



19 February 2010

Graeme Innes, AM
Disability Discrimination Commissioner &
Race Discrimination Commissioner
Australian Human Rights Commission
Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2001

Dear Commissioner Innes,

Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act 1975*

The National Association of Community Legal Centres ('NACLC')¹ and the National Welfare Rights Network ('NWRN')² welcome the introduction of and invitation to comment on the Commission's *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* ('Draft Guidelines').

1. Background and context

In separate submissions to the Senate Committee inquiry into the *Welfare Reform and Reinstatement of the Racial Discrimination Act Bill 2009* and related Bills ('the Bills')³ the Commission, NACLC and NWRN⁴ have each expressed concern that the proposed compulsory income management measures are inconsistent with the *Racial Discrimination Act 1975* ('RDA'). As the Commission is aware, the Bills propose to restore the operation of the RDA to the Northern Territory Emergency Response ('NTER') and extend compulsory income management to new categories of social security recipients across the NTER areas and the Northern Territory.⁵ NACLC and NWRN support the Commission's efforts to address the racial discrimination implications of compulsory income management, particularly in light of recent developments in this area.

NACLC and NWRN have three main concerns about the interaction between the proposed measures and the RDA which the Draft Guidelines, if properly followed, have the potential to address. First, the continuation of compulsory income management in NTER areas means that the provisions apply to communities that are predominantly populated by Aboriginal people, with the effect of denying these prescribed communities equality before, or equal protection by, the law.⁶

¹ Information about NACLC is in Appendix A.

² Information about NWRN is in Appendix B.

³ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009)*, *Other Legislation Amendment Act Bill 2009* and *Restoration of Racial Discrimination Act Bill 2009*.

⁴ For your reference, the submissions of NACLC and NWRN to the Senate Committee Inquiry into the Bills are attached to this letter at Appendix C & D, respectively.

⁵ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, ss 123UCA-C.

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, article 26.

Second, as part of the proposed Northern Territory and national roll out, the Government has not provided any detail about the basis on which it will choose one community for intervention over another. While a measure may have a varied purpose (in this case, to tackle ‘the destructive and intergenerational cycle of passive welfare’)⁷ it will still be discriminatory if the effect of the measure disproportionately impacts on a group based on race. NACLC and NWRN strongly believe that the proposed roll out of compulsory income management across the Northern Territory will continue to have a disproportionate impact on Aboriginal communities, given that these communities are more likely to experience disadvantage than the general population.

Third, the model of compulsory income management proposed by the Bills are not capable of being ‘special measures’ for the purposes of the RDA.⁸ NACLC and NWRN contend that the Government has failed to demonstrate that such measures confer preferential treatment or action that would promote substantive equality; nor has the Government obtained the requisite informed consent to the measures from affected communities.

Against this background, NACLC and NWRN have reviewed the Commission’s Draft Guidelines with a view to providing feedback on how they could be modified and improved as a useful and practical tool. We make six recommendations in relation to the following aspects of the Draft Guidelines:

- improving the accessibility of the Draft Guidelines for its intended audiences;
- including additional categories of discrimination;
- emphasising the need for the Government to demonstrate an evidence base;
- strengthening the provisions in relation to consultation;
- adding the key question in relation to the need for decision-makers to take a holistic approach to the impact of the measures on other rights and areas of disadvantage; and
- strengthening the test for unreasonableness in the context of determining whether the measures constitute indirect discrimination.

2. Accessibility

NACLC and NWRN recommend that the inclusion of case studies, examples and check lists (particularly in the context of legal tests or elements) will complement the comprehensive legal analysis, especially in Part 2 of the Draft Guidelines. We believe that this will assist decision-makers to consider the broader context of rights implications, especially where there are multiple rights and disadvantage issues that must be considered and weighed up; particularly at the individual level.

The Commission has also noted that the Draft Guidelines will not only serve as a tool for Parliament and Government, but are ‘intended to increase awareness among affected communities about the application of the RDA to income management regimes.’⁹ We strongly support the use of the Draft Guidelines as such a tool and make two suggestions to strengthen their accessibility for this key audience.

