

6 February 2012

Committee Secretary
Senate Standing Committees on Community Affairs
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Dear Committee Secretary

Submission on Social Security Legislation Administration Bill 2011

About National Legal Aid and legal aid commissions

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

National Legal Aid (NLA) welcomes the opportunity to comment on the *Social Security Legislation Amendment Bill 2011*.

Australian legal aid commissions have significant experience in providing assistance, advice and representation to people who are reliant on social security income. Our organisations provide assistance to clients throughout the states and territories (other than the Northern Territory Legal Aid, who refer cases to Welfare Rights Service or ATSILS) with administrative reviews of Centrelink decisions, social security prosecutions and advice on entitlements and obligations. In 2010/11 NSW Legal Aid and Victoria Legal Aid provided assistance to over 5,000 people in social security matters. More broadly, the majority of all legal aid clients are reliant on some form of social security benefit.

Legal assistance in this area reflects the fact that people who receive social security payments by definition suffer substantial disadvantage in forms such as unemployment and disability. It also recognises that the social security system is a complex system, frequently amended, contained in several pieces of legislation and difficult for people to navigate. Importantly, assistance with social security matters is articulated as a Commonwealth priority under the National Partnership Agreement on Legal Assistance Services.

Summary

The comments contained in the following submission are based on broad practice experience in this area and work across different communities with people who are vulnerable, disadvantaged and reliant on social security as their primary source of income.

Our experience shows that income management has the potential to be overbearing and overly intrusive, and to stigmatise and disempower vulnerable people. The submission notes our preference for proper funding of support services and investment in financial literacy to help people manage their income in a sustainable way.

Where income management is extended as proposed by the Bill, we are concerned by the new external referral power and the limited access to review rights. Our practical experience shows that social security decisions are particularly vulnerable to error. Indeed, the fallibility of Centrelink's decision making processes is illustrated by a Commonwealth Ombudsman's report of March 2011,¹ which identified 'systemic weakness' in Centrelink's review processes, including a lack of transparency and insufficient information provided to customers about their review rights – leading to delays and inaction. The report found that in 2009/10, approximately 47% of Centrelink decisions were changed on internal review.² The same fallibility is demonstrated by statistics from Centrelink annual reports, which show that over 1 in 3 Centrelink decisions are overturned at each of the several tiers of review.

In light of this, the current proposal to limit the review and appeals for process for income management raises serious concerns about proper administrative decision making and the principles of access to justice. Access to legal advice and representation for people who are income managed is an important accountability mechanism when planning to extend a regime which already has proven flaws.

Punitive Effects of Income Management

We are concerned that income management may increasingly become an automatic and arbitrary tool of administrative decision making which bypasses other more appropriate alternatives.

¹ Commonwealth Ombudsman, Report No. 04|2011: Centrelink: The Right Of Review – Having Choices, Making Choices

² Ibid, page 19

Our extensive work with clients from poor and vulnerable backgrounds has demonstrated that long term positive outcomes in relation to responsible income management are best achieved through adequate income, financial literacy and access to relevant services which support individuals to improve their financial management skills and make better financial decisions. Notwithstanding the myriad complex factors which contribute to poverty, those who experience financial hardship require practical support to deal with financial problems and learn to manage money within realistic budgets.

We submit that existing facilities such as Centrepay should be optimised as a voluntary measure for participants to organise their financial affairs and meet their financial commitments in a timely manner.

We are further concerned that compulsory income management will result in a number of undesirable effects on proposed participants. For instance, it was suggested by community groups in Shepparton - one of the recommended locations under the Bill - that the required use of the 'Basics Card' to purchase necessities in a country area would lead to stigmatisation of participants and their children. Moreover, the imposition of compulsory income management on individuals who belong to groups or communities that already experience discrimination is likely to compound disadvantage and alienation rather than alleviate it.

Place-based income management

We are similarly concerned by the proposed amendments to Division 2, subdivision A of the *Administration Act* which will allow income management to continue if a person moves out of a declared income management area. The social stigma which can result from being income managed will potentially be heightened if an income managed person moves to a community where the income management regime is not practiced.

