THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:PWvk:1385782

28 July 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

Inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017

Thank you for your memorandum dated 30 June 2017 requesting input for a Law Council submission to the inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (the "Bill"). The Human Rights and Indigenous Issues Committees of the Law Society of NSW have provided comments informing this submission.

We provide comments primarily in respect of Schedule 12 of the Bill.

1. Summary of the Law Society's position

Schedule 12 of the Bill would set up a pilot scheme where, in three selected areas, recipients of Newstart and Youth Allowance would be "randomly" picked via a "data driven profiling tool" that would identify "relevant characteristics that indicate a higher risk of substance abuse issues" to undergo drug testing.[1]

We understand that the drug testing trial areas would be selected by considering a range of factors, including crime statistics, drug use statistics, social security data and health service availability.[2]

The Law Society is of the view that the issues that Schedule 12 of the Bill seeks to address are complex and require nuanced policy responses. However, we are concerned that the Government has not demonstrated that there is sufficient current and credible evidence to support the approach taken in Schedule 12 of the Bill, aspects of which appear unnecessarily punitive. The Law Society is concerned that restricting access to social security because of what is essentially a health issue (alcohol or drug use) is likely to have

[1] Australian Government Department of Social Services, "Welfare Reform Budget 2017", Factsheet, at 3 available at: https://www.dss.gov.au/sites/default/files/documents/05_2017/budget_2017_-_welfare_reform_-_fact_sheet_for_web_0.pdf [accessed 26 July 2017]
[2] Ibid.

an adverse effect on Closing the Gap measures in health, justice and housing where Indigenous people are impacted by the trial. Further, we note that in regional, rural and remote NSW there is little access to detox and rehabilitation facilities. The Law Society considers that Schedule 12 of the Bill would represent a significant step backwards.

It does not appear that Schedule 12 of the Bill meets the criteria set out by the Australian Human Rights Commission in respect of ensuring that income management measures comply with the *Racial Discrimination Act 1975* (Cth), namely that the proposed measures are evidence based, last resort, and the least restrictive option.

Further, it does not appear that Schedule 12 of the Bill is compliant with the obligations set out in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) as they do not appear to be reasonable, necessary or proportionate to their objectives. In so far as children may be affected by the amendments relating to Youth Allowance, Schedule 12 may also violate Articles 3, 16 and 26 of the Convention on the Rights of the Child (CRC).

For these reasons, the Law Society's view is that Schedule 12 of the Bill should be opposed.

We are also concerned that Schedule 12 deals with certain matters by allowing the Minister or the Secretary to make provisions by legislative instrument, rather than in the primary legislation. In the Law Society's view, this approach to the legislative process should not be supported as it is likely to adversely impact on transparency and accountability. We are also concerned about the lack of avenues for appeal.

For the reasons set out below, the Law Society submits further that should the scheme set out in Schedule 12 proceed, it should be amended in the following ways:

- Given that the Government intends that testing be random, the Bill should refrain from using personal and sensitive information (particularly if initially collected for other reasons) and other data-driven profiling tools in determining the drug test trial areas, and in determining individual participants.
- Participation in the scheme, particularly the income management aspects of the scheme, should be on a voluntary basis.
- Recipients of Youth Allowance who are children should be exempt from the scheme.
- Obtaining consent for participation in the trial should be separated from seeking to claim Newstart or Youth Allowance to ensure that individuals are in fact able to provide voluntary and informed consent.
- Provisions that arbitrarily and unreasonably restrict access to social security, such as requiring individuals to bear the cost of second and subsequent drug tests, waiting periods, involuntary and indefinite income management, should be removed.
- Limit the use of subsequent legislative instruments, and instead provide detail on the operation of the scheme in the primary legislation.
- Provide for a clear and independent appeal process in respect of the validity of drug test results, and for referrals to income management.
- There should be a mechanism for monitoring and evaluating the efficacy of the scheme.

The Law Society's more specific concerns are set out below.

2. Concerning features of Schedule 12

Item 3 of Schedule 12 provides that the Minister may make drug testing rules via legislative instrument. Such drug testing rules would encompass the following matters:

(a) prescribing up to 3 discrete areas for the purposes of the definition of drug test trial area;
(b) prescribing substances for the purposes of the definition of testable drug;
(c) giving and taking samples of persons' saliva, urine or hair for use in drug tests;
(d) dealing with such samples;
(e) carrying out drug tests;
(f) giving results of drug tests in certificates or other documents and the evidentiary effect of those certificates or documents;
(g) confidentiality and disclosure of results of drug tests;
(h) requirements relating to contracts entered into for the carrying out of drug tests;
(i) keeping and destroying records relating to:
    (i) samples for use in drug tests; or
    (ii) drug tests.

The effect of items 4-8 and 12 of Schedule 12 appear to be that the person making a claim for Newstart or Youth Allowance would be required to acknowledge in the claim form that they may be required to undergo drug testing as a condition of payment. Their claim may be rejected if they do not acknowledge this in the claim form. If they apply again for the benefit after having refused to submit to drug testing, they will be subject to a waiting period of 28 days.

Such testing would be administered by a contracted third-party provider. Those who tested positive would be put on income management, via referral of the third-party contractor (item 24). Item 24 inserts new subsection 123UFAA(1B) which provides that although the pilot is for 24 months, the Secretary may, by legislative instrument, extend the period of income management for longer than 24 months.

The cost of the drug test for second or subsequent tests will be deducted from the payment received by the person (up to a maximum of 10%, an amount to be determined by legislative instrument) (item 11).

The Law Society notes also that individuals who fail to comply with notices to do certain things may have their payments suspended, unless they have a reasonable excuse for not complying. It appears that the burden of proving reasonable excuse would fall on the individual. However, the benefit will not be backdated to the date of the suspension, but will only be payable from the date the person attended an appointment in accordance with the later notice (item 20).

The cost of this initiative has not been released on the basis that it is commercial in confidence.[3]

3. Right to be free from discrimination

The methods used to select the drug test trial areas and the individuals to be tested may be contrary to the requirements of Article 26 of the ICCPR as they may have discriminatory effect, either directly or indirectly (or both). The drug trial test areas may include locations where Indigenous peoples will more likely be subject to participation in the trials than non-Indigenous peoples. If that is the case, there are domestic and international law obligations under the *Racial Discrimination Act 1975* (RDA) and the ICCPR that will be relevant to this Bill.

Further, given that it is intended that a data-driven profiling tool be used to select individuals for testing, "randomness" in selection becomes unlikely. The Law Society is concerned that

[3] Ibid.

the amendments contained in Schedule 12 will disproportionately impact already vulnerable people, including Indigenous peoples, and people with cognitive or other impairments. As with the selection of drug test trial areas, the tool used in the selection of individuals to be tested may engage the provisions of the RDA and the ICCPR. This issue is discussed in more detail in the section dealing with income management.

4. Voluntary and informed consent

Item 12 of schedule 12 provides that the Secretary must not, in a drug test trial period, determine that a claim for Newstart or Youth Allowance by a potential drug test trial pool member is to be granted, unless the Secretary is satisfied that the claimant acknowledged in the claim that they could be required to submit to drug testing. This provision appears to make consent to testing a precondition of being able to claim Newstart or Youth Allowance for these individuals. As noted above, if a person refuses, they will be subject to a waiting period if they apply to claim again. In the Law Society's view, this raises questions of whether such consent is in fact voluntary and informed. We note that there may be issues of capacity to consent that the Bill does not deal with.

5. Right to privacy, including bodily privacy

The use of social security data to select drug test trial areas as well as individuals for testing, if it was provided for other reasons, may violate Article 17 of the ICCPR.

The requirement for drug testing as a precondition to receiving social security may also violate Article 17 of the ICCPR as it would concern the right to bodily privacy, particularly if individuals did not have the opportunity to provide voluntary and informed consent.

6. Right to social security

The Law Society notes that Article 9 of the ICESCR recognises that everyone has a right to social security. In General Comment No. 19 the Economic and Social Rights Committee stated that, "All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups..."[4] and that "[t]he obligation of States parties to guarantee that the right to social security is enjoyed without discrimination" whether direct or indirect.[5] The Economic and Social Rights Committee further states that, "Qualifying conditions for benefits must be reasonable, proportionate and transparent".[6] In the same document it stated that "[t]he right to social security includes the right not to be subject to arbitrary and unreasonable restrictions on existing social security coverage".[7]

A number of features of Schedule 12 appear to be contrary to Article 9 of the ICESCR as they may constitute an arbitrary and unnecessary restriction on the right to social security, including the following:

- requiring consent to drug testing as a precondition of claiming social security.
- imposing drug testing refusal waiting periods.
- deducting the costs of second and subsequent drug tests from benefits.

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[4] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19 at 8, available at: http://www.refworld.org/docid/47b17b5b39c.html [accessed 26 July 2017]
[5] Ibid. at 9.
[6] Ibid.
[7] Ibid at 4.

- the use of involuntary income management, where there is a possibility that a person may have their income managed for an indefinite period even after the pilot period ends.

We note further that individuals would bear the burden of proving reasonable excuse if their payments have been suspended because they have not complied with notices (item 20 inserting new subsection 110A(3)(b)). The benefit will not be backdated to the date of the suspension, but will only be payable from the date the person attended an appointment in accordance with the later notice (see page 75 of the Explanatory Memorandum). The Law Society's view is that this feature of the Bill appears to be an arbitrary and unreasonable restriction and may also contravene Article 9 of the ICESCR.

We submit that these features of Schedule 12 should be removed from the Bill.

7. The rights of the child

Children aged 16-17 years can apply for Youth Allowance. However, it appears that the rights of children have not been considered in the preparation of Schedule 12 of the Bill. We note that the Statements of Compatibility with Human Rights states, "The drug testing trial engages with the rights under the CRC as it is applied to people with children" (at page 156).

This seemingly indicates that the drafters have only considered the indirect impacts of children (that is, if a caregiver is tested), as opposed to when a child themselves may be subjected to the drug testing themselves (that is, a 16 or 17 year old applying for Youth Allowance). As it appears that Schedule 12 is intended to apply to Youth Allowance recipients regardless of whether they are children, the Bill risks inconsistency with:

- The best interests of the child as a primary consideration (Article 3, CRC)
- The child's right to privacy (Article 16, CRC). Also of concern is the potential inconsistency with the right of children to be free from unlawful interference with their privacy. This was not discussed in the Statement of Compatibility with Human Rights.
- The child's right to social security (article 26).

It is very concerning that these direct impacts on children have been seemingly overlooked. The Law Society submits that if the proposal was to proceed at all (contrary to our recommendations), children (people under 18 years of age) should not be subject to drug testing outlined in Schedule 12.

8. Income management

The Law Society does not support involuntary income management, given that its operation may implicate fundamental rights. We are particularly concerned that the Secretary is provided with the discretion to extend the period of income management for longer than 24 months for particular individuals by legislative instrument, where the Bill does not appear to contain a maximum term (item 24 inserting new subsection 123UFAA(1B)).

As a policy response, involuntary income management has been shown to be ineffective. We attach a submission made in respect of the Social Security Legislation Amendment (Debit Card Trial) Bill 2015. The concerns we detailed in that submission in respect of compliance with Australia's domestic and international law obligations, as well as more generally in relation to effective policy responses, apply equally in this context. Schedule 12 of the Bill is not targeted at people of a particular race, but to social security recipients who meet particular criteria. However, the trials may be located in areas where Indigenous peoples are disproportionately affected and may therefore result in indirect discrimination. This is true also of the profiling tools used to select individuals for participation. If this is the case, the measures may have to be justified as a special measure to comply with the RDA.

Attached to the 2015 submission are *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* issued by the Australian Human Rights Commission ("Commission").

The Draft Guidelines pose three "key questions" in considering income management measures:

- Where the measure is established by legislation, does it ensure equality before the law?
- Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
- Is the measure a 'special measure'?[8]

If the income management scheme requires special measure status in order to comply with the *Racial Discrimination Act*, the Commission's view is that it is unlikely to be considered a special measure, if:

- the consultations do not meet the standard of consultation and consent of the affected group
- there is insufficient current and credible evidence which shows that the measure will be effective
- there are alternative means of achieving the objective that are not as restrictive of affected persons' human rights
- there are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.[9]

The Committees further note the Commission's view that the preferred features for an income management measure so that it would be consistent with international human rights requirements include:

- voluntary/opt-in approaches - rather than automatic quarantining or an exemption approach;
- a last-resort approach for targeted risk areas such as child protection (that is supported by case management and support services), akin to the Family Responsibilities Commission model in Queensland - rather than automatic quarantining; and
- a defined period of income management, where the timeframe for compulsory quarantining is proportionate to the context.[10]

Given this, the Law Society is concerned that the measures proposed under the Bill are, effectively, compulsory in nature for people receiving restrictable payments in trial areas. The Law Society is also concerned that the Government has not demonstrated that:

- there is sufficient current and credible evidence that the measures will be effective;
- that the measures are a last resort approach; or
- the measures are the least restrictive option for achieving the benefit sought.

Finally, the Law Society is aware that Australia recently appeared before the UN Committee on Economic, Social and Cultural Rights, and that Committee published its draft Concluding Observations in June (attached). The UN Committee expressed concern about mandatory

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[8] Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act*, available online: https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/draft-guidelines-ensuring (accessed 15 September 2015).
[9] Ibid.
[10] Ibid.

income management schemes that were recognised as disproportionately affecting Aboriginal and Torres Strait Islander peoples, and recommended that Australia do the following:

> (c) Consider maintaining only an opt-in income management scheme with appropriate oversight of decision making and monitoring, and review existing and envisaged conditionalities for eligibility to social assistance and unemployment benefits as well as penalties for non-compliance, and ensure that all beneficiaries receive adequate benefits, without discrimination;
> (d) Consider the Committee's general comment No. 19 (2007) on the right to social security. (see paras 31-32).

It is pertinent that an expert UN Committee has considered income management practices in Australia unfavourably, and the Law Society suggests that the Law Council draw attention to these recommendations in its submission.

9. Procedural fairness and transparency

We are concerned that the Minister has discretion to do certain things, such as make the drug testing rules by legislative instrument (item 3), rather than in the primary legislation. The Secretary is also provided with similar discretion in other instances. For example, we note that item 18 provides that the Secretary may enter into contracts with third parties to carry out drug testing. However, there is no detail on how the contractors will be selected and regulated, including how personal information, and the results of the testing, will be safeguarded.

From a rule of law perspective, the Law Society is in principle opposed to this approach to the legislative process given that legislative instruments are exercises of executive power that are not subject to similar scrutiny and transparency.

Further, we query whether and how individuals will be able to appeal false positives or any other procedural concerns related to testing. The Bill does not appear to make any provision for avenues of appeal in this regard, nor in respect of referrals to income management. Given the onerous obligations and significant consequences for individuals as a result of the operation of this Bill, in our view the lack of a clear and independent appeal process is procedurally unjust.

The Law Society submits that the cost of this initiative should be released. Transparency is required as a matter of course in respect of any Governmental law reform and policy proposal, particularly where the Government proposes to infringe on the rights of individuals in order to properly consider whether the benefits of the scheme (if any) outweigh the costs.

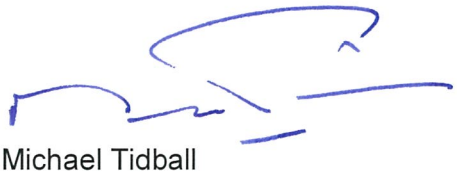
10. Schedule 14

Schedule 14 of the Act amends the *Social Security (Administration) Act 1999* (Cth) to give the Secretary a new power to make a legislative instrument setting out matters that must not be taken into account when deciding whether a person has a reasonable excuse for failing to do certain things. The purpose of this new power would be to prevent income support recipients from repeatedly using drug/alcohol abuse or dependency as a reasonable excuse for relevant participation failures without seeking treatment if it is available and appropriate as part of their Employment Pathway Plan (see Explanatory Memorandum at page 85).

In the Law Society's view, Schedule 14 would appear to suffer similar problems as Schedule 12 in respect of compliance with Article 9 of the ICESCR.

Thank you for the opportunity to provide comments. Questions should be directed to Vicky Kuek, Principal Policy Lawyer, on Victoria.kuek@lawsociety.com.au or at (02) 9926 0354.

Yours sincerely,



Michael Tidball
Chief Executive Officer

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/HRC/JFEvk:1051668

25 September 2015

Ms Jeanette Radcliffe
Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Ms Radcliffe,

Social Security Legislation Amendment (Debit Card Trial) Bill 2015

I write on behalf of the Indigenous Issues Committee and the Human Rights Committee of the Law Society of NSW. The Committees respectively represent the Law Society on Indigenous issues and human rights as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committees are concerned about the operation and effect of the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 ("Bill").

While the Committees share the Government's concern about the effects of alcohol addiction in all communities across Australia, the Committees note that compulsory income management approaches alone have been demonstrated to have limited utility in addressing alcohol addiction in communities, and its attendant harms. It may also result in unintended social consequences.

The Committees submit that the issues the Bill seeks to address are complex and require nuanced policy responses. If the Bill is to proceed, the Committees submit that it should be amended to provide that participation in the scheme should be on a voluntary basis, and that there should be a mechanism for monitoring and evaluating the scheme. Further, the income management approach should be supplemented with additional support services that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills.

1. Proposal under the Bill

The Bill proposes to trial cashless welfare arrangements in three trial areas (proposed s 124PF), and that the Government has been in consultation with community leaders in Ceduna, SA and in East Kimberley WA.

The Committees understand that the trial locations will be selected on the basis of "high levels of welfare dependence, where gambling, alcohol and illegal drug abuse are

causing unacceptable levels of harm and there is an openness to participate from within the community".[1]

As a default position, 80% of "restrictable payments" (that is, income support payments as defined by proposed s 124PD) will be a restricted portion, with a 20% unrestricted portion to provide for cash-only situations (proposed ss 124PJ(1)). The Minister has the discretion to vary these portions (proposed ss 124PJ(3) and (4)). The Committees note that this is a high percentage to apply, relative even to measures such as income management under the Northern Territory Emergency Response laws where the proportion quarantined was 50%.

The Committees acknowledge that the Government has undertaken to consult communities prior to determining the trial locations. The Committees also acknowledge that part of the trial is intended to determine whether cashless welfare arrangements are more effective when community bodies are involved.[2] Further, the Committees also acknowledge that the Government has attempted to provide for some flexibility to trial participants by allowing an unrestricted portion.

However, the Committees are concerned that the concept underpinning the proposal under the Bill is, in effect, compulsory income management. This approach has been demonstrated to have had limited success.

2. Evaluation of income management in the Northern Territory

The IIC notes that in 2010, the then Australian Government's Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA, now the Department of Social Services (DSS)) commissioned the Social Policy Research Centre, Australian National University, to undertake an evaluation of income management in the Northern Territory. This evaluation culminated in a report provided in 2014.

The report noted:

> Measures of well-being at the community level show no evidence of improvement, including for children.[3]

And that:

> There was no evidence of changes in spending patterns, including food and alcohol sales ... for those on compulsory income management [and] spending on BasicsCard on fruit and vegetables is very low.[4]

The report continued:

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[1] Commonwealth, *Parliamentary Debates,* House of Representatives, 19 August 2015, 3 (Alan Tudge, Parliamentary Secretary to the Prime Minister) available online: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Ffd2f3451-f05d-425a-9815-471294607839%2F0009%22 (accessed 15 September 2015).

[2] Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth).

[3] J Rob Bray, Matthew Gray, Kelly Hand and Ilan Katz, *Evaluating New Income Management in the Northern Territory: Final Evaluation Report,* September 2014, Social Policy Research Centre, Australian National University, at xxi, available online: https://www.dss.gov.au/sites/default/files/documents/12_2014/evaluation_of_new_income_management_in_the_northern_territory_full_repor.pdf (accessed 22 September 2015)

[4] Ibid.

> When the data are taken as a whole, not only does it suggest that there has been very little progress in addressing many of the substantial disadvantages faced by many people in the Northern Territory, but it also suggests that there is no evidence of changes in aggregate outcomes that can plausibly be linked to income management.[5]

In respect of alcohol-related issues, the report stated:

> There has been a substantial decrease in per capita alcohol consumption from the mid-2000s. However, this decrease started well before the NTER [Northern Territory Emergency Response] and is almost certainly driven by factors other than income management.
>
> The number of alcohol-related presentations to emergency departments and admissions to public hospitals by Indigenous people in the Northern Territory has increased dramatically since the mid-2000s.
>
> Imprisonment rates of the Indigenous population have increased in the Northern Territory since 2002 at a faster rate than amongst the Indigenous population Australia-wide.[6]

In this respect, the Committees express particular concern that the control of spending and therefore reduction in available cash for vulnerable people could lead to an increase in unintended consequences.[7] These may include an increase in crimes such as break and enter, or an increase in prostitution, for example in situations where people with substance addictions try to find a way to access cash.

The Committees note that the report also found that there was a difference in outcomes based on whether participants were involved on a voluntary or compulsory basis:

> Only those on Voluntary Income Management reported a relative reduction in alcohol problems in their family, but, along with others, no improvement in problems with drinking in their community.[8]

This is consistent with the findings of the Australian Law Reform Commission (ALRC Report 117) report into income management and family violence. The ALRC found that:

> [...] the complexity of family violence and the intertwining of family violence with a number of the 'vulnerability indicators' that trigger the imposition of compulsory income management leads to serious questions about whether it is an appropriate response. Accordingly, the ALRC recommends that people experiencing family violence should not be subject to compulsory income management and examines alternative approaches.[9]

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[5] Note 3 at 235.
[6] Ibid.
[7] See for example, Lucy Cormack, "Vegemite being used to make homemade alcohol in dry communities: reports" *Sydney Morning Herald,* 9 August 2015, available online: http://www.smh.com.au/national/vegemite-being-used-to-make-homemade-alcohol-in-dry-communities-reports-20150808-giutpp.html#ixzz3In0SwBp7 (accessed 15 September 2015).
[8] Note 3 at xxii.
[9] Australian Human Rights Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks,* Report 117, February 2012, at [10.2] available online: http://www.alrc.gov.au/publications/10-income-management%E2%80%94social-security-law/summary (accessed 15 September 2015).

The ALRC recommended that "the Australian government should create a flexible and voluntary form of income management—an 'opt-in and opt-out' model—to better meet the needs and protect the safety of people experiencing family violence".[10]

The Committees support this view.

Further, the Committees note that the report found, as a fundamental issue, that:

> Building capacity is a challenging process that requires time and resources, and it cannot be developed by simply imposing restraints.

The Committees' view is that any income management scheme should be supplemented with additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy and budgeting skills.[11]

3. Compliance with Australia's legal obligations

The Committees are concerned that the cashless debit cards will be trialed at locations where Indigenous peoples will more likely be subject to participation in the trials than non-Indigenous peoples. If that is the case, there are domestic and international law obligations under the *Racial Discrimination Act 1975* ("RDA"), the *International Covenant on Civil and Political Rights* ("ICCPR") and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR") that will be relevant to this Bill.

The Committees note that the Australian Human Rights Commission ("Commission") has issued *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act*. These guidelines are attached at "A" for reference.

The Draft Guidelines pose three "key questions":

- Where the measure is established by legislation, does it ensure equality before the law?
- Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
- Is the measure a 'special measure'?[12]

The Committees note the Government's view that the Bill is not targeted at people of a particular race, but to welfare recipients who meet particular criteria. However, the trials may be located in areas where Indigenous peoples are disproportionately affected and may therefore result in indirect discrimination. If this is the case, the measures may have to be justified as a special measure in order to comply with the RDA. In this event, the Committees note that the Commission's view is that if the income management scheme requires special measure status in order to comply with the *Racial Discrimination Act*, it is unlikely to be considered a special measure, if:

> - the consultations do not meet the standard of consultation and consent of the affected group

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[10] Ibid.

[11] Australian Human Rights Commission, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (2010)*, available online: https://www.humanrights.gov.au/information-concerning-australia-and-international-convention-elimination-all-forms-racial (accessed 15 September 2015).

[12] Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act*, available online: https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/draft-guidelines-ensuring (accessed 15 September 2015).

- there is insufficient current and credible evidence which shows that the measure will be effective
- there are alternative means of achieving the objective that are not as restrictive of affected persons' human rights
- there are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.[13]

The Committees further note the Commission's view that the preferred features for an income management measure so that it would be consistent with international human rights requirements include:

- voluntary/opt-in approaches - rather than automatic quarantining or an exemption approach
- a last-resort approach for targeted risk areas such as child protection (that is supported by case management and support services), akin to the Family Responsibilities Commission model in Queensland - rather than automatic quarantining and
- a defined period of income management, where the timeframe for compulsory quarantining is proportionate to the context.[14]

Given this, the Committees are concerned that the measures proposed under the Bill are compulsory in nature for people receiving restrictable payments in trial areas. The Committees are also concerned that the Government has not demonstrated that:

- there is sufficient current and credible evidence that the measures will be effective;
- that the measures are a last resort approach; or
- the measures are the least restrictive option for achieving the benefit sought.

The Committees query whether the timeframe for the trial is proportionate to the aims underlying this proposal (proposed s 124PF(1) provides for an 18 month trial period).

4. Effective policy responses

The Committees share the Government's concern in respect of the damaging effects of alcohol addiction on communities. However, the Committees are of the view that this is a complex issue that requires a nuanced policy and service delivery response, which may or may not require legislative change to effect it.

In this respect, the Committees note that the Australian Institute of Health and Welfare ("AIHW") is responsible for the Closing the Gap Clearing House, which collects and analyses the quality of reports on Indigenous programs.

As part of its role in running the Closing the Gap Clearing House, the AIHW has developed a set of 14 criteria that outlines what has and has not been effective in the design and implementation of programs which specifically target or serve Indigenous communities and individuals.[15]

Without commenting on the process that the Government may have undertaken, and given the exploratory nature of the trials, the Committees attach at "B" the criteria

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[13] Ibid.
[14] Ibid.
[15] Closing the Gap Clearinghouse (AIHW, AIFS) 2011. *What works to overcome Indigenous disadvantage: key learnings and gaps in the evidence.* Produced for the Closing the Gap Clearinghouse, Canberra: Australian Institute of Health and Welfare & Melbourne: Australian Institute of Family Studies at 2-3, available online: http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2011/what_works_to_overcome_disadvantage_2009-10.pdf (accessed 22 September 2015).

(together with commentary provided by the Jumbunna Indigenous House of Learning).[16] The Committees consider the criteria helpful in the design and implementation of policy and programs (which in turn will subsequently inform legislative design).

5. Submissions of the Committees

In considering the above, the Committees submit that the Government has not demonstrated that there is sufficient evidence that the proposed compulsory income management measure will be effective to "ensure that vulnerable people are protected from abuse of these [alcohol and illegal drugs] substances, and associated harm and violence."[17]

The Committees also submit that the Government has not yet made the case that these measures are a last resort approach, or that they are the least restrictive option for achieving the benefit sought. Given this, the Committees are not certain that these measures comply with the obligations under the RDA, ICCPR or ICESCR.

However, if the Government proceeds on this basis, the Bill should be amended at minimum to provide that:

- participation in the trial is voluntary, and
- there are mechanisms for monitoring and evaluation of the trials.

Further, the income management scheme should be supplemented with additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy and budgeting skills.

Thank you for the opportunity to provide comments. Questions may be directed to Vicky Kuek, policy lawyer for the Committees, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Michael Tidball
Chief Executive Officer

[16] *Journal of Indigenous Policy* - Issue 16, "What Works – And Why the Budget Measures Don't", December 2014, at 9-10, available online: http://www.uts.edu.au/sites/default/files/article/downloads/JIP_16_2014.pdf (accessed 22 September 2015).

[17] Statement of compatibility with human rights, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth).

Attachment A

Australian Human Rights Commission

everyone, everywhere, everyday

Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*

Australian Human Rights Commission

11 November 2009

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1. Introduction

1. Section 20(d) of the *Racial Discrimination Act 1975* (Cth) (RDA) provides the Australian Human Rights Commission with a function to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA' of the Racial Discrimination Act.[1]

2. The Commission has issued these draft guidelines to provide practical assistance to Parliament and the Government in designing and implementing income management measures that protect human rights and are consistent with the RDA. They are also intended to increase awareness among affected communities about the application of the RDA to income management regimes.

3. While not legally binding, they provide important guidance as to the operation of the RDA and will be relevant in assisting the resolution of complaints.[2]

4. The draft guidelines contain two sections which should be read concurrently:

    - Section one: poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this.

    - Section two: provides background information on the legal basis for the different elements discussed in the first section. It also provides the background on existing income management regimes nationally and considers the extent to which they are consistent with the RDA.

5. In the Commission's view, taking the approach set out in these draft guidelines will not only ensure that such measures are compliant with fundamental human rights and discrimination laws, they will also help to ensure that they are effective.

6. The guidelines provide a framework to ensure that competing human rights concerns can be balanced in a manner that is appropriate and consistent with Australia's human rights obligations.

7. These guidelines have been released in draft format on the Commission's website to encourage feedback and comments. The Commission particularly wants to hear how the guidelines could be modified and improved to be a more useful and practical tool.

8. Comments should be provided to the Australian Human Rights Commission by close of business, **Friday 12 February 2010.**

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[1] Part II relates to the prohibition of racial discrimination and Part IIA to the prohibition of offensive behaviour based on racial hatred.
[2] Note that these guidelines do not alter the operation of the RDA and compliance with them does not constitute a defence to an allegation of discrimination under the RDA.

9. The Commission aims to finalise the guidelines in early 2010.

2. *Key questions*

10. This section poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this. The key questions are:

    - Where the measure is established by legislation, does it ensure equality before the law?
    - Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
    - Is the measure a 'special measure'?

2.1 *Does the income management measure ensure equality before the law?*

11. Where income management measures are established by law, the measure should ensure human rights are enjoyed equally by all racial groups (s10 of the RDA).[3]

12. Income management measures may impact upon the enjoyment of a number of human rights including, most prominently, the right to social security. This is a right relevant to both adults who may be entitled to social security and their children under Article 26 of the *Convention on the Rights of the Child*.

13. In determining whether an income management measure ensures equal human rights for all, you should ask:

    (a) Does the measure have a disparate impact upon the ability of people of a particular race to enjoy a right? If it does, the measure may be discriminatory.

    It is not necessary that the measure *target* a particular racial group, *apply* only to that racial group or *intend* to have a disparate impact upon members of that group. What matters is the practical effect of a measure. If, in practice, it has a greater impact upon people of a particular race, then it may be discriminatory.

    (b) Is any limitation on the right a legitimate one, intended to achieve a non-discriminatory purpose? If it is not, the measure will be discriminatory.

    To be legitimate, any limitation on a right should meet the following criteria:

[3] For the purposes of these guidelines, the term 'race' is used as shorthand for 'race, colour or national or ethnic origin'.

- The purpose of the limitation should be directly linked to the promotion of another human right, such as those protected by the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC'). Administrative convenience or efficiency will not be a legitimate purpose to justify racial distinction.

- The limitation must be *proportionate* to the benefit being sought by the measure. This in turn requires that:

  - the benefit be clearly identified, and

  - the measure be the least restrictive/interfering option available to achieve that benefit.

  In practice, other ways of achieving the relevant benefit that do not have a disparate impact upon the rights of people of a particular race should be considered first. Only if the purpose of the measure cannot reasonably be achieved by those other methods can a limitation be described as 'proportionate', and therefore legitimate.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

  For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation in any decision is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should always be applied (see key elements of free, prior and informed consent in Appendix 1).

2.2 *Does implementation of the measure involve discrimination?*

14. Discretionary actions and decisions taken in the implementation of an income management measure must also avoid 'direct' and 'indirect' racial discrimination (sections 9(1) and 9(1A) of the RDA).

'Direct discrimination': s 9(1)

15. There are two central questions in assessing whether an income management measure may involve 'direct' discrimination. These include:

    (a) Are there any discretionary acts done in the implementation of the income management measure that involve a distinction, exclusion,

restriction or preference based on race? If so, the acts may be discriminatory.

An act will be 'based on race' where there is a sufficient connection between the act and the race of a person or group. It is not necessary to show a causal connection or that a person had an intention to discriminate - discrimination can be unintentional and unconscious.

(b) Does the act have a negative impact on the equal enjoyment of rights in public life by people of that race?

The practical effect of an act 'based on race' must be considered. If its practical effect is to limit the enjoyment of a human right, it is discriminatory.

'Indirect discrimination': s 9(1A)

16. 'Indirect discrimination' occurs when a term, condition or requirement is imposed *generally* that is unreasonable and has a disparate impact on people of a particular race.

17. In assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:

(a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?

(b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?

(c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?

18. If the answer to all of these questions is 'yes', the implementation of the income management measure is indirectly discriminatory.

2.3 *Is the measure a 'special measure' that meets the requirements of the RDA?*

19. If a measure is non-discriminatory, then it is not necessary to consider whether it is a 'special measure'.

20. For an income management measure to meet the requirements of a special measure it must comply with all of the following criteria:

- the measure must confer a *benefit* on some or all members of a class of people
- membership of this class must be based on race, colour, descent, or national or ethnic origin

- The *sole purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

- The protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and

- The measure must not have already achieved its objectives.

21. To meet the requirement outlined above that the sole purpose of the measure is to secure adequate advancement of the beneficiaries, the following should be considered:

    - When assessing the 'adequate advancement' of a group, it is necessary to consider their views. Because income management measures operate by limiting certain rights, both consultation with and consent of the group to whom it applies is essential.

    - In dealing with Indigenous communities, the standard of free, prior and informed consent should be applied. See Appendix 1 for an overview of the key elements of the standard of free, prior and informed consent.

    - The consultation process must be a real opportunity for engagement. It should aim for full and equitable participation across and between affected communities. (For a brief guide to good practice for community consultations see Appendix 2).

22. In relation to the requirement that the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others, you should be aware that:

    - If the benefits of the measure can be achieved without making a racial distinction, the measure will not be necessary.

    - Demonstrating necessity requires evidence - current and credible evidence which shows that the measure will be effective. The data must be reliable, credible and where possible, supported by both qualitative and quantitative sources.

    - All parts of the measure must be appropriate and adapted to meet the intended purpose.

    - The measure must also be monitored and evaluated to ensure that it is working effectively. Without this it is not possible to establish whether the measure is necessary or not. (For a brief guide to good practice for monitoring and evaluation see Appendix 3).

23. To meet the requirement that the measure must not have already achieved its objectives - regular monitoring and evaluation is also required to assess if the objectives of the measure have been met. This includes:

- whether the measures are appropriate and suitably adapted to their stated purpose
- whether the measures are having the intended (immediate/short-term and/or long-term) effect
- whether there are any emerging, unintended consequences of the measures
- whether there are any negative flow on effects from the measures?
- whether there is a continuing need for the measures, that is, have they already achieved their stated purpose?

3. Commentary

24. This section provides background information on the legal basis for the different elements discussed in the first section. It also provides background on the recent income management measures and considers the extent to which current income management measures are consistent with the RDA.

3.1 Background

25. On 21 June 2007, the Australian Government announced the Northern Territory Emergency Response (NTER) to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.

26. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) was part of the package to enable the NT intervention. Schedule 1 of the Act authorises a variety of income management measures.

27. The purpose of the income management measures is to promote socially responsible behaviour, particularly in relation to the care and education of children, by quarantining the suspended payments to ensure that they are only spent on food and other essential items. The quarantined income can not be used to purchase alcohol, tobacco products or pornographic material.[4]

28. The Act provides for five different types of income management measures for people receiving welfare, including:

- **Declared relevant Northern Territory area**

  A person can be subject to an income management measure if the person lives in a declared relevant Northern Territory area (s 123UB).

- **Child protection notices**

  Child protection officer of a State or Territory can require a person to be subject to the income management regime (s 123UC).

- **School enrolment in declared primary school area and declared secondary school area**

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[4] The objects of the legislation under section 123TB are as follows:

(a) to promote socially responsible behaviour, particularly in relation to the care and education of children
(b) to set aside the whole or a part of certain welfare payments
(c) to ensure that the amount set aside is directed to meeting the priority needs of:
  I. the recipient of the welfare payment
  II. the recipient's partner
  III. the recipients children
  IV. any other dependants of the recipient.

A person can be subject to an income management measure if the person, or the person's partner, has a child who does not meet school enrolment requirements (s 123UD).

- **School attendance in declared primary school area and declared secondary school area**

  A person can be subject to an income management measure if the person, or the person's partner, has a child who has unsatisfactory school attendance (s 123UE).

- **Queensland Commission**

  A person can be subject to an income management measure if required by the Queensland Commission (s 123UF).

29. While the first measure is specific to the Northern Territory and the last measure only operates in specific areas of Queensland, the remaining measures have a national application and can be introduced in any State or Territory of Australia.

30. At the time the NTER measures were introduced, the *Social Security (Administration) Act* stated that: 'a decision under Part 3B of this Act that relates to a person who is subject to the income management regime under section 123UB cannot be reviewed by the Social Security Appeals Tribunal' (and subsequently the Administrative Appeals Tribunal).

31. However, an individual can ask the original decision maker or an authorised review officer to review the decision; can seek review under the *Administrative Decisions (Judicial Review) Act 1977*; or lodge a complaint with the Commonwealth Ombudsman. Also, payment suspensions due to a failure to respond to the income management letter, or attend an income management interview, are not made under Part 3B of the *Social Security (Administration) Act* and are subject to the usual review and appeals process.

32. In June 2009, the *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009* amendments were passed enabling the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to review a decision made under Part 3B of the *Social Security (Administration) Act* about a person who is subject to the Northern Territory income management regime.

3.2 Current status of income management measures

33. To date, the following income management measures have been introduced:

- 73 prescribed communities in the Northern Territory have been determined to be declared areas in the NT for the purposes of income management;

- The Families Responsibilities Commission was established in Queensland (*Family Responsibility Commission Act 2008* (Qld) for the

Cape York Welfare Reform Trial and operates in the Aurukun, Coen, Hope Vale and Mossman Gorge communities and associated outstations.

- A trial in the Logan area (across Woodridge, Kingston, Logan Central and Eagleby), Queensland. This is the first welfare reform trial in Australia that targets a densely populated, urban mainstream community.

- In conjunction with the Western Australian Government, an income management measure for child protection was introduced in selected areas of WA (Cannington and Kimberley region). Under this measure a case manager from the WA Department for Child Protection can refer a person to Centrelink for income management.

34. In addition, the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) 2008 Act*, established an income management measure for school enrolment and attendance in two metropolitan locations in Western Australia and six Northern Territory communities (Hermannsburg, Katherine, Katherine town camps, Wallace Rockhole, Wadeye and Tiwi Islands).

35. There are also examples of voluntary income management measures. Such measures have been introduced under the Cape York Welfare Reform Trial and under the child protection income management measure in WA. [5]

36. There also continues to be provision under social security legislation to make regular payments to a registered service provider directly from Centrelink payments.[6]

37. This provision has been the basis for voluntary income management measures, such as the Tangentyere Council's food voucher system, which has been in operation for 25 years, pre-dating the income management measures under the NTER. Under the food voucher system, people receiving Centrelink payments can choose to have a nominated amount of money deducted from their Centrelink payments every fortnight. This money is then provided to them in the form of a food voucher, which is issued through the Tangentyere community banking service. The Council supports over 800 Aboriginal people under this voluntary measure.[7]

38. Of the four income management measures outlined above (not including the voluntary income management measures) the 'School enrolment and attendance measure (WA/ NT)' is the only one that is not exempted from the RDA and state/territory anti-discrimination legislation.

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[5] Section 123TGA of the *Social Security (Administration) Act 1999* also provides for the Minister to declare a specified State, Territory or area as a declared voluntary income management area for the purposes of this Part.
[6] Centrelink, *Voluntary Income Management* (2008). At http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508_0808/$file/co508_0808en.pdf (viewed 1 October 2009).
[7] Tangentyere Council, 'Tangentyere's Voluntary Food Voucher System'. At http://www.tangentyere.org.au/services/finance/food_voucher/ (viewed 1 October 2009).

39. All four of the income management measures now allow for Commonwealth and state review processes and appeal rights, but, with the exception of the 'School enrolment and attendance measure (WA/ NT)', only for decisions made after 1 July 2009.

40. The '73 prescribed communities measure (NT)' applies mandatory quarantining within a declared area. In contrast, the 'Cape York Welfare Reform Trial measure (QLD)', the 'Child protection measure (WA)' and the 'School enrolment and attendance measure (WA/ NT)' are based on an opt-in or last-resort suspension model[8]

3.3 Racial discrimination and income management measures

41. To date, income management measures have been introduced primarily under the NTER legislation, which declares that the whole legislation is a special measure, as well as exempting the legislation and acts done under it from the RDA.[9]

42. The Commission and Indigenous communities have expressed concerns that the measures involve breaches of human rights.[10] In particular, concerns have focused on the potentially racially discriminatory impact of the measures, the characterisation of the measures as 'special measures' accompanied by the exclusion from the protection of racial discrimination laws, and the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the measures. Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the

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[8] An example of the last-resort suspension model can be seen in the Cape York Welfare Reform Trial which operates as follows: A person is referred by an agency to the Families Responsibilities Commission if:

a person's child is absent from school three times in a school term, without reasonable excuse
a person has a child of school age who is not enrolled in school without lawful excuse
a person is the subject of a child safety report
a person is convicted of an offence in the Magistrates Court, or
a person breaches his or her tenancy agreement - for example, by using the premises for an illegal purpose, causing a nuisance or failing to remedy rent arrears.

Once the Commission receives an agency notice, a process is followed where it is determined if the person is within the jurisdiction of the Commission. Upon determination of jurisdiction, the matter is then referred to the Local Commissioners for a decision about whether to order the person to attend a conference. A conference proceeds where the client may be encouraged to enter in an agreement, or an order is made to refer the person to community support services. The matter is then case managed by the Commission for the period of the order/agreement. Where a person does not comply, show cause proceedings are initiated and the client is ordered to appear before the Commission to explain reasons for non-compliance and if necessary an order for Conditional Income Management (CIM) may be made. (Families Responsibilities Commission, *Quarterly Report No. 3 January – March 2009,* Report *to the Family Responsibilities Board and the Premier of Queensland* (2009). At http://www.atsip.qld.gov.au/government/families-responsibilities-commission/documents/frc-quarterly-report-3.doc (viewed 1 October 2009).)

[9] *Northern Territory National Emergency Response Act 2007* (Cth), s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(3), (5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4 (2).

[10] Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009). See also: James Anaya, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia*, Canberra, 27 August 2009. At ttp://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf

overall well-being of these communities in both the short and longer term than measures that respect their human rights.

43. In its response to the NTER Review, the Government has committed to introducing legislation into the Parliament in the Spring sittings of 2009 to remove the provisions in the current NTER Acts that exclude the operation of the RDA and state/territory anti-discrimination legislation.

44. On 21 May 2009, the Government released a discussion paper setting out proposals for the measures affected by the RDA, including the income management measures. Community consultations are underway to assess how these measures might be improved and amended to conform with the RDA.

45. These guidelines are aimed at ensuring that income management measures are designed and implemented so as to be consistent with the RDA and accordingly Australia's international legal obligations under the International Convention on the Elimination of All Forms of Racial Discrimination[11] (ICERD), upon which the RDA is based.

3.4 Making income management consistent with the RDA

46. There are two ways to ensure income management measures are consistent with the RDA:

- ensure that the structure and implementation of an income management measure avoids racial discrimination, or
- develop and implement the measure as a 'special measure' under the RDA.

Option 1: Avoiding discrimination in the structure and implementation of the income management measure

47. The RDA seeks to ensure that laws do not breach the rights of people of a particular race (the right to equality before the law, s 10) and prohibits actions that discriminate against people based on their race, colour or national or ethnic origin (the prohibition on discrimination ss 9, 11-5).

48. In the context of income management regimes, it is necessary to consider both

- the laws that establish the regime to ensure that such laws do not impair the right to equality before the law, and
- the manner in which such laws are implemented to ensure that such acts do not discriminate based on race.

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[11] Opened for signature 21 December 1965 (entered into force 4 January 1969 except for art 14 which came into force 4 December 1982). ICERD entered into force for Australia on 30 October 1975 and art 14 with effect from 28 January 1993.

Right to equality before the law

49. Section 10 of the RDA creates a general right to equality before the law. The section is concerned with ensuring the equal enjoyment of rights of all persons under law.[12]

50. It provides:

> 10. Rights to equality before the law
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

51. It is not necessary for a law to single out people of a particular race for it to engage s 10(1). The section is directed at 'the practical operation and effect' of laws and is 'concerned not merely with matters of form but with matters of substance'.[13]

52. Determining whether s 10(1) has been breached requires asking:

- whether there is a relevant 'right' or 'rights' that are affected by the impugned law, and
- whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law. This requires asking:
  - does the law limit the enjoyment of a right by people of a particular race relative to others, and
  - is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?[14]

What are the relevant 'right' or 'rights' that are affected?

53. Article 5 of ICERD sets out an extensive list of rights, covering civil, political, economic, social and cultural rights. However, s 10(2) makes clear that the rights covered by s 10(1) are not limited to those referred to in ICERD.

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[12] *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*'), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'), [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[13] *Jango v Northern Territory* (2007) 159 FCR 531 [115]; *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward* (2002) 213 CLR 1, 107 at [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[14] *Bropho v State of Western Australia* [2008] FCAFC 100 ('*Bropho*'), [81]-[83].

54. The rights protected by s 10 should be understood very broadly. It is not necessary that a right be one that is recognised in Australian law.[15]

55. A 'right' under s 10 should be understood to exist where there is 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights'.[16] A law will engage a right if it impacts upon a persons ability to 'live in full dignity', 'engage freely in any public activity' or 'enjoy the public benefits of... society'.[17]

56. This approach is consistent with the broad purpose of s 10. As its title makes clear, s 10 is intended to guarantee equality before the law. That purpose is also clear from the second reading speech of the Racial Discrimination Bill 1975: 'The Bill will guarantee equality before the law without distinction as to race'.[18]

57. In the context of income management measures, the right to social security is clearly one right that is engaged. Such measures may also impact upon the right to privacy where they allow for, or require, the disclosure of information in determining which people can be made the subject of a measure.[19]

Do persons of a particular race not enjoy a right or enjoy it to a more limited extent than persons of another race by reason of the law?

58. As noted above, there are two aspects to this question.

59. *First, does the law limit the enjoyment of a right by people of a particular race relative to others?*

60. Section10 (1) of the RDA is engaged where there is unequal enjoyment of rights between racial groups by reason of the law that is being considered. It is not necessary to show that this effect is the intention or purpose of the law. The focus is on its practical operation and effect.[20]

61. The central issue here is whether a law has a disparate impact upon people of a particular racial group.[21]

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[15] *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo No. 1*'), 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70,126 (Brennan J).
[16] *Mabo No.1* (1988) 166 CLR 186, 229 (Deane J).
[17] *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).
[18] Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (James McClelland, Minister for Manufacturing Industry).
[19] Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), 278. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).
[20] *Bropho* [2008] FCAFC 100, [73]; *Ward* (2002) 213 CLR 1, 103.
[21] The CERD Committee has noted in General Recommendation 32: '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'. (Committee on the Elimination of Racial Discrimination,

62. In the case of income management, where a measure operates in a particular location that is predominantly populated by people of a particular race, the measure is likely to have a disparate impact upon people of that racial group.

63. *Second, is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?*

64. As most rights are not absolute, it may be permissible to limit them in pursuit of a legitimate, non-discriminatory goal. In determining whether a limitation is 'legitimate', the following principles should be applied:

- When determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the law-maker lacks a discriminatory motive or intention.
- Proportionality will be a vital factor in making assessments of what is legitimate – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality the following should be considered:
  - Is the measure applied only for a specific purpose and directly related to a specific need?
  - Is the regime the least restrictive one available to achieve the lawful objectives pursued? The measure must involve the least possible interference with the right to be free from race discrimination.
- The legitimacy of any limitation upon a right must be assessed in the context of the right in question: not all rights can necessarily be limited in the same ways. Where a right is one that is expressly protected by a convention it is necessary to consider what limitations are permitted under that convention and/or what, if any, limitations are recognised for that specific right.[22]
- Because the 'balancing' of rights is taking place in the context of the right to racial equality before the law and non-discrimination, legitimacy should be judged against the objectives and purposes of ICERD and other relevant human rights instruments such as the ICCPR, ICESCR, CEDAW and the CRC.[23]

General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), par 8. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009)).

[22] United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN4/1985/4, Annex (1985) ('Siracusa Principles'). This is also consistent with the approach adopted by the CERD Committee for ICERD in General Recommendations 14, 30 and 32 (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. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009)).

[23] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, except Article 41 which came into force 28 March 1979). See the Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination* (Forty-second session), UN Doc A/48/18 at 114 (1994),

The purpose of the measure should be directly linked to the promotion of another human right. Administrative convenience or efficiency will not be a legitimate purpose upon which a racial distinction can be justified.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

  For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation and consent is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should be applied (see Appendix 1). These issues are discussed further above in the context of special measures in 2.3 of the first section.

65. The Commission notes that income management measures that are properly targeted to parents or families in need of assistance to prevent neglect or abuse of children and reduce family violence may limit rights in a manner that is legitimate and accordingly be non-discriminatory.

66. As currently formulated, however, the limitation upon the rights of Aboriginal people under the income management measure applied in declared NT areas under the NTER is not legitimate. This is because the measure has a disproportionate impact upon the rights of the people subject to it:

- The income management measures apply to all people receiving welfare payments in the relevant communities. This means that the measures apply to individuals that are not responsible for the care of children, are not problem gamblers, do not engage in family violence and do not abuse alcohol or other substances. They also apply equally to responsible and irresponsible parents. There is accordingly no connection for such people between the operation of the measure and the object of addressing family violence and abuse.

- It is difficult for individuals to be exempted from the income management provisions. Exemption requires a decision by the Minister. It would be more appropriate for the decision making about the applicability of the measure to be inverted; that is, for the measure to operate in relation to a particular individual only if a decision is made, based on clearly defined criteria, that the measure should be applied to that individual.[24]

67. A model that complies with the RDA should include the following features:

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[2]; Human Rights Committee *General Comment 18: Non-discrimination*, (Thirty –seventh session), UN Doc A/45/40 (1989), [13]. For a list of some of the relevant human rights standards to consider see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

[24] See further Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) pp 19, 276-7. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

- it should be subject to the application of the RDA and state/territory anti-discrimination legislation
- it should not apply automatic quarantining – different options that should be considered may include allow for a voluntary/opt in approach or a last-resort suspension approach for income management
- it should provide for a defined period of income management, where the time-frame for compulsory quarantining would be proportionate to the context and/or subject to periodic review
- it must allow for review and appeal processes, and
- it should include additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills development for welfare recipients, safe houses for women and men, alcohol and substance abuse programs.[25]

Discriminatory acts

68. Section 9 of the RDA contains broad prohibitions on acts of racial discrimination.[26] This section does not apply to laws that may be alleged to discriminate against people of a particular race,[27] but it does apply to discretionary acts done under those laws – for example, by administrators implementing the laws.

'Direct' discrimination

69. Section 9(1) prohibits what is generally known as 'direct' race discrimination. It provides:

> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

70. To ensure that the implementation of an income management measure does not directly discriminate on the basis of race, those implementing the measure must take care not to include do acts that:

- involve a distinction, exclusion, restriction or preference

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[25] For effective human rights based approaches for addressing family violence and child abuse in Indigenous communities in Australia see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap2.html (viewed 1 October 2009).

[26] Sections 11 to 15 of the RDA also prohibit acts of race discrimination in specific areas of public life, including in the provision of goods and services (s 13).

[27] *Gerhardy* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo No.1* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho* [2008] FCAFC 100, [70].

- are based on race, and
- have a negative impact upon the equal enjoyment by people of a particular racial group of their rights and freedoms in public life.

71. An act will be 'based on' race where there is a 'sufficient connection' between the act and the race of a person or group. It is not necessary to show a *causal* connection.[28]

72. It is not necessary for race to be the sole or dominant reason for the act: it only needs to be *a* reason.[29]

73. It is also not necessary for a person to have a discriminatory intention or motive: an act can still be 'based on race' unintentionally or unconsciously.[30]

'Indirect' discrimination

74. Section 9(1A) of the RDA describes what is generally known as 'indirect' race discrimination. It provides:

> (1A) Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and
>
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
>
> The act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

75. People implementing an income management measure may therefore indirectly discriminate on the grounds of race if:

- they impose an unreasonable term, condition or requirement

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[28] *Macedonian Teachers' Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 ('*Macedonian Teachers*'), 29-30 cited in *Bropho* [2008] FCAFC 100, [68].
[29] Section 18, RDA.
[30] *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74 (Sackville J); *Macedonian Teachers* (1998) 91 FCR 8, 39.

- a person of a particular race does not or cannot comply with that term, condition or requirement; and

- imposing the requirement has a negative impact upon the equal enjoyment of rights in public life by other people of the same race.

76. Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1* provides an example of how a discretion may be structured and exercised so as to limit the potential for discrimination.[31] See Text Box 1 below.

Text Box 1: Information to consider for discretionary decisions
(excerpt from Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1*)

(5) In deciding whether to make a determination under subsection (1), the Minister must have regard to the following matters:

(a) the availability in the relevant Northern Territory area of information setting out:

(i) the proposal to make the determination; and

(ii) an explanation, in summary form, of the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;

(b) the opportunities that have been made available to people in the area to discuss:

(i) the proposal to make the determination; and

(ii) the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB; with employees or officers of the Commonwealth;

(c) the opportunities that have been made available to potentially affected people in the area to:

(i) discuss their circumstances with officers of Centrelink; and

(ii) give Centrelink information about their expenditure;

(d) the extent to which it will be feasible for the Secretary to take action under Division 6 in relation to people who may become subject to the income management regime under section 123UB;

(e) such other matters (if any) as the Minister considers relevant.

[31] Note, however, that section 123TE (6) allows for the Minister to make a discretionary decision that contravenes section 123TE (5). This undermines the effectiveness of such a clause.

Option 2: Income management measure as a special measure

77. The prohibitions in sections 9 and 10 of the RDA do not apply to 'special measures' that fall within Article 1(4) of ICERD.[32]

78. Article 1(4) of ICERD provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.

79. Special measures are typically 'affirmative action' measures that give members of a disadvantaged racial group access to a benefit that is intended to promote substantive equality. For example, Abstudy – a government allowance for Indigenous students – has been held to be a special measure.[33]

80. In the Commission's view, it is preferable that measures that may limit the rights of people of a particular racial group, such as income management measures, are designed so as to be non-discriminatory, rather than justified as special measures.

Features of special measures

81. From the definition in Art 1(4) of ICERD, the following features of special measures can be identified:

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;

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[32] Note, however, that the special measures 'exemption' does *not* apply to laws that authorise management of property owned by Aboriginal or Torres Strait Islander people without their consent or restricts the ability of Aboriginal or Torres Strait Islander people to terminate the management of their property by another: ss 8(1), 10(3).

[33] *Bruch v Commonwealth* [2002] FMCA 29. The CERD Committee has also noted that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as...the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men. Such rights are permanent rights, recognised...in human rights instruments...The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures. (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 15. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009))

- the special measure must be for the *sole purpose* of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;

- the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and

- the special measure must not already have achieved its objectives.[34]

82. All parts of a 'special measure' must be 'appropriate and adapted' to the relevant purpose.[35] In other words, the exemption for a special measure does not mean that if some aspects of a measure are a special measure, all aspects of that measure are immune from challenge.[36]

83. To be satisfied that a measure is necessary to ensure that the people it benefits can enjoy their human rights equally with others, you should ask:

- Could the benefits of the measure be achieved in a way that does not make a racial distinction?

- Is there current and credible evidence that supports the need for the measure and shows that it will be effective?

- Are the elements of the measure appropriate and adapted to meet the intended purpose?

- How will the measure be monitored and evaluated to ensure that it is working effectively?

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[34] *Gerhardy* (1985) 159 CLR 70, Brennan J (133). The CERD Committee in General Recommendation 32 has outlined similar requirements of a special measure under ICERD as follows:

> 16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.
>
> 17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural [34]status and conditions of the various groups in the population and their participation in the social and economic development of the country'.
>
> 18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. (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), pars 16-18. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009))

[35] *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).
[36] *Vanstone v Clark* (2005) 147 FCR 299, 354 [209] (Weinberg J), Black CJ agreeing.

Consultation and consent

84. Consulting with the group that is intended to benefit from a special measure and obtaining their consent to the measure should be given special attention. The Commission is of the view that the level of consultation or consent required will vary depending on whether the measure to be introduced involves a limitation on certain rights or is entirely beneficial in nature.

Consent to 'affirmative action' measures

85. In the context of 'affirmative action' measures (i.e. measures that give members of a racial group access to a benefit that is not available to people of other racial groups), the appropriate approach is to consider the wishes of the beneficiaries to be 'of great importance (perhaps essential)' in establishing whether the measure is a special measure. This means that, at a minimum, consultation with the 'beneficiary' group is essential and consent should be obtained unless there are legitimate reasons for not doing so (for example, because a measure is a short-term one to be introduced at short notice).

86. In the context of a law that granted land rights to a group of Aboriginal people, Brennan J in *Gerhardy v Brown* stated:

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[37]

87. It has similarly been observed that:

> Legislators and social welfare administrators should resist their natural inclination to believe that they know better than the recipients what is good for them. Preferential programs should always, where remotely feasible, be developed in consultation with those being helped, and individuals should always be given the opportunity of receiving normal, non-preferential treatment should they so prefer. Where these conditions are not met, doubts about the benignity of a measure may be well founded.[38]

Consent to measures that limit certain rights of a racial group

88. Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. This includes income management measures.

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[37] *Gerhardy* (1985) 159 CLR 70, 135.
[38] Gareth Evans, *Benign Discrimination and the Right to Equality* (1974) 6 FLR 26, 30.

89. In the Commission's view, such measures will *not* be special measures where they are implemented without the consent of the group to whom they apply (Please refer to Appendix One)

90. An example of such a measure is a restriction on the sale of alcohol to Aboriginal people living in remote communities.[39] Such restrictions will only be special measures where they are introduced with the consent of the relevant community.[40]

91. In the context of measures that apply to Aboriginal and Torres Strait Islander peoples, the concept of 'special measures' must be understood consistently with the right of peoples to self-determination. It is inconsistent with the right to self-determination for a measure that limits the rights of a group to be imposed upon it without the consent of the group.

92. Article 1 of the ICCPR and the ICESCR provides:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[41]

93. The Committee on the Elimination of Racial Discrimination has, in its General Recommendation 23, called upon parties to ICERD to:

> ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent...[42]

94. The *Declaration on the Rights of Indigenous People*[43] has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' (FPIC) in dealings with Indigenous peoples. Article 19 states:

> 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.

95. An important part of the principle of FPIC is ensuring that accurate and clear information is provided to affected communities. Prescribed communities, as defined by the NTER legislation, cover over 500 Aboriginal communities and multiple language groups. Information regarding any significant developments with income management programs should be:

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[39] See Race Discrimination Commissioner, *Alcohol Report* (1995), pp 137-49.
[40] It is important to note, however, that alcohol restrictions that apply generally to a community and not just members of a particular racial group may not be discriminatory and may therefore be permissible under the RDA. As discussed above, the first question is whether the measures are discriminatory. Only then is it necessary to consider the question of special measures.
[41] See also art 1 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[42] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997) par 4. At http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument (viewed 1 October 2009).
[43] GA Res 61/295, UNGAOR, 62nd sess, 107th plen mtg, Annex, UN Doc A/Res/61/295 (2006).

- translated where necessary and also provided in a plain-English format
- comprehensible for members of affected communities
- provided in summary form so that community members are able to become familiar with content quickly.

96. Government officers should make appropriate use of interpreter services during any consultation process. This will require adequate advance notice to ensure than an interpreter from the required language group is available.

97. Where proposed special measures may have a vastly different impact on the male and female members of a racial group it is crucial to consider ways to maximise broad participation in a consultation process. For example, there may be compelling evidence of family violence across a community, as a result of which women are not necessarily in a position to participate in a general consultation process or consent to a proposed measure.[44]

98. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in commenting on States' duty to consult with indigenous peoples, has noted that where Indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations.

> The strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.'[45]

99. The Special Rapporteur further notes, that in order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. Having observed that, in many instances, consultation procedures are not effective because the affected indigenous peoples were not adequately included in the design and implementation of the consultation procedures.[46]

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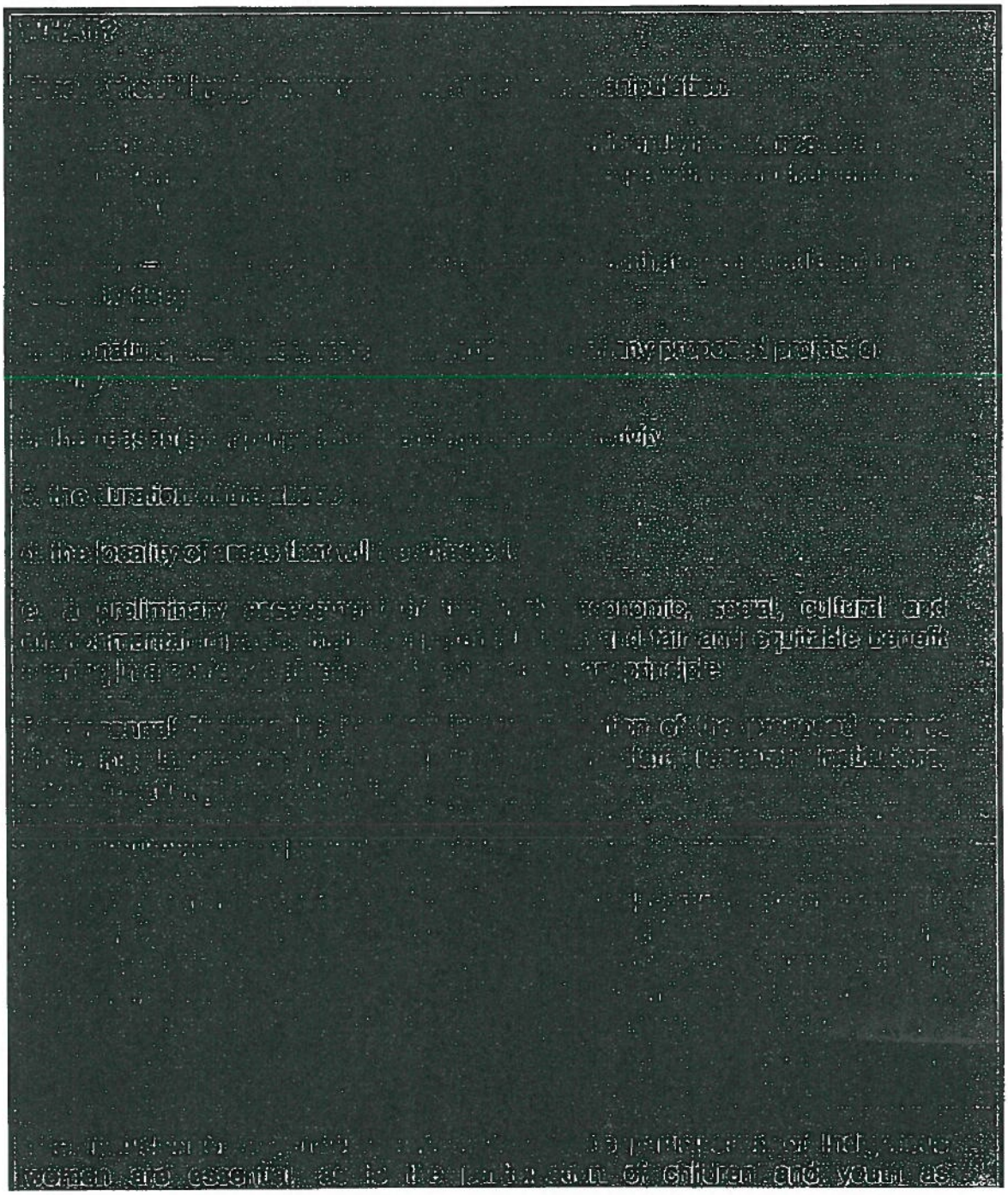
[44] M Davis, *International Human Rights Law, Women's Rights and the Intervention,* 10, Indigenous Law Bulletin (2009), pp 11-14.

