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## Human Rights Law Centre Submission

Senate Community Affairs Legislation Committee Inquiry into  
the Social Services Legislation Amendment (Welfare Reform) Bill  
2017

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## Introduction

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to comment on the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (**the Bill**).

The HRLC has been working closely with a number of Aboriginal organisations in the Northern Territory in relation to the Federal Government's remote Community Development Program (**CDP**) and its detrimental impact on remote Aboriginal communities. Our comments are therefore informed by the impact that the Bill would have on remote Aboriginal and Torres Strait Islander communities subject to CDP. We also confine our comments to Schedules 12 to 15 of the Bill.

In summary, the HRLC opposed Schedules 12 to 15 of the Bill and urges the Committee to recommend that the Bill not be passed if these Schedules remain part of the Bill.

## The remote Community Development Program should be abandoned

CDP is a racially discriminatory program. Aboriginal and Torres Strait Islander people make up around 83 per cent of people subject to CDP.<sup>1</sup> CDP requires participants to undertake up to 500 or 760 more hours of work activities per year (depending on age) for the same amount of social security income as participants in the non-remote 'Jobactive' program, most of whom are non-Indigenous.<sup>2</sup>

We **attach** a copy of our submission to the current inquiry into CDP by the Senate Standing Committee on Finance and Public Administration. The submission calls for CDP to be abandoned and replaced with a fair and human rights compliant model for community and economic development in remote communities, which is consistent with principles of self-determination and community control. At an absolute minimum, the Federal Government should immediately reduce the work activity obligations of CDP participants to no more than that which applies to Jobactive participants in non-remote areas.

An alternative community-led model, the Remote Development and Employment Scheme, has been proposed by the Aboriginal Peak Organisations Northern Territory, which the HRLC endorses.<sup>3</sup>

## Impact of the Bill on remote Aboriginal and Torres Strait Islander communities

The above comments about CDP provide important context for our opposition to Schedules 12 to 15 of the Bill. These Schedules include proposals to:

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<sup>1</sup> Lisa Fowkes, *Update on Impact of the Community Development Programme on Social Security Penalties* (8 September 2016) 4.

<sup>2</sup> CDP participants must do 25 hours of work activities per week for at least 46 weeks per year: Australian Government, *Community Development Programme Guidelines Handbook* (effective 7 September 2015); Australian Government, *Guide to Social Security Law* (31 May 2017) 3.2.9.70. In contrast, non-remote Jobactive participants aged between 18 and 29 years are only required to do 25 hours per week for 26 weeks of the year, and those aged 30 to 49 years are currently required to do 15 hours per week for 26 weeks each year: Australian Government, *Guide to Social Security Law* (31 May 2017) 3.2.10.30.

<sup>3</sup> See Aboriginal Peak Organisations Northern Territory, Submission 37 to Senate Standing Committee on Finance and Public Administration, *Inquiry into the Appropriateness and Effectiveness of the Objectives, Design, Implementation and Evaluation of the Community Development Programme (CDP)* (22 June 2017).

- introduce drug testing and income management trials (Schedule 12);
- remove temporary drug or alcohol dependence exemptions to activity requirements (Schedule 13);
- change how often drug or alcohol dependence can be used as a reasonable excuse for non-compliance with activity requirements (Schedule 14); and
- introduce a 'targeted compliance framework' (Schedule 15).

The Bill excludes CDP participants from measures in Schedules 13 and 15 of the Bill. This is done in Schedule 13 by:

- creating a new term in the *Social Security Act 1991* (Cth) – 'declared program participant'; and
- giving the Secretary an exceptionally broad power to determine, by legislative instrument, that CDP participants are 'declared program participants' and also to modify how social security law will apply to them (**proposed section 28C**).<sup>4</sup>

While the Explanatory Memorandum to the Bill states that CDP areas would also be excluded from the drug testing trial (Schedule 12), this is not explicitly stated in the Bill.<sup>5</sup> In addition, changes to how often drug or alcohol dependence can be used as a reasonable excuse (Schedule 14) *would* apply to CDP participants.

The Minister for Indigenous Affairs indicated that CDP participants would be excluded from some of the changes in the Bill because the Department of Prime Minister and Cabinet is currently undertaking a review of CDP.<sup>6</sup> Unfortunately, there has been a lack of transparency and clarity around the process for the review and to date, a failure to engage with CDP participants and very limited engagement with providers.

## Schedules 12 to 15 of the Bill are opposed

The HRLC opposes the changes in Schedules 12 to 15 because:

- the measures in Schedules 12 to 15 of the Bill would have a detrimental impact on people in remote Aboriginal and Torres Strait Islander communities; and
- the power given to the Secretary to exclude CDP participants from some measures in the Bill is far broader than what is necessary and delegates far too much power in an unelected government official to create different classes of social security recipients with different rights and obligations with only limited Parliamentary scrutiny.

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<sup>4</sup> Social Security Legislation Amendment (Welfare Reform) Bill 2017, sch 13, cl 1-2. Proposed section 28C would give the Secretary the power to determine the operation of social security law to declared program participants and to modify of how social security law applies to them. The Government's intention is that CDP participants would be 'declared program participants': Explanatory Memorandum, Social Security Legislation Amendment (Welfare Reform) Bill 2017, 81.

<sup>5</sup> Explanatory Memorandum, Social Security Legislation Amendment (Welfare Reform) Bill 2017, 62.

<sup>6</sup> Nigel Scullion, '2017-18 Budget: Community Development Programme' (Media Release, 9 May 2017) <http://www.nigelscullion.com/media+hub/2017+-+18+Budget+Community+Development+Programme>.

More broadly, the HRLC notes the lack of evidence to support the proposals in Schedules 12 to 15 of the Bill and supports the submissions and recommendations of the Australian Council for Social Services and Law Council of Australia.

**The measures in Schedules 12 to 15 of the Bill will have a detrimental impact on people in remote communities.**

The changes proposed to the compliance framework, drug and alcohol dependence exemptions and reasonable excuses would make it even more difficult for Aboriginal and Torres Strait Islander people in remote communities to comply with existing unfair and discriminatory work activity obligations and result in more financial penalties. CDP participants are already around 20 times more likely to receive a penalty for non-compliance and in 2015-16, 90 per cent of CDP participants penalised were Aboriginal and Torres Strait Islander.<sup>7</sup>

The proposed drug testing and income management trial provisions are inconsistent with rights to procedural fairness, privacy, social security and non-discrimination.<sup>8</sup> People in remote Aboriginal communities are already subject to discriminatory obligations to work more hours for the same payment as those in non-remote areas. Many are also already subject to income management. Imposing drug testing and income management trials into CDP areas would compound that discrimination and result in even greater denial of basic rights.

**The Bill gives an unelected Government official too much power to change social security law**

As noted above, the Bill would exclude CDP participants from a harshening of the compliance framework and the removal of drug and alcohol dependence exemptions for activity requirements. However, the exceptionally broad power given to the Secretary in proposed section 28C to determine *who* 'declared program participants' are and *how* the social security law applies to them goes far beyond what is necessary to achieve the stated purpose of excluding CDP participants from these measures.

More fundamentally, it is a power to modify how social security rights and obligations apply, not only to CDP participants, but to other classes of people whom the Federal Government may decide in the future should have different entitlements or be subject to different conditions under social security law.

Moreover, it is a power delegated to the unelected executive – the Secretary would determine through legislative instrument how social security law should apply to CDP participants and other 'declared program participants'. While legislative instruments can usually be disallowed by the Parliament, it is a process that entails far less Parliamentary oversight and scrutiny than passing a Bill.

The extraordinarily broad power given to the Secretary in proposed section 28C creates a dangerous precedent. It would make it easier for future Governments to make unfavourable changes to how basic social security entitlements and obligations apply to remote Aboriginal and Torres Strait Islander communities, and any other classes of people determined by the Secretary to be 'declared program participants'.

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<sup>7</sup> Based on data for December 2016 quarter: Department of Employment, 'Job Seeker Compliance Data – December Quarter 2016', table 17, available <https://www.employment.gov.au/job-seeker-compliance-data>. See also Lisa Fowkes, *Social Security Penalties Applied to Participants in the Community Development Programme. Update Including Data for the Quarter Ending December 2016* (24 April 2017).

<sup>8</sup> See further submission of the Law Council of Australia to Senate Community Affairs Legislation Committee Inquiry into the Social Security Legislation Amendment (Welfare Reform) Bill 2017.

This is not the Government's first attempt to create a broad power to change how social security law applies to CDP participants through legislative instrument. A Bill that sought to give the Minister for Indigenous Affairs a similarly broad power was widely criticised and failed to pass through Parliament prior to the 2016 Federal Election.<sup>9</sup>

Social security is a basic human right and must be equally accessible to all.<sup>10</sup> Any changes to basic social security rights and obligations should be subject the proper law making process by Federal Parliament, preceded by thorough and transparent consultation with affected individuals and communities, rather than determined by unelected government officials.

***Recommendation:***

That the Senate Community Affairs Legislation Committee recommend that the Senate not pass the Welfare Reform Bill if Schedules 12 to 15 remain part of the Bill.

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<sup>9</sup> Social Security Legislation Amendment (Community Development Program) Bill 2015. For a summary of the issues, see James Haughton, 'Social Security Legislation Amendment (Community Development Program) Bill 2015' (Bills Digest No 93, Parliamentary Library, Parliament of Australia, 29 February 2016).

<sup>10</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (entered into force 3 January 1976), arts 3, 9.