First, we recommend the publication of a plain English version of the Draft Guidelines that avoids legal language and which is capable of translation into the local languages of target communities. The case studies and examples referred to in the paragraph above would be particularly useful in this context. Second, we recommend that the Commission consider an alternative dissemination

⁷ Australian Government, *Policy Statement – Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (‘NTER Policy Statement 2009’), 2.

⁸ *Racial Discrimination Act 1975*, s 8.

⁹ Australian Human Rights Commission, *Draft RDA Guidelines for Income Management Measures (2009)*, [2].

strategy for target communities without written language and for individuals with limited or no literacy skills.

3. Additional Categories of Discrimination

NACLC and NWRN acknowledge that the Draft Guidelines were constructed in the context of the implementation of compulsory management in Aboriginal communities in the Northern Territory, Western Australia and Queensland. We support the Commission's efforts to address the ongoing racial discrimination implications of compulsory income management. However, we note the Commission's function to prepare and publish guidelines on a number of areas of discrimination, including disability, sex and gender.¹⁰ In their current form, the Draft Guidelines make only a brief mention of the need to consider the implications of measures on women and children and are silent on the issue of age and disability discrimination.

NACLC and NWRN suggest that given the complexities of multiple discrimination, disadvantage and rights issues across NTER areas, coupled with the proposed roll out of income management beyond the NTER prescribed areas, the Commission should consider expanding the Draft Guidelines to address additional categories of discrimination beyond racial discrimination, particularly disability discrimination. People with disability are likely to fall within the new income management categories at a higher rate than the general population. We are particularly concerned that the categories will have a disproportionate impact on people with mental illness or intellectual disability when compared to the general population.

Determining the proportionality and reasonableness of measures will be complicated when, for example, an individual is an Aboriginal person with disability, or the community has a high rate of disability. People with disability are more likely to need a level of flexibility in their income management to enable the purchase of modifications, aids and medical treatment. In their current form, the Draft Guidelines do not provide this flexibility, nor do they direct decision-makers to consider the intersection between these categories of discrimination and disadvantage.

Further, the requirement for 'informed consent' to a special measure is complicated in cases involving intellectual disability and mental illness. In their current form, the Draft Guidelines do not direct decision-makers to consider whether informed consent has been properly obtained in this context.

4. Evidence Base

The Draft Guidelines succinctly set out the legal test for determining whether a measure is a 'special measure' for the purposes of the RDA. We note that two core features across the elements are the requirement that the Government provide clear objectives against which an assessment of whether the elements have been met is capable of being made, and that assessments are underpinned by 'current and credible' evidence.¹¹

In our respective submissions to the Senate Committee inquiry, NACLC and NWRN noted the Government's lack of clear and objective criteria against which an assessment of compulsory income management measures can be made in order to establish the fact and extent of any benefit conferred, and the necessity and proportionality of the measure's impact. This is particularly important in the construction of a special measure as a temporary measure that avoids establishing

¹⁰ See, *Sex Discrimination Act 1984*, s 48(ga), *Age Discrimination Act 2004*, s 53(f) and *Disability Discrimination Act 1992*, s 67(k).

¹¹ Australian Human Rights Commission, *Draft RDA Guidelines for Income Management Measures (2009)*, [22].

separate rights permanently for different racial groups.¹² While temporary does not necessarily mean that the measures will be short term, the current lack of clear and measurable goals for achieving the broad objectives of compulsory income management make it difficult to establish what must occur for the Government to be satisfied and lift the measures, or provide opportunities to opt-out, both at the community and individual levels.

Accordingly, NACLC and NWRN recommend that the Draft Guideline's broad requirement of 'current and credible' evidence be supported by a requirement that the Government set out clear objectives for the measures and provide both qualitative and quantitative independent sources of evidence which are local or locally acceptable and capable of independent assessment. This suggestion arises from the experience of the disability discrimination legal services in insurance discrimination matters where actuarial evidence is used to justify direct discrimination. In our experience, much of the data in these cases is of dubious relevance, as it is often out of date or has been compiled in another region, such as Europe.

We acknowledge that there will be significant challenges associated with obtaining evidence from remote and culturally and linguistically diverse communities. It is nonetheless important that decision-makers are directed to making efforts to obtain such evidence to avoid a reversion to less relevant data or anecdotal evidence, as is currently the case.

5. Consultation

The Draft Guidelines note the importance of 'free, prior and informed consent' of affected Aboriginal communities to special measures.¹³ The Government has claimed that the requisite consent was obtained during its consultations with NTER prescribed communities across the Northern Territory. However, the consultation process has been criticised as being 'insufficient in quality as indicating consent by Aboriginal people in the Northern Territory to special measures for the purposes of the RDA',¹⁴ a view shared by NACLC and NWRN.¹⁵

In this context, we recommend that the Draft Guidelines provide more direction to decision-makers on the following aspects of consultation and consent:

- how communities are defined and thus identified;
- not to assume a high level of homogeneity within communities;
- the needs of the community may not be the same as the needs of individuals within that community (that is, the extent to which a majority or 'community view' should be used to determine questions of proportionality, benefit, adequate advancement and consent);
- difficulties may arise where consultation and consent is in relation to a person with disability or linguistic/literacy issues (such as the use of English as a second or third language, or not at all);
- the importance of involving affected communities in every stage of the consultation process, particularly with respect to influencing decision-making; and
- clearer guidelines on how information collected during consultations will be fed back to communities and utilised by decision-makers.

¹² Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples (1997)*.

¹³ *Ibid*, [36]. See also, *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J at 159 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), 261.

¹⁴ Jumbunna Indigenous House of Learning, *Will they be heard? A response to the NTER Consultations, June to August 2009* (November 2009), [40].

¹⁵ See National Association of Community Legal Centres, *Submission to the Australian Senate's Community Affairs Legislation Committee's Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and related Bills* (February 2010), [35].

We also note that the focus on community consultations obscures the impact of income management measures on individuals; yet it is at the individual level that the impact of income management is most likely to be felt. For example, income management is highly likely to impact on the right of people with disability to an adequate standard of living and social protection, especially as people with disability are more likely to need flexibility in their financial management to access treatment and aid.¹⁶ Accordingly, practical implementation of the measures will require a level of flexibility and individual assessment to provide an individual right to opt out which is not currently provided for by the Draft Guidelines.

6. Key Questions

NACLC and NWRN suggest that the Commission consider an additional key question that directs decision-makers to identify other relevant rights or areas of disadvantage that may be impacted by compulsory income management and to make an assessment on the proportionality of the measures on the enjoyment of those rights. We believe that this additional consideration will encourage decision-makers to take a more holistic view of the implications on the rights and needs of individuals and communities, rather than limiting their consideration to questions of race discrimination (or discrimination generally if the Commission adopts additional categories of discrimination in the final version of the Guidelines).

We also recommend that the Draft Guidelines provide decision-makers with more guidance on how to address and balance the competing rights of individuals who will be differently affected by the same decision made at the community level.

Finally, the additional key question should be supported by more guidance for decision-makers about how to assess the proportionality and reasonableness of measures where individuals and communities face multiple forms of disadvantage. The intersection between race and literacy, disability, linguistic disadvantage, domestic violence, etc is difficult and it would not be possible in such an assessment process to consider the impact of the proposed measure without taking each of the elements of disadvantage into account. However, in their current form, the Guidelines do not provide enough direction on how to consider non-race based disadvantage.

7. The test for unreasonableness

NACLC and NWRN suggest that the Commission provide more guidance on what will be considered by decision-makers as an 'unreasonable' measure in the context of indirect discrimination. We recommend that the Draft Guidelines stress that unreasonableness involves an assessment of the circumstances of the individual or community, as well as the general administrative circumstances of the measure. This is an area where examples or case studies would be useful. What is reasonable for a young Aboriginal man living in a small community in the Northern Territory may not be considered reasonable in the context of an older woman living with disability in a city.

We also recommend that the Draft Guidelines provide that where a measure is ongoing, circumstances may change so that a previously reasonable measure might become unreasonable (for example, a person acquiring a disability while on income management). In this context, clear guidelines on the ability of individuals to reassess, withdraw consent or opt out of the measures is essential.

¹⁶ Convention on the Rights of Persons with Disability, article 28.