[45] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 47. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf (viewed 22 October 2009)

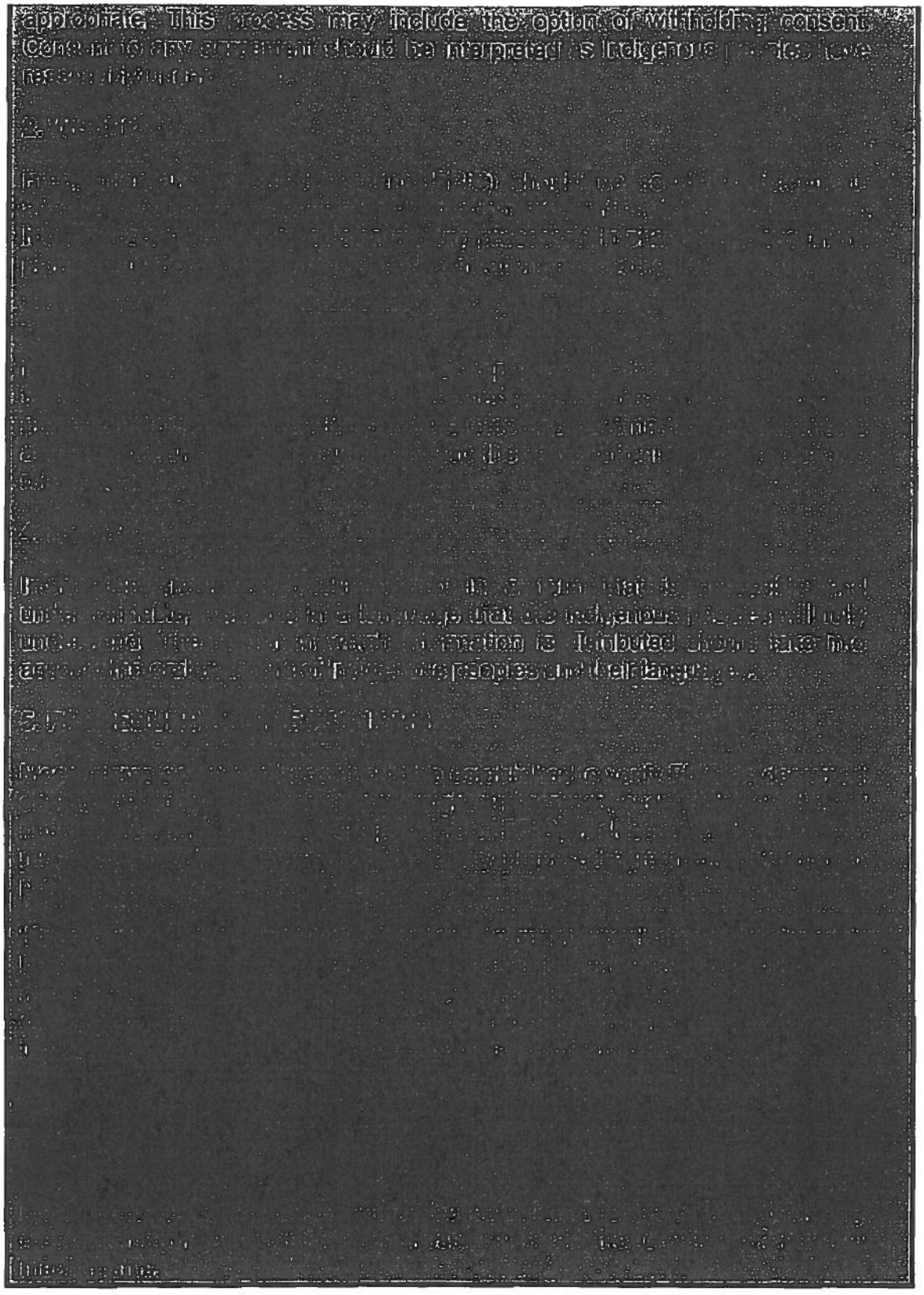
[46] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 51. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf (viewed 22 October 2009)

Appendices

Appendix 1: Key elements of free, prior and informed consent[47]



[47] Australian Human Rights Commission (formerly HREOC), the United Nations and the Queensland Government, *International Conference on Engaging Communities* (2005). At http://www.humanrights.gov.au/social_justice/conference/engaging_communities/fpic_brochure.html (viewed 1 October 2009). See also Principle of Free Prior and Informed Consent. At http://www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc (viewed 1 October 2009).



Appendix 2: A brief guide to good practice for community consultations[48]

Following are good practice requirements for community consultations in relation to income management measures.

(i) Pre-consultation phase:

- **Involving Aboriginal and Torres Strait Islander people at the outset**. Community leaders (e.g. traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.

- **Ensuring that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting traditional land owners, the Prescribed Body Corporate (PEC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital. Peak bodies such as the National Aboriginal Community Controlled Health Organisation (NACCHO) and Indigenous Coordination Centers may also be good sources of knowledge.

- **Recognising the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.

- **Ensuring that the consultation process is accessible for broad cross sections of affected communities.** The consultation process should provide sufficient opportunity for grassroots communities to provide input, and not simply focus around individuals/community organisations that are high profile or easy to access. In other words, don't just dialogue with 'experts' or the usual suspects. Where consultations cannot be held across each affected community, free transport should be provided to the nearest local hub where a consultation has been scheduled.

- The consultation process should aim for a **gender balance** in relation to overall participant representation. Government officers should acknowledge the special role of women in discussions about income management. Aboriginal women are the heads of households in many cases and have caring responsibilities for their families and extended families. Consultation sessions should specifically seek information regarding the impacts and effectiveness of any measures on Aboriginal women who are caring

[48] Australian Government, *Best Practice Regulation Handbook* (2007). At http://www.finance.gov.au/obpr/docs/handbook.pdf (viewed 22 June 2009).

for their grandchildren.

- Ensuring that the conduct of consultations allow affected communities to have control over timeframes. Notice of proposed measure/s must be given sufficiently in advance of its authorisation to allow time for the community to reach informed consent or to arrive at considered points of difference.

(ii) Consultation phase:

- Using various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation. It is important that government officers check for participant understanding periodically during the course of any consultation session.

- **Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.

- Acknowledging that it may not be possible to reach a community consensus or agreement about the merit or likely impact/s of a measure in all cases. Where consensus is not attainable, it is important to consult with the broadest cross section of the affected community, to be able to demonstrate that there has been appropriate and adequate consultation and weigh up the diverse views against current evidence.

- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with an income management regime, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.

- Being clear about what ***outcomes(s)*** the proposal seeks to achieve and what ***issue(s)*** the proposal seeks to address.

- Being clear about the potential and real **risks, costs** and **benefits** of the proposed measure. Be clear about what aspects of the proposed measure Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern. Consultation sessions should seek information regarding **unintended positive and negative consequences** of the income management measure.

- Identifying how you will **accurately collect** and **record data** during consultations. Provide people with a clear idea of **how their input** will be included in decision making processes.

- Special measures are temporary and therefore do not set out permanent rights or arrangements. Consultation sessions should ask for input regarding whether the measures build long-term capacity in affected communities, develop improved budgeting skills and healthier spending patterns.

- Considering what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures. Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.

- Reaching agreement with communities about **how feedback will be provided** after the consultation phase is concluded.

(iii) Post-consultation phase:

- Identifying the best ways to **keep communities informed** about developments regarding the issue/proposal. Explain to community members the likely timeframes for the first phase of implementation. Explain what, if any options community members have to call for a **review of decision making.**

- Government agencies should **publish their consultation protocols**. This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate/not feasible. Government agencies should evaluate and continuously improve their consultation processes.

- Remember that consent is *not* valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with *all* of the information relevant to a proposed measure.[49]

[49] United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005). At http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc (viewed 22 June 2009).

Appendix 3: A brief guide to good practice for monitoring and evaluation[50]

The following questions need to be considered when developing good practice for monitoring and evaluating income management measures.

(i) Developing indicators and measures

- What are your indicators and how are they measured? Are they sufficiently specific (focused around impacts of the measure) and holistic (the combined impact of the measure and other developments in a community)?
- Has the income management measure worked as a specific initiative or have other factors facilitated or been a barrier to impact/community benefit?
- How will you ensure that you evaluate both the quality of your consultation and overall process and the *impact* of the measure? How will you evaluate immediate, medium and long-term impacts?
- Has the measure caused any unintended positive or negative consequences?
- Have your results suggested that alternative, less intrusive strategies could have achieved similar, positive outcomes?
- What additional support services are required to increase the likely success of the measure?
- How will you know when the measure has achieved its stated purpose?

(ii) Developing monitoring and data collection methods:

- How will you monitor developments in the affected communities? Who will be responsible for the monitoring role in your agency? How will emerging data be captured?
- Do you have a system to collect, organise and analyse anecdotal evidence?
- Is your evaluation plan flexible enough to track and investigate emerging issues?

[50] Australian Government, *Best Practice Regulation Handbook* (2007). At http://www.finance.gov.au/obpr/docs/handbook.pdf (viewed 22 June 2009).

- How will you reduce bias in your data collection and interpretation? Have you considered appointing an independent reviewer or observer?

(iii) Designing an evaluation:

- Will the evaluation be designed and conducted by an independent, external provider?
- Have you developed criteria as part of your procurement process to ensure that your supplier has adequate expertise and cross cultural competence?
- Is your contract with the supplier flexible enough to allow for process changes?
- Has your agency dedicated sufficient resources to plan and conduct a comprehensive evaluation? Has adequate consideration been given to the quantum and type of resources required?
- What is your methodology/evaluation plan? How will you make information regarding your plan available to members of affected communities?
- Has your evaluation been designed to adequately measure the stated objective of your special measure (for example, reducing the incidence of child abuse and family violence)?
- What are your key evaluation questions/themes? Have affected communities had input into the development of these questions/themes?
- Have you developed an evaluation schedule? Have you consulted community leaders in developing this schedule?

(iv) Engaging community participation in the evaluation:

- Have you developed strategies to ensure that you will capture a full or representative range of community views to be included in your evaluation process?
- Have you considered strategies to inform affected communities about your evaluation process and how they can participate?
- Have you considered the likely barriers to community participation in your evaluation process and how you will address them?
- Have you considered if and how you will share the outcomes or your evaluation process?

Attachment B

AIHW criteria: what works in the design and implementation of programs specifically targeted at or serve Indigenous communities and individuals

What works

- **Community involvement and engagement**
  This should start at the earliest practical point and consultations should be undertaken before any decisions are taken on services needed and how they should be delivered. There must be open discussion and listening. Feedback on decisions is crucial as is ensuring local people feeling engaged so local ideas are heard and appropriately incorporated.

- **Adequate resourcing for planned and comprehensive interventions.**
  Avoid further partial, short term and inadequate interventions that fail to effectively deal with the identified problems or do not operate for long enough to make a difference. Long term planning, funding and support for staffing are all essential for effective services. A far too common outcome is successful programs are often defunded and create future disillusionment.

- **Respect for language and culture**
  Design processes need to recognise and value the local leadership, culture and languages and ensure these are integrated. Local services work best when there is reciprocal respect and cultural embedding to ensure that outsiders recognise their importance.

- **Working together through partnerships, networks and shared leadership**
  This is the structural key to making programs work locally: the genuine sharing of formal and informal decision making and mutual recognition of joint interests, whether expressed as through self-determination or other forms of shared control.

- **Development of social capital**
  There needs to be adequate levels of trust and trustworthiness on all sides to allow people to work effectively and minimise the bureaucratic processes. The building of such relationships takes time so there should be limited use of turnover of staff.

- **Recognising underlying social determinants**
  Recent findings by the World Health Organisation suggest strongly that population wide social and health problems are usually derived from institutional and structural inequities that limit people's sense of control and autonomy, rather than personal or familial deficits. Therefore programs need to address local issues, structural problems and the effects of past histories as well as assisting with immediate needs.

- **Commitment to doing projects with, not for, Indigenous people**
  This is an important component of both effective delivery of services and improving the power imbalances that undermine benefits. Relationships need to be genuinely collaborative between funders, providers and recipients of services. Whether expressed formally in written agreements or informally in actual decision making and delivery, this engagement model is the core of effectiveness and goodwill. Decisions need to integrate Aboriginal knowledge and aspirations.

- **Creative collaboration that builds bridges between public agencies and the community and coordination between communities, non-government and government to prevent duplication of effort.**
  Services need to plan, listen to and engage with local communities to avoid the problems of too few or too many overlapping services that reduce the effectiveness of all providers. Some areas have high numbers of outside agencies operating in small or localised areas, fragmenting local goodwill and undermining the effectiveness of joined up programs.

- **Understanding that issues are complex and contextual**
  The proposals above oversimplify complex issues but hopefully offer a starting point for new approaches that are more inclusive and effective.

What doesn't work

- **'One size fits all' approaches**
  This is a major flaw both in government programs as well as in some services and NGO groups. The administrative processes in larger organisations may see cookie cutter models as easier to manage, and apply them widely. These don't work as they fail the basics of most of the above criteria for what does work.

- **Lack of collaboration and poor access to services**
  As outlined above, multiple services in many locations fail if they are not locally connected and accepted. This may mean services are not seen as legitimate and are therefore not used or recognised as useful.

- **External authorities imposing change and reporting requirements**
  Many local services resent what they see as externally imposed changes to what they feel is working and the frequent reporting that is not even read in many cases.

- **Interventions without local Indigenous community control and culturally appropriate adaptation**
  This is a common complaint that breaches most of the criteria for what is working. External decision making, one size fits all design and delivered services are most unlikely to engage locals and develop the levels of trust and good will in local communities and/or with clients that make their services effective or even appropriately used.

- **Short-term, one-off funding, piecemeal interventions, provision of services in isolation and failure to develop Indigenous capacity to provide services**
  Short term inflexible funding may tempt bureaucrats and community groups but often undermines good relations and possible future engagement of local communities. Defunding some successful programs after pilots expire can create future resistance. The failure to plan, support and resource services as well as ensuring that local skills are developed, may also lead to local staff finding delivery too hard.

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Committee on Economic, Social and Cultural Rights

Concluding observations on the fifth periodic report of Australia*

1. The Committee on Economic, Social and Cultural Rights considered the fifth periodic report of Australia on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/AUS/5) at its 14th and 15th meetings (E/C.12/2017/SR.14 and 15) held on 30 and 31 May 2017, and adopted the following concluding observations at its 47th meeting, held on 23 June 2017.

A. Introduction

2. The Committee welcomes the submission of the fifth periodic report of the State party, as well as the submission of the written replies to the list of issues (E/C.12/AUS/Q/5/Add.1). The Committee appreciates the constructive dialogue held with the State party's high-level intersectoral delegation.

B. Positive aspects

3. The Committee welcomes the State party's accession to the Optional Protocol to the Convention of the Rights of Persons with Disabilities, in August 2009.

4. The Committee also welcomes the legislative, institutional and policy measures taken to promote economic, social and cultural rights in the State party, including:

(a) Youth Employment Strategy (2015);

(b) Remote School Attendance Strategy (2014);

(c) National Partnership Agreement on Universal Access to Early Childhood Education (2013-2015);

(d) National Aboriginal and Torres Strait Islander Health Plan (2013-2023);

(e) National Framework for Protecting Australia's children (2009-2020) and its actions plans;

(f) National Plan to Reduce Violence against Women and their Children (2010-2022);

(g) National Disability Strategy (2010-2020) and its action plans as well as the National Disability Insurance Scheme;

* Adopted by the Committee on Economic, Social and Cultural Rights at its sixty-first session (29 May – 23 June 2017).

