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Committee Secretary
Senate Standing Committees on Community Affairs
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Dear Committee Secretary

Inquiry into the Social Services Legislation Amendment (No. 2) Bill 2015

Please find enclosed, our submission to the inquiry into the Social Services Legislation Amendment (No. 2) Bill 2015.

Any questions about the submission may be directed to Ms Prem Aleema, Acting Senior Assistant Ombudsman on 02 9218 3040.

If any member of the committee would like to speak to me personally, I can be contacted by telephone

Yours sincerely

Colin Neave
Commonwealth Ombudsman



**Submission by the
Commonwealth Ombudsman**

**PARLIAMENTARY INQUIRY INTO THE
Social Services Legislation Amendment
(No. 2) Bill 2015**

CONDUCTED BY
SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Colin Neave
Commonwealth Ombudsman

10 June 2015

Commonwealth Ombudsman's submission to the Senate Community Affairs Legislation Committee Inquiry
into the Social Services Legislation Amendment (No. 2) Bill 2015

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SUMMARY

The office of the Commonwealth Ombudsman has had significant exposure to the problems that Centrelink customers have experienced with the administration of income management (IM). Since 2007, when we began monitoring the administrative actions of Commonwealth agencies involved in the administration of the Northern Territory Emergency Response, our Indigenous team had regular contact with Indigenous and remote Centrelink customers, as well as the stakeholder groups in the Northern Territory who service and assist them with IM issues.

Since 2013, we have received more than forty complaints from individuals about the impacts of IM. These have mainly been from Centrelink customers resident in the Northern Territory, but in recent times we have received and investigated complaints from people in other Australian states who have been placed on IM. Our office has had a significant role in closely monitoring and investigating systemic problems with the IM scheme since its inception. Our work has given us a unique insight into the machinery of the IM regime, as well as the impact that particular aspects of the scheme have had on individuals, from the legislation and policy, right down to the processes, procedures and practices employed by Centrelink in administering the scheme.

Most recently, in response to issues identified through our investigation of an individual complaint, our office has closely examined the administrative regime surrounding the newest category of IM, referred to by Centrelink as the 'vulnerable youth' measure. Under this measure, IM is automatically applied to customers who live in an IM declared area and are classed as 'vulnerable youth' by virtue of their age and their qualification for a particular Centrelink payment type. This measure differs from the traditional model of Vulnerable IM, where customers are identified by a qualified social worker, based on their individual attributes and needs.

We understand that the *Social Services Legislation Amendment (No. 2) Bill 2015* seeks to move towards a model of defining all vulnerable welfare payment recipients (VWPRs) to be subject to IM by virtue of their membership of a group or class of individuals, much like the 'vulnerable youth' measure. We therefore consider that our observations in this area are highly relevant to Parliament's consideration of this Bill.

We are currently preparing a report about Centrelink's administration of the 'vulnerable youth' measure of IM to provide to the Department of Human Services (DHS) and the Department of Social Services (DSS). Our office has identified some potential issues with the way in which automated decision-making processes are currently being used to administer the scheme, which we think may have the potential to result in IM being applied to customers in circumstances where it could be detrimental to their wellbeing. However, we have not included our tentative views arising from that investigation in this submission, as the departments have not had an opportunity to comment upon them.

We understand that one of the key drivers for the proposed amendments to streamline VWPR IM decision-making is to simplify the administration of IM and make the process more efficient. It is not clear to us from the available material whether the proposed amendments have been based on a review of the operation of the existing 'vulnerable youth' measure. Nor is it clear to us whether the legislative instrument will have exception criteria along the lines of those that currently exist for the 'vulnerable youth' measure.¹ However, if that is the case,

¹ See subsection 8(2) of the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*

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then further consideration of the way in which the current scheme is operating may be appropriate to ensure that the exception criteria are properly considered and applied.