People that move from a declared income management area will also have fewer choices about how they can spend their payments. As noted above, the availability of the Basics Card at a wide range of outlets is very important, especially for foodstuffs. We are concerned that people will be forced to use large retailers that have 'signed up' for the card (that are located throughout Australia), therefore limiting their choice of retail outlet, their choice of foodstuff and possibly paying higher prices.

Implications for family violence

NLA statistics show that there has been a significant increase in demand for family violence services over recent years. In Victoria, there was a 23% increase in demand in 2010/11 for family violence services compared to the previous year. In 2009/10, Legal Aid Queensland saw demand for domestic violence services increase by 12.32%, and the Northern Territory and Australian Capital Territory have also reported increases in demand for family violence services.

While complaints of family violence have increased in recent times, our extensive work with victims of family violence shows that the issue is still under reported. We are concerned that the risk of being referred for income management may deter victims of family violence from contacting Centrelink social workers or DHS workers where they are exposed to harm or the threat of harm.

We note that although the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2010* do not expressly refer to family violence as an indicator of vulnerability, our client experience highlights that the common indicators of vulnerability such as financial exploitation, financial hardship, failure to undertake reasonable self-care and risk of homelessness often form the factual matrix of an underlying family violence issue. Clear guidelines should be set out stipulating how this sensitive situation would be taken into account in any income management decision-making to promote the wishes and best interests of the victims of family violence and their children.

New external referral power

With respect to the proposed extension of income management, we are particularly concerned with the amendment to Part 3B of the *Social Security (Administration) Act 1999* (the "Administration Act") enabling income management referrals from state and territory agencies [proposed section 123FUAA of the Administration Act].

In essence, the Bill proposes to amend the Administration Act so that income management can be triggered by referrals from state and territory agencies. The Bill confers delegated powers to enable state and territory agencies to place people on income management, with Centrelink unable to question or challenge the external agency's decision.

We are concerned that if the legislation is passed, the Minister will have unprecedented powers to give a decision-making authority to control a person's income support payments to any state or territory agency that the Minister chooses. We believe it sets a dangerous precedent and should be avoided.

No access to appeal rights under social security law

By conferring the power to place a person on income management to external agencies, social security recipients will be denied the right to challenge that decision under social security law.

Currently, social security recipients determined to be "vulnerable" by a Centrelink social worker and placed onto income management under the "Vulnerable Welfare Payment Recipients Measure" have access to the full range of free appeal and review rights under social security law. They can seek internal review by an Authorised Review Officer and then external review by the Social Security Appeals Tribunal and finally the Administrative Appeals Tribunal. They can challenge the decision to put them onto income management. They also have the right, every 90 days, to have their circumstances reviewed to see if the decision to impose income management should be revoked.

As discussed above, social security law is complex and the Centrelink error rate is high. Social security recipients "required" to be on income management by an external agency will not have the same rights. They will not have access to the free, quick and informal review rights provided under social security law.

It is crucial that every person who has income management imposed on them is given the opportunity to challenge that decision. If external agencies can "require" Centrelink to income manage a person's payments that opportunity may be lost.

Furthermore, under the current proposal, appeal and review rights are completely unknown as it will depend on the agency given the power to require income management, via subsequent legislative instruments. Depending on the particular agency there may be significant cost and difficulties for people seeking to challenge a decision made by an external agency to compulsory income manage payments.

In the Northern Territory, where there is no system of administrative review for NT administrative decisions, this should be in place before this power is afforded to an NT decision making body.³

Our experience in the social security system shows that many people on social security have little understanding of their appeal rights or report a reluctance to challenge the system less they be further penalised. A 2006 Law and Justice Foundation of NSW survey found that nearly one third of individuals did nothing in response to a civil legal event which involved government decision making.⁴ If many of those who are adversely affected by a decision of a government agency are likely to do nothing, the importance of making the right decision in the first place is significantly increased.

Different decision-making processes and guidelines

A further problem with essentially 'outsourcing' decisions about who should be income managed is that decision-making processes and guidelines will be set by each external agency. It would appear that the Commonwealth government will have no control or say over those decision-making processes or guidelines. Agencies may have different and possibly inconsistent guidelines about who should be referred for income management.