8. Conclusion

NACLC and NWRN oppose the Government's decision to continue compulsory income management in some of the most disadvantaged communities in Australia. While we applaud the Commission's efforts to use its function to promote a rights-based approach implementation, the Government's use of *compulsory* income management as its flagship policy in assisting these vulnerable populations to meet development goals remains of significant concern to NACLC and NWRN's networks.

If the Government really wants to ensure that the rights of affected communities and individuals are protected, it must rethink its current policy and redraft the Bills to ensure that income management measures are *voluntary* and part of a broader strategy to improve pathways out of poverty, social exclusion and disadvantage.

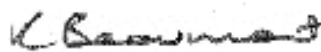
We recognise that since the beginning of the NTER, the Commission has consistently voiced its opposition to the Government's imposition of compulsory income management. It is a position that NACLC and NWRN will continue to support in both our own work and in supporting the work of the Commission through initiatives such as this public consultation on the Draft Guidelines, our position on which is set out in this letter for your consideration.

We welcome any questions or inquiries in relation to our recommendations and look forward to the publication of the final version.

Yours sincerely



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National Convenor
National Association of CLCs



Kate Beaumont
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National Welfare Rights Network

Appendix A

About the National Association of Community Legal Centres



About Community Legal Centres

Community Legal Centres (CLCs') are not for profit, community based organisations that provide free legal advice, information, education and referrals to their client communities, focusing on disadvantaged members of the Australian community and those with special needs. For over thirty years, CLCs have been working for a rights-based approach and equitable access to justice for all Australians and to prevent social exclusion. Many CLCs have tailored specific programs and service models for Aboriginal and Torres Strait Islander people and communities and for people with disability.

CLCs are also actively involved in law reform initiatives that flow from their advice and casework activities and other contacts with their community and client base. Law reform is integral to the fundamental goals of CLCs to protect human rights and ensure equitable access to justice, to their holistic approach to problem solving and their strategies of early intervention and prevention. During 2009/8/9, CLCs finalised approximately 1000 law reform projects.¹⁷

About the National Association of Community Legal Centres

NACLC is the peak national organization representing CLCs in Australia. Our members are the state and territory associations of CLCs that, together, represent over 200 CLCs nationally. NACLC's purpose is to assist disadvantaged and marginalized people in the Australian community obtain access to legal services by:

- supporting and assisting CLCs to provide these services;
- providing a national forum for CLCs;
- developing and coordinating national CLC policy; and
- advancing the interests of CLCs within Australia.

As part of its national coordination role, NACLC makes and endorses law reform and policy submissions on behalf of the CLC sector.

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¹⁷ National Association of Community Legal Centres, *2008/9 Annual Report*, 13.

Appendix B

About the National Welfare Rights Network



The NWRN is an incorporated national peak body representing Welfare Rights Centres throughout Australia. NWRN's members are specialists in Social Security law and policy and its administration by Centrelink and provide direct advice, assistance and representation to clients on a daily basis facing Social Security and Centrelink related problems. The NWRN draws on this daily casework experience to analyse systemic problems and trends, legislation and service delivery issues and raises these with Centrelink, relevant Government Departments and Ministers in order to achieve reform and a better system for all.

Based on the experience of clients of NWRN members, the Network also undertakes research and analysis, develops policies and position papers, advocates for reforms to law, policy and administrative practice and participates in campaigns consistent with its aim to reduce poverty, hardship and inequality in Australia and to build a fair, inclusive and sustainable Australia underpinned by a comprehensive, rights based Social Security safety net for all.

The NWRN advocates that the Social Security system in Australia should be characterized by an uncompromising recognition of the following rights:

- the right of all people in need to an adequate level of income support which is protected by law;
- the right of people to be treated with respect and dignity by Centrelink and those administering the Social Security system;
- the right to accessible information about Social Security rights and entitlements, obligations and responsibilities;
- the right to receive prompt and appropriate service and Social Security payments without delay;
- the right to a free, independent, informal, efficient and fair appeal system;
- right to an independent complaints system;
- the right to independent advice and representation; and
- the right to natural justice and procedure fairness.

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Appendix C

Submission of NACLC to the Senate Community Affairs Legislation Committee's Inquiry into the Bills

Appendix D

Submission of NWRN to the Senate Community Affairs Legislation Committee's Inquiry into the Bills