In our view, the sole use of an automated decision-making process to determine that a person is a vulnerable welfare payment recipient creates a risk that vulnerable customers might be further disadvantaged through the application of IM in their particular circumstances. Depending upon the precise nature of the legislative instrument used to extend IM, if the criteria include a consideration of a person's individual's circumstances, this requires a subjective assessment to be conducted by a decision-maker. We do not believe a subjective assessment of this type can or should be automated.

We consider the subjective consideration of an individual's circumstances when applying IM is important, both to ensure that the individual is afforded natural justice, and that the application of IM will be consistent with its intended purpose of supporting and assisting the individual. We think that such considerations are especially important when dealing with vulnerable individuals, who, in our office's experience, are the least likely to exercise their review rights or lodge a complaint.

This office welcomes the committee's inquiry into the *Social Services Legislation Amendment (No. 2) Bill 2015* and we trust that this submission will assist the committee in its deliberations.

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INTRODUCTION

Background

The office of the Commonwealth Ombudsman was established in Australia by the *Ombudsman Act 1976* (the Ombudsman Act). The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability
- reviewing statutory compliance by agencies.

The Commonwealth Ombudsman opened for business in 1977 with jurisdiction to investigate complaints about the administrative actions of Australian Government departments and agencies. Since then, the Ombudsman's role has grown and diversified as Parliament has expanded the jurisdiction to address issues in particular areas of administration.

The Commonwealth Ombudsman's unique position in the Australian administrative law landscape provides us with an understanding of many individual experiences of members of the public, who are dissatisfied with the way that government has dealt with their issue. The Commonwealth Parliament has given the Ombudsman's office the power to investigate those complaints by obtaining records and information from the agency that would not ordinarily be available to a person acting on their own behalf.

Over time, through investigating complaints about the actions of a particular Commonwealth department or agency, the Ombudsman's office is able to build up a detailed picture of an agency's operations. This includes information about new complaint trends and also the persistent problems that repeatedly crop up, despite changes intended to address them. One area in which this office has developed such an understanding is income management (IM).

The Commonwealth Ombudsman's oversight of Income Management

The Commonwealth Ombudsman received funding in 2007 to provide an independent oversight and a complaints mechanism in relation to the Australian Government's Northern Territory Emergency response (NTER) and Closing the Gap initiatives in the Northern Territory (NT). A dedicated team, the Indigenous Unit, was established to undertake this role. During the period of the NTER, from 2007 to 2012, members of our Indigenous Unit visited the 73 prescribed communities and town camps in the NT and took at least 1500 complaints. Investigation of these complaints helped our office to identify problem areas, including systemic problems that Ombudsman staff worked with agencies to address.

One of the main programme areas which our office received complaints about during the NTER was IM. We have continued to monitor issues with the IM scheme as it has changed and expanded over the years. As a result of our work in this area, over time, our office has established a close understanding of the IM legislation and administrative framework, as well as common types of administrative and other problems associated with the scheme.

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The Ombudsman's office has been instrumental in identifying problems with the IM scheme's operation and administration and in bringing these matters to the attention of government. We have worked successfully with government agencies to remedy these problems and to bring about significant improvements in the operation of IM more generally. While much of this work has been done behind the scenes through our individual investigations and regular liaison with the Centrelink programme (Centrelink) in the Department of Human Services (DHS), our office has also published two public reports associated with our work in relation to IM.

The first report, *Department of Families, Housing, Community Services and Indigenous Affairs and Centrelink: Review rights for income managed people in the Northern Territory (Report 10|2010)* highlighted a significant failure in the provision of review rights to people affected by the former IM regime. Our investigation identified a Social Security Appeals Tribunal (SSAT) decision on the SSAT's lack of jurisdiction to consider reviews about IM exemptions. The SSAT decision went unnoticed by the department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and Centrelink, but should have prompted the two agencies to assess the decision and consider the need for appeal, legislative amendment or a change to administrative processes. This report led to improