

26 September 2019

Committee Chair  
Senate Community Affairs Legislation Committee  
Parliament House  
CANBERRA ACT 2600

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

Dear Committee Chair

**Response to question on notice from Committee hearing on 23 September 2019**

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Please find below question on notice and response arising from the Committee hearing on 23 September 2019 in relation to the Committee's Inquiry into the *Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019*.

**Question on notice**

Hansard has recorded the question on notice as follows:

“Senator SIEWERT: This is a question to both of you. The legislation says, in section 39, 'for persons who are trial participants', and then when you go to the EM it says 'for trial participants under 124PGE(1) for specific communities in the NT to reflect community requests'. That's about increasing the percentage to 100 per cent not just for a person; that could be interpreted as being for the whole of that specific community. Am I right in interpreting it in that way?

Ms C Mills : I believe so. Adrienne?

Adrienne Walters : On a reading of it right now, I think it could be applied to all persons who are trial participants under 124PGE(1), which would be the bulk of people in the Northern Territory.

Senator SIEWERT: Or in a specific community?

Adrienne Walters : I could take that on notice and come back to you.”

**Response to question on notice**

Clause 39 of the Bill would insert new subsections 124PJ(2A) and (2B) into the *Social Security (Administration) Act 1999* (Cth). Proposed subsection 124PJ(2A) would provide a power for the Minister to make a determination by *notifiable instrument*:

- “for persons who are *trial participants under subsection 124PGE(1)* and whose usual place of residence is, becomes or was *within an area specified in the instrument*”,
- that does the following:
  - varies the percentage amount that is restricted (under proposed subsection 124PJ(1B)(a)) to an amount higher than 50% and less than or equal to 100%; and
  - varies the percentage that is not restricted to a percentage that is below 50%, including 0% (emphasis added).

The class of persons to whom the determination could be made will therefore depend on the area specified in the instrument, which is determined by the Minister. There is no guidance or apparent limitation on the

size of that area except that it can only apply to trial participants under subsection 124PGE(1),<sup>1</sup> which in turn sets out broad criteria for mandatory participation in the Cashless Debit Card trial, which would apply throughout the Northern Territory.

Accordingly, the Minister could specify the whole of the Northern Territory, or a specific community or local government area, in the instrument, and the determination would apply to everyone who is or was living in that area and who is a trial participant under subsection 124PGE(1).

There is a reference in the Explanatory Memorandum to this power enabling the Minister to respond to “community requests”, or requests of state and territory authorities.<sup>2</sup> Given the power imbalance between governments and Aboriginal people in the Northern Territory, and the history of Income Management and other discriminatory measures being imposed on Aboriginal communities without their consent or request, a reference to “community requests” in the Explanatory Memorandum (and not the Bill itself) cannot be considered a safeguard in any meaningful respect.

I note that in my evidence to the Committee on 23 September 2019, I referred to sections 17 and 19 of the *Legislation Act 2003* (Cth) as providing little in the way of safeguards around consultation. However, upon review it has become apparent that sections 17 and 19 of the *Legislation Act* would not be relevant because they apply to a *legislative* instrument. In contrast, proposed subsections 124PJ(2A) and (2B) refer to a determination made by *notifiable* instrument.

Even if, hypothetically, proposed subsections 124PJ(2A) and (2B) did refer to a determination by *legislative* instrument, there is no meaningful or enforceable obligation on the Minister to consult affected communities – the *Legislation Act* is clear that a failure to consult “does not affect the validity or enforceability of a legislative instrument”.<sup>3</sup>

Finally, it should be noted that the Standing Committee for the Scrutiny of Bills has also raised concern about the power that would be given to the Minister through proposed subsections 124PH(2A) and (2B). The Committee noted “little to no guidance on the face of the bill as to how this power is to be exercised” and that “notifiable instruments are not subject to the tabling, disallowance, and sunseting requirements that apply to legislative instruments under the *Legislation Act 2003*. Parliamentary scrutiny of the determinations would therefore be limited”.<sup>4</sup>

Proposed subsections 124PJ(2A) and (2B) would place far too much power in the hands of a Minister. It is a power that could potentially be used to make a determination affecting some 20,000 people, with far-reaching implications for their right autonomy and to manage their private and family lives. Such matters should never be left to a notifiable instrument. If the Government wants to restrict human rights in such a way, it should, at a minimum, be required to bring a bill before Parliament for robust scrutiny and debate, accompanied by a statement of compatibility with human rights.

## Contact

Should you have any queries about this response, please contact Adrienne Walters, Senior Lawyer,

Sincerely,

Adrienne Walters  
Senior Lawyer  
Human Rights Law Centre

<sup>1</sup> There is a separate power, in proposed subsection 124PJ(2B), which would apply to people who are Northern Territory trial participants by virtue of the participation criteria in proposed subsections 124PGE(2) and (3).

<sup>2</sup> Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, Explanatory Memorandum, 13.

<sup>3</sup> *Legislation Act 2003* (Cth) ss 19.

<sup>4</sup> Parliament of Australia, The Senate, Standing Committee for the Scrutiny of Bills (Scrutiny Digest 6 of 2019, 18 September 2019) [1.54]-[1.55].