SSAT cannot review any of the following decisions:

    ...

    (ka) a decision under Part 3B of this Act that relates to a person who is subject to the income management regime under section 123UB;

[4] The reference to "person" or "persons" in this part of the Submission is to be read as "Aboriginal person/s in the Northern Territory who are welfare recipients".

12. Section 144 does not refer to ss 123UC-123UF. Accordingly, decisions under those sub-sections continue to be reviewable.

The 12-month review of the NT Intervention

13. In September 2008, the Northern Territory Intervention Review Board, Chaired by Peter Yu, (the Review Board) handed down its recommendations after widespread public consultation with Indigenous Australians living in the Northern Territory.

14. The primary recommendations of the Review Board were that:

    (1) blanket compulsory income management be removed and replaced with voluntary income management;

    (2) compulsory income management should be applied only in response to certain triggers such as child protection, school enrolment and attendance and other relevant behavioural triggers; and

    (3) all income management decisions be subject to full merits review. In support of its recommendations, the Review made the following observations:

    "The people to whom the scheme applies were not consulted about it nor did they consent to the income management regime before or during its roll-out. The relevant provisions of the Racial Discrimination Act 1975 which protect other Australians from racial discrimination were deliberately rendered inoperative under the NTER legislation for those people living in the prescribed communities and town camps, almost all of whom are Aboriginal.

    "The application of income management was not based on any assessment of a person's capacity to properly meet their family responsibilities. Nor was there any opportunity extended to those living in the affected communities to negotiate their way out of the imposed regulation of their income, if they could demonstrate their ability to responsibly manage their income. The only determinant was whether an individual lived in a prescribed area on 21 June 2007.

    "The blanket imposition of compulsory income management across Indigenous communities in the Northern Territory has resulted in widespread disillusionment, resentment and anger in a significant segment of the Indigenous community."[5]

15. The Review Board also noted that there had been positive outcomes from income management. Many people, particularly Aboriginal women and pensioners, felt better able to control their finances and avoid 'humbugging' by family or other community members. This had lead, in a number of reported cases, to better food being put on tables and some of those subject to income management being better able to save for household goods, including whitegoods.[6]

16. The present Bill implements only one aspect of the Review Board's recommendation, i.e. that decisions against a person in relation to income management be subject to full merits review.

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[5] Yu, P., Duncan, M., Grey, B., *Report of the NT Emergency Response Review Board*, September 2008, Commonwealth of Australia, page 20.

[6] Ibid, page 21.

Racial Discrimination Act 1975

17. Under the *Welfare Reform Act 2007* and other legislation implementing the NT Intervention, the *Racial Discrimination Act 1975* (the RDA) has been suspended for the majority of the operative provisions.

18. It is widely acknowledged that the implementation of the income management regime would conflict directly with the central provisions of the RDA, given it was directed at Aboriginal people without their consent (or even a facade of public consultation). The suspension of the RDA was predicated on the basis that the government considered it necessary to "remove any uncertainty" as to whether the NT intervention could be affected or struck down by the RDA. In reality however, there would be little scope either to strike down the legislation on such a basis or to challenge its validity, given that subsequent legislation will survive to the extent of any inconsistency with older legislation.

19. The Law Council has consistently called for the provisions suspending the RDA to be repealed. The suspension of the RDA in 2007 was widely regarded as a gross repudiation of human rights in this country and was unprecedented in 32 years since the enactment of the RDA.

20. The Law Council acknowledges that the Federal Government has undertaken to introduce legislation in the spring Parliamentary sitting period to bring the Intervention into compliance with the RDA. This is a matter which requires the utmost urgency. The suspension of the RDA continues to be a blight on Australia's international reputation and has already been the subject of criticism by the United Nations Human Rights Committee, which has pointed out that Australia is currently not in compliance with its fundamental obligations under the ICCPR.[7]

Schedule 2

21. The Explanatory Memorandum accompanying the Bill indicates that the removal of s 144(ka) is to be done in response to the recommendation of the NTER Review Board that persons subject to income management have access to full merits review. However, this recommendation has been made in the context of other recommendations, including that blanket compulsory income management be repealed and applied only on a voluntary basis or in response to certain triggers, including child protection, school enrolment and attendance, etc.

22. In making the recommendation, the Review Board envisaged that appeals would be from decisions against a person based on their child's health and safety, school enrolment status and school attendance record, not on the basis of whether they had stayed in a designated area at any stage since the announcement of the NT Intervention on 21 June 2007.

23. Accordingly, it is difficult to discern what will be the actual impact of removing s 144(ka) from the SSA Act.

24. The Law Council understands that there are approximately 15,000 people in the Northern Territory who are subject to income management. If Schedule 2 is enacted, those people already subject to income management may request an exemption from income management under s 123UG of the SSA Act, with the

[7] Ibid, *op cit* 3

pursuant decision on that request subject to full merits review. S 123UG(2) outlines several considerations for the Secretary in deciding whether to declare a person exempt from income management. All of those considerations are based on the person's family and kinship status (which appears to suggest that one factor will be whether or not they are Indigenous), whether the person ordinarily resides in a prescribed area and their reasons for residing or temporarily staying there.

25. Accordingly it is apparent that an appeal on the merits of a decision to apply income management to a person would rest on whether the individual could demonstrate that they did not ordinarily reside or stay in a prescribed area. Indigenous people subject to income management under s 123UB would be unlikely to have a decision against them overturned unless they could demonstrate that they had not stayed for any significant length of time in a prescribed area since 20 June 2007, had not lived in a prescribed community and had no assets, family or other ties to the relevant area.

26. However, the proposed amendment might make it easier for non-Indigenous persons who reside or stay in a prescribed area to successfully appeal against an income management decision made against them, as their family and kinship status would be one of the matters relevant to the merits of the decision.

Conclusion and recommendation

27. The Law Council recommends that Schedule 2 should be enacted. All persons subject to adverse decisions by government should have the opportunity to challenge the merits of the decision to the full extent of the law.

28. However, Schedule 2 of the Bill, if enacted, is unlikely to have significant impact on the discriminatory application of s 123UB of the SSA Act.

29. There appear to be very limited grounds on which a person, who is already subject to income management by virtue of living in a particular community, could successfully appeal against that decision. For example, there would be little scope to overturn a decision on the basis of evidence that the welfare recipient's children have strong school attendance records and they have never been subject to any investigation by child protection authorities.

30. The Law Council considers that the recommendations of the NTER Review Board should be implemented in full. Implementation of one aspect of the Review Board's recommendation while rejecting the others, as is the case under this Bill, results in little change to the discriminatory application of the income management regime.

31. However, if the Review Board's recommendations are fully implemented, it would not amount to removal of income management. It would simply apply a principled approach to decisions about income management based on whether welfare recipients meet certain conditions, rather than applying it only to Aboriginal people living in certain areas. If applied across the board – not only in Aboriginal communities – such an approach may resolve concerns about in income management regime's inconsistency with the RDA and Australia's associated international obligations.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.