(h) Closing the Gaps Strategy (2008).

C. Principal subjects of concern and recommendations

Justiciability of the Covenant rights

5. The Committee remains concerned that in spite of its previous concluding observations, the Covenant provisions are still not fully incorporated in the State party's domestic legal order and therefore not justiciable in domestic courts. While noting the role of the Parliamentary Joint Committee on Human Rights (PJCHR) in scrutinising existing legislation as well as pending bills for compatibility with human rights, the Committee is concerned that recommendations of the PJCHR are often not taken into account by legislators (art. 2(1)).

6. **The Committee recommends that the State party take immediate steps to incorporate fully the Covenant provisions in the State party's legal order so as to render them justiciable in domestic courts. In this regard, the Committee reiterates its recommendation that the State party consider introducing a Federal Charter of Rights guaranteeing the full range of economic, social and cultural rights (E/C.12/AUS/CO/4, para. 11). The Committee refers the State party to its general comment No. 9 (1998) on the domestic application of the Covenant. The Committee also recommends that the State party ensure that recommendations made by the PJCHR regarding existing or proposed legislation are taken fully into account by legislators.**

Official development assistance

7. The Committee regrets that the State party's official development assistance (0.22 per cent) falls far below the internationally agreed commitment of 0.7 per cent of Gross National Income (GNI) (art. 2, para.1).

8. **The Committee recommends that the State party progressively increase the level of its contribution to official development assistance, with a view to achieving the international commitment of 0.7 per cent of its GNI, and to fully incorporate the rights contained in the Covenant in its development cooperation policy.**

Australian Human Rights Commission

9. While noting with appreciation the work carried out by the Australian Human Rights Commission, the Committee is concerned that the definition of 'human rights' within the Australian Human Rights Commission Act (1986) does not include economic, social and cultural rights.

10. **The Committee recommends that the State party review the Commission's Act to include the Covenant within its mandate, and to that end ensure that the Commission has sufficient resources to discharge its role effectively. The Committee refers the State party to its general comment No. 10 (1998) on the role of national human rights institutions in the protection of economic, social and cultural rights.**

Climate change

11. The Committee is concerned about the continued increase of CO_2 emissions in the State party, at risk of worsening in the coming years, despite the State party's commitments as a developed country under the UN Framework Convention on Climate Change and the Kyoto Protocol, as well as its Nationally Determined Contribution under the Paris Agreement. The Committee is also concerned that environmental protection has decreased in recent years as shown by the repeal of the Emissions Trading Scheme in 2013, and the State party's ongoing support to new coal mines and coal-fired power stations. The Committee is also concerned that climate change is disproportionately affecting the enjoyment of Covenant rights by indigenous peoples.

12. **The Committee recommends that the State party revise its climate change and energy policies, as indicated during the dialogue. It recommends that the State party take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases, and pursue alternative and renewable energy production. The Committee also encourages the State party to review its position in support of coal mines and coal export. The Committee further recommends that the State party address the impact of climate change on indigenous peoples more effectively while fully engaging indigenous peoples in related policy and programme design and implementation.**

Business and human rights

13. The Committee notes the information provided by the delegation on the ongoing national consultation on the implementation of the 2011 Guiding Principles on Business and Human Rights. The Committee is however concerned about the lack of a regulatory framework to ensure that companies operating in the State party, as well as companies under the State party's jurisdiction acting abroad, fully respect economic, social and cultural rights. The Committee is further concerned that private companies, such as the service providers in the regional processing centres in Nauru and Papua New Guinea, are responsible for serious human rights violations, and about the lack of proper and independent investigation and complaints mechanisms (art. 2, para. 1).

14. **The Committee recommends that the State party:**

(a) Establish a clear regulatory framework for companies operating in the State party to ensure that their activities do not negatively affect the enjoyment of economic, social and cultural rights, inter alia, by developing a national action plan on business and human rights;

(b) Take all necessary measures to ensure legal liability of companies based in or managed from the State party's territory regarding violations of economic, social and cultural rights by their activities conducted abroad, or resulting from the activities of their subsidiaries or business partners where these companies have failed to exercise due diligence;

(c) Ensure that private companies, such as the service providers in the regional processing centres in Nauru and Papua New Guinea, comply with their human rights obligations;

(d) Reinforce effective mechanisms to investigate complaints filed against private companies, and take effective measures to ensure access to justice for victims;

(e) Consider the Committee's general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

Indigenous peoples

15. The Committee remains concerned that indigenous peoples do not have constitutional recognition and continue to experience high levels of disadvantage across all socio-economic indicators, and that the 'Closing the Gap' strategy has yielded limited progress in this regard. The Committee is also concerned about:

(a) Inadequacy of meaningful consultation with indigenous peoples in programmes and policies that affect them;

(b) The decrease in funding for the National Congress of Australia's First Peoples in recent years, and financial cuts to indigenous programmes and to organizations providing services to indigenous peoples;

(c) Persistent difficulties in proving land titles under the Native Title Act of 1993, which is still undergoing reform;

(d) Insufficient compliance with the principle of free, prior and informed consent of indigenous peoples, including in the context of developing the White Paper on the

development of Northern Australia, and of the approval of extractive projects on lands owned or traditionally used by indigenous peoples (art. 1, para 2, and art. 2).

16. **The Committee urges the State party to:**

(a) Step up its efforts to introduce constitutional recognition of indigenous peoples, and in this regard, take into consideration the Uluru Statement made by the Referendum Council on 26 May 2017;

(b) Continue its efforts to refresh the Closing the Gap Strategy and to implement other programmes to respect, protect and realise the rights of indigenous peoples, in close consultation with indigenous representative bodies and civil society;

(c) Increase the funding of the National Congress of Australia's First Peoples to enable it to discharge its duties effectively, as indicated during the dialogue, and consider increasing the funding for indigenous-led programmes and organizations providing services to indigenous peoples;

(d) Proceed with the legal reform of the Native Title Act in close consultation with all concerned stakeholders, taking into consideration the recommendations of the Australian Law Reform Commission Review of the Native Title Act 1993, and the report by the Coalition of Australian Governments into Indigenous Land Administration and Use;

(e) Ensure that the principle of free, prior, and informed consent is incorporated in the Native Title Act and in other legislation as appropriate, and is fully implemented in practice;

(f) Promote and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, and consider ratifying the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (no. 169).

Off-shore processing of asylum claims and living conditions in regional processing centres

17. The Committee is aware that a high number of persons are granted humanitarian protection in the State party. The Committee is however alarmed by the punitive approach taken by the State party in recent years towards asylum seekers arriving by boat without a valid visa. The Committee also remains concerned at the State party's policy of transferring asylum seekers to the regional processing centres for the processing of their claims, despite public reports on the harsh conditions prevailing in those centres, including for children. This includes acute isolation, overcrowding, limited access to basic services, including healthcare and education, allegations of sexual abuse by personnel of the service providers, acts of intimidation, taunting and provocation against asylum seekers, as well as reports of repeated incidence of suicide and self-harm among asylum seekers (art. 2).

18. **The Committee reiterates that the State party continues to be accountable for the treatment of asylum seekers in the regional processing centres over whom it exercises effective control, also by funding the centres and hiring companies to provide services. The Committee urges the State party to:**

(a) Halt its policy of off-shore processing of asylum-claims;

(b) Complete the closure of the regional processing centres, repatriate all concerned persons to Australia and process their asylum claims with all procedural safeguards, while respecting their right to family-reunification;

(c) Implement the recommendations made by the United Nations Special Rapporteur on the Human Rights of Migrants, in his report of 24 April 2017;

(d) Consider the Committee's Statement on duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, adopted on 24 February 2017 (E/C.12/2017/1).

Persons with disabilities

19. While noting with appreciation the adoption of the National Disability Strategy (2010-2020), the Committee is concerned about the slow progress in its implementation, attributed to insufficient resources and weak accountability and implementation mechanisms (art. 2).

20. **The Committee recommends that the State party ensure full implementation of the National Disability Strategy by focusing on all the six areas covered and allocating the necessary resources. The Committee also recommends that the State party strengthen the accountability mechanisms to ensure that persons with disabilities fully enjoy their economic, social and cultural rights.**

Equality between men and women

21. While appreciating the many measures adopted to ensure a whole-of-government approach to mainstreaming gender policy, the Committee remains concerned that women continue to experience disadvantages across key areas including work, health, education, and housing (art. 3).

22. **The Committee recommends that the State party intensify its efforts to address remaining obstacles to achieving substantive equality between men and women, including through the strengthening of temporary special measures. The Committee refers the State party to its general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights.**

Unemployment

23. The Committee is concerned about the high rate of unemployment among the youth, and that persons with disabilities, older persons, and indigenous peoples remain disproportionately vulnerable to unemployment. The Committee is also concerned that asylum seekers on bridging visas or temporary protection visas are either not allowed to work or allowed to work for only a limited period (art. 6).

24. **The Committee recommends that the State party take targeted measures to address the unemployment of specific groups, such as the youth, persons with disabilities, older persons, and indigenous peoples, and take into consideration the Australian Human Rights Commission report, Willing to Work, 2016. The Committee also recommends that the State party facilitate full access to work by asylum seekers on bridging visas or temporary protection visas.**

Equal pay for work of equal value

25. The Committee is concerned about limited progress achieved in closing the gender wage gap, which is attributed to persistent industrial and occupational segregation by sex, as well as concentration of women in low-paid sectors and in part-time work (arts 3 and 7).

26. **The Committee recommends that the State party redouble its efforts to reduce the gender wage gap by taking effective measures to enable women to access traditionally male-dominated sectors, including by promoting opportunities for both men and women to reconcile their professional and family responsibilities.**

Migrant workers

27. The Committee is concerned about the working conditions of migrant workers, particularly those on temporary visas (approximately 1.8 million workers on temporary visas), who receive lower wages and work for longer hours, especially in the construction, agricultural and hospitality industries. The Committee is also concerned that due to fear of dismissal, detention, or deportation, many of these workers refrain from seeking redress, which contributes to increased exploitation by employers (art. 7).

28. **The Committee recommends that the State party take effective measures to:**

(a) Increase labour inspection especially at workplaces in industries with a concentration of migrant workers;

(b) Encourage workers to report violations of labour rights, including by providing adequate resources to legal aid service providers, and ensure that public services work independently from the immigration authorities, so as to guarantee adequate labour protection and access to public services for all migrant workers, without fear of dismissal, detention or deportation;

(c) Strengthen the human and financial resources of the Fair Work Ombudsman to enable it to perform its functions effectively;

(d) Take steps to hold exploitative employers accountable and to compensate victims;

(e) Consider the Committee's general comment No. 23 (2016) on the right to just and favourable conditions of work.

Trade union rights

29. The Committee is concerned about the existence of legal restrictions to the exercise of trade union rights, including in the Fair Work Amendment Act of 2015, the Code for the Tendering and Performance of Building Work 2016, and The Building and Construction Industry (Improving Productivity) Act 2016. The Committee is also concerned that the right to strike remains constrained in the State party (art. 8).

30. **The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action. It also calls on the State party to effectively investigate all reports of violations of these rights brought to its attention, and to ensure adequate compensation for the workers and trade unions affected.**

Right to social security

31. The Committee is concerned about the:

(a) Inadequacy of income support benefits and the measures to further reduce social security entitlements contained in the 2017 Budget, such as the Family Tax Benefit freeze;

(b) Insufficient amounts of benefits under the Status Resolution Support Services programme for asylum seekers on bridging visas, many of whom have been waiting for years for the outcomes of their asylum claims, the so called 'asylum caseload legacy' (arts. 2, 3 and 9);

(c) Mandatory income management schemes, disproportionately affecting indigenous peoples;

(d) Stricter conditionalities and increased penalties applied under the Community Development Programme (formerly known as the Remote Jobs and Communities Program), which has a disproportionate impact on indigenous peoples' access to social security benefits.

32. **The Committee recommends that the State party:**

(a) Reconsider the financial cuts to the social security system, with a view to ensuring that all beneficiaries, especially disadvantaged and marginalised individuals and groups and those in need of income support benefits, are able to enjoy an adequate standard of living. In this regard, the Committee refers the State party to the letter concerning austerity measures, which was sent to all States parties to the Covenant by the Chair of the Committee in 2012;

(b) Increase the amounts of benefits under the Status Resolution Support Services programme for asylum seekers on bridging visas to ensure they enjoy an adequate standard of living, and expedite processing of all asylum claims, in

particular those part of the 'caseload legacy' while guaranteeing procedural safeguards;

(c) Consider maintaining only an opt-in income management scheme with appropriate oversight of decision making and monitoring, and review existing and envisaged conditionalities for eligibility to social assistance and unemployment benefits as well as penalties for non-compliance, and ensure that all beneficiaries receive adequate benefits, without discrimination;

(d) Consider the Committee's general comment No. 19 (2007) on the right to social security.

Domestic violence

33. The Committee commends the State party for the establishment of the National Sexual Assault, Domestic and Family Violence Counselling Service (1800RESPECT) in 2010, and the *Stop it at the Start* campaign. It, however, remains concerned that domestic violence remains widespread and is leading to homelessness among affected victims, including indigenous women. The Committee is also concerned about limited access to justice by victims, including due to inadequate funding to legal aid providers (art. 10).

34. **The Committee recommends that the State party:**

(a) Redouble its efforts to combat domestic violence against women and children, including among indigenous peoples;

(b) Allocate adequate resources to initiatives such as the National Plan to Reduce Violence against Women and their Children 2010-2022, the National Framework for Protecting Australia's Children 2009-2020, and its action plan, ensuring genuine participation of civil society organizations in the implementation and evaluation of such initiatives;

(c) Increase accommodation and support services, especially in rural and remote areas, with a view to reducing the risk of homelessness among victims of domestic violence;

(d) Take effective measures to facilitate access to justice and legal aid for victims, and take steps to prosecute perpetrators and punish them adequately, if convicted.

Violence against persons with disabilities

35. The Committee is concerned about high levels of violence and abuse against persons with disabilities, especially those with intellectual disabilities and women with disabilities, placed in institutions or residences. The Committee is also concerned at the lack of effectiveness of oversight and complaint mechanisms in alternative care settings (arts. 2 and 10).

36. **The Committee recommends that the State party fully implement the recommendations put forward in the inquiry report by the Senate Community Affairs References Committee into violence, abuse and neglect against people with disability in institutional and residential settings (2015), including the creation of a Royal Commission to inquire into violence and abuse against people with disabilities. The Committee also recommends that the State party pursue its intention to establish a well-resourced independent complaints system as well as a national registrar, responsible for registering providers and overseeing compliance with the registration requirements. The Committee requests the State party to pay particular attention to ensure that women with disabilities and persons with intellectual disabilities, victims of domestic violence, can claim their rights.**

Family reunification

37. The Committee is concerned that asylum seekers arriving by boat to Australia and granted temporary protection visas are banned from family reunification, which is further exacerbated for the asylum seekers who are part of the so-called 'asylum caseload legacy',

accounting for about 30,000 persons. The Committee is also concerned that these asylum seekers when granted permanent protection visas continue to face restrictions to family reunification. The Committee is further concerned about the separation of families who arrived together and yet are given different visas with different migration pathways, resulting in physical separation and uncertainty regarding family unity (arts. 2 and 10).

38. **The Committee recommends that the State party prioritise family reunification for all asylum seekers granted protection. The Committee also recommends that the State party amend relevant policies and legislation, particularly the Migration Act 1958, to end restrictive access to services and entitlements on the basis of a person's mode of arrival in Australia, and ensure equity and transparency in processing claims for permanent protection and requirements for family reunification.**

Poverty

39. The Committee notes the continuous absence of an adequate poverty measurement tool in the State party, and regrets the limited statistical data on the extent and depth of poverty. It also notes with concern the reported increase of poverty, including child poverty, affecting more than 2.5 million persons (art. 11).

40. **The Committee reiterates its previous recommendation to the State party to adopt and implement a comprehensive strategy to combat poverty and promote social inclusion, while paying particular attention to disadvantaged and marginalised individuals and groups. It also recommends that the State party collect data on the extent and depth of poverty, also disaggregated by sex, indigenous peoples, age, urban/rural area and disability, and provide such data in its next periodic report. In that regard, the Committee draws the attention of the State party to its statement on poverty and the International Covenant on Economic, Social and Cultural Rights, adopted on 4 May 2001 (E/C.12/2001/10).**

Right to housing

41. The Committee is concerned about the:

(a) Persistent shortage of affordable housing, including rental housing and social housing;

(b) Increased number of homeless persons (estimated at 105,000 in 2014), mainly youth, victims of domestic violence, asylum seekers, and indigenous peoples;

(c) Proposed amendments to a local law in Melbourne that have the effect of criminalising homelessness;

(d) Overcrowding and severe shortage of housing for indigenous peoples living in remote areas;

(e) Continued practice of forced evictions disproportionately affecting indigenous peoples in Western Australia (art. 11).

42. **The Committee recommends that the State party develop a comprehensive national housing strategy that takes into account the human rights of those most vulnerable to homelessness, in particular the youth, victims of domestic violence, asylum seekers, and indigenous peoples. The Committee also recommends that the State party:**

(a) Continue to allocate adequate funding for the National Affordable Housing Agreement and the National Partnership Agreement on Homelessness to enable their effective implementation at the State and Territory levels;

(b) Increase its investments in affordable housing and social housing;

(c) Review existing and draft legislation in States and territories that have the effect of criminalising homelessness;

(d) Allocate sufficient financial resources and effectively implement the Remote Housing Strategy (2016) with a view to addressing the precarious housing conditions of indigenous peoples in remote areas;

(e) Expand social services' outreach to remote areas and refrain from relocating indigenous peoples due to geographical considerations;

(f) Consider the Committee's general comments No. 4 (1991) on the right to adequate housing, and No. 7 (1997) on forced evictions.

Right to health

43. The Committee expresses its concern at the limited progress in the implementation of the National Aboriginal and Torres Strait Islander Health Plan. As a result, indigenous peoples, especially those living in remote areas, continue encountering difficulties across a range of key health and wellbeing indicators. The Committee reiterates its concern about the limited health care services available to asylum seekers transferred by the State party to the regional processing centres and expresses its concern at the high levels of self-harm and suicide among them. The Committee is also concerned that the proposed programme of conditioning welfare benefits on the results of drug testing lacks a credible evidence base, may deepen stigma and drive drug users away from treatment (arts. 2 and 12).

44. **The Committee recommends that the State party redouble its efforts to achieve the 'Closing the Gap' health targets. The Committee also recommends that the State party allocate sufficient funding to the National Aboriginal and Torres Strait Islander Health Plan, including increased investment in the healthcare services in remote areas, and involve indigenous peoples and their representatives and civil society organizations in its implementation and evaluation. The Committee recommends that the State party repeal the envisioned drug-testing programme, and take effective steps to ensure refugees and asylum-seekers are able to exercise their right to the highest attainable standard of health, with particular attention to mental health services. In this regard, the State party is encouraged to seek cooperation with the UNHCR and WHO. The Committee refers the State party to its general comment No. 14 (2000) on the right to the highest attainable standard of physical and mental health.**

Mental health

45. The Committee is concerned about the large number of persons with cognitive or psychosocial disabilities in contact with the criminal justice system, as a victim or offender, in particular indigenous peoples. The Committee is particularly concerned that persons with disabilities who are deemed unfit to stand trial may be subject to indefinite detention without being convicted of a crime. The Committee is moreover concerned that mental health laws across many States and Territories in the State party allow compulsory treatment, including forced sterilisation and electroconvulsive therapy. The Committee is extremely concerned with regard to the negative impact of the prolonged detention of children in the regional processing centres on their mental health (arts 2 and 12).

46. **The Committee takes note of the State party's intention to address the situation of persons with disabilities in contact with the criminal justice system. It urges the State party to revise its approach to mental health and ensure full respect for the human rights of persons with cognitive or psychosocial disabilities. The Committee recommends that the State party:**

(a) Address the root causes of large number of persons with disabilities, notably indigenous peoples, in contact with the criminal justice system, as a victim or offender;

(b) Introduce the necessary legislative and policy changes to end indefinite detention of people with disabilities without conviction;

(c) Take effective measures to find alternative living solutions, and prioritise community-based living settings, for persons with cognitive or psychosocial disabilities;

(d) Repeal all legislation that authorises medical intervention without the free, prior and informed consent of the persons with disabilities concerned, abolishing the use of restraint and the enforced administration of intrusive and irreversible treatments. In this regard, the State party is encouraged to take into account the report of the 2013 Senate Community Affairs References Committee on 'Involuntary or coerced sterilisation of people with disabilities in Australia';

(e) Ensure access to appropriate child and family psychiatric care by asylum seekers and support for their social integration.

Obesity

47. The Committee is concerned about the increased number of obese persons in the State party (28% of adults), especially in remote areas, and among indigenous peoples as well as women of low-income groups. The Committee is also concerned about the considerable consumption of junk food and processed food that is contributing to an increase in non-communicable diseases, disproportionately affecting low-income groups (arts. 11 and 12).

48. **The Committee recommends that the State party redouble its efforts to combat obesity, particularly in remote areas and among indigenous peoples as well as women of low-income groups. It also recommends that the State party step up measures to restrict the consumption of junk foods and sweet beverages and consider adopting strict regulations on the marketing of such products, while ensuring improved access to healthy diets. The Committee refers the State party to its general comment No. 12 (1999) on the right to adequate food.**

Intersex persons

49. The Committee is concerned that children born with intersex variations are subject to early surgeries and medical interventions before they are able to provide full and informed consent (art. 12).

50. **The Committee recommends that the State party study and implement the recommendations put forward in the 2013 Senate Community Affairs References Committee report on the 'Involuntary or coerced sterilisation of intersex people in Australia'.**

Right to education

51. The Committee is concerned at the limited availability of culturally-appropriate early education programmes for indigenous children, especially in remote areas. The Committee is also concerned about lower educational achievements of indigenous children at all school levels, and that school attendance decreases with remoteness. Despite the information provided by the delegation, the Committee is concerned that a number of asylum seekers' children transferred by the State party to Nauru are in reality not attending school (arts 2, 13 and 14).

52. **The Committee recommends that the State party continue implementing the Remote School Attendance Strategy and the National Partnership Agreement on Universal Access to Early Childhood Education, with a particular focus on indigenous children. The Committee also recommends that the State party apply a culturally-appropriate approach in its early childhood programmes in remote areas, and ensure genuine engagement of the concerned indigenous peoples in the design, implementation and evaluation of related policies and programmes. The Committee urges the State party to take effective measures to ensure that all refugees and asylum seekers children within its territory or under its jurisdiction enjoy the right to education, without discrimination or harassment.**

53. The Committee is concerned about inequitable State funding to schools leading to a form of segregation in education in which public schools are under-funded and academic performance depends strongly on the income of the family, and to the concentration of

disadvantaged and marginalized students in under-funded public schools (arts 2, 13 and 14).

54. **The Committee appreciates the information provided during the dialogue about the State party's willingness to study and implement recommendations put forward in the Review of Funding for Schooling, the so-called Gonski review (2011). The Committee in particular recommends that the State party's investments in schools be students-needs based, and to that end, it encourages the State party to put in place an expert National Schools Resourcing Body, as recommended by the Gonski Review. The Committee encourages the State party to provide information in the next periodic report on the progress of the implementation of the recommendations of the Gonski Review.**

Inclusive education

55. While noting with appreciation that all state and territory jurisdictions have developed policies that support inclusive education practices, the Committee is concerned that many children with disabilities are in reality placed in special schools (arts. 2, 13 and 14).

56. **The Committee recommends that the State party take effective steps to ensure that children with disabilities, including those with cognitive impairments, can access inclusive education. In this regard, the State party is encouraged to implement the 2016 Senate Education and Employment References Committee Report 'Access to Real Learning: the impacts of policy, funding and culture on students with disability'.**

Indigenous languages

57. The Committee notes the State party's commitment to multiculturalism as indicated during the dialogue, as well as the development of the National Framework for Aboriginal Languages and Torres Strait Islander Languages in 2015. It, however, remains concerned that many indigenous languages are in danger of extinction and that only half of indigenous languages are still spoken (art. 15).

58. **The Committee recommends that the State party intensify its efforts to promote and preserve indigenous languages including through the effective implementation of the above-mentioned Framework, and take further steps to ensure that indigenous languages are systematically taught in schools with a significant presence of indigenous children.**

D. Other recommendations

59. **The Committee encourages the State party to consider ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.**

60. **The Committee recommends that the State party consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers, and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance.**

61. **The Committee recommends that the State party take fully into account its obligations under the Covenant and ensure the full enjoyment of the rights enshrined therein in the implementation of the 2030 Sustainable Development Agenda at the national level, with international assistance and cooperation when needed. Achievement of the Sustainable Development Goals would be significantly facilitated by the State party establishing independent mechanisms to monitor progress and treating beneficiaries of public programmes as rights holders who can claim entitlements. Implementing the Goals on the basis of the principles of participation, accountability and non-discrimination would ensure that no one is left behind.**

62. **The Committee recommends that the State party take steps to progressively develop and apply appropriate indicators on the implementation of economic, social**

and cultural rights in order to facilitate the assessment of progress achieved by the State party in complying with its obligations under the Covenant for various segments of the population. In that context, the Committee refers the State party to, inter alia, the conceptual and methodological framework on human rights indicators developed by the Office of the United Nations High Commissioner for Human Rights (see HRI/MC/2008/3).

63. **The Committee requests that the State party disseminate the present concluding observations widely at all levels of society, including at the federal, state and territory levels, particularly among parliamentarians, public officials and judicial authorities, and that it inform the Committee in its next periodic report about the steps taken to implement them. The Committee encourages the State party to engage with the Human Rights Commission, non-governmental organizations and other members of civil society in the follow-up to the present concluding observations and in the process of consultation at the national level prior to the submission of its next periodic report.**

64. **In light of the follow-up to concluding observations procedure adopted by the Committee, the State party is requested to provide, within 18 months of the adoption of the present concluding observations, information on the implementation of the recommendations made by the Committee in paragraphs 16 (b), 18 (b), and 32 (c) above.**

65. **The Committee requests the State party to submit its sixth periodic report by 30 June 2022, to be prepared in accordance with the reporting guidelines adopted by the Committee in 2008 (E/C.12/2008/2). It also invites the State party to update its common core document and in accordance with the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN/2/Rev.6, chap. I).**