Even more troubling is that an agency may not have *any* decision-making guidelines and so whether a social security recipient is subjected to income management may depend on the attitude of an individual worker in an agency.

³ NT Law Reform Committee *Report on Review of Administrative Decisions and an Administrative Tribunal* September 2004.

⁴ Law and Justice Foundation, *Justice Made to Measure, NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p99.

Such proposals are contrary to the principles of good administrative decision making and the commitment to improved primary decision making which are outlined in the Federal Attorney-General's 2008 Access to Justice Framework.

"It is essential that administrative decisions are made in accordance with the principle of the rule of law, as it is fundamental to Australia's democracy, economy and prosperity. Therefore one critical element in improving access to justice is ensuring that decision makers have a strong understanding of the legal and administrative framework under which decisions are made."⁵

Under the current situation where a person is to be considered for income management under the "vulnerable category" Centrelink social workers must make determinations after considering detailed policy guidelines contained in the Guide to Social Security Law. This promotes consistency and transparency in decision-making. By 'outsourcing' the power to require a person to be income managed there is a substantial risk of inconsistency and lack of transparency in decision-making.

Even if guidelines and appeal or review processes are available within a particular agency, we are concerned that information about the processes may not be readily accessible to people subjected to income management.

It is less than six months from the proposed commencement date of the introduction of income management of social security recipients living in Bankstown. Legal Aid NSW has been unable to locate any information about the process for income management decisions that will be made by the NSW Department of Community Services, relating to child protection concerns. There is no evidence of any decision-making guidelines or processes or any appeal or review rights.

Types of external agencies

Given the concerns raised above, we consider that there should be a restriction on the types of state and territory agencies that can be given income management decision-making powers. It should be restricted to agencies/bodies that have free and accessible appeal mechanisms that are comparable to the appeal rights available under social security law. This will ensure that a person being referred for income management has the opportunity to respond and challenge the decision.

Using the "Vulnerable Welfare Payment Recipients Measure"

We understand that Centrelink may benefit from agencies referring people to it that the agency believes would benefit from income management. Centrelink could then investigate the person's circumstances to determine if they should be income managed under the "Vulnerable Welfare Payment Recipients Measure". However, the external referral power requires Centrelink to accept the referral and prevents Centrelink from scrutinising the agency's decision.

⁵ A Strategic Framework for Access to Justice in the Federal Civil Justice System, p131

Increasing reliance on legislative instruments

We are similarly concerned with what appears to be an increasing reliance on legislative instruments in the social security jurisdiction. As noted above, the social security landscape is already extremely complex and difficult to navigate. This Bill introduces the need for legislative instruments:

- to specify which state and territory authorities can make referrals for income management (proposed section 123TGAA); and
- to specify "deductable portions" (proposed section 123XPAA).

Increasing use of legislative instruments makes access to the law more difficult. There is a need to ensure legislative instruments can be found easily by members of the public and advisers. Legislative instruments result in less scrutiny from members of Parliament and the community.

We propose that the state and territory agencies that can make income management decisions should be individually listed in the Administration Act, in the way that the Queensland Commission is currently listed.

The capacity for the Minister to determine different percentage portions [new section 123XPAA] may result in overly complex administration of an affected person's income which they may find difficult to comprehend.

Impact on need for legal services

NLA believes that the expansion of income management into new areas will create a greater demand for advice and representation services by those adversely affected by decisions to put them on income management. Centrelink recipients identified as "vulnerable" and placed onto income management by Centrelink will have the right to seek review of that decision. Recipients required to be on income management by external agencies, such as child protection agencies, may also have appeal rights. It is important for people to have access to legal advice for a matter which affects them in a fundamental way.

There will also be a need for extensive community legal education by organisations such as legal aid and welfare rights services to explain the income management scheme and to explain rights to review decisions.

Additional funding is required for legal services in the newly affected areas to deal with the increased demands. We understand that this was done when income management was introduced in prescribed communities in the Northern Territory, and we would expect that a similar approach should be taken in the additionally affected areas.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely

Andrew Crockett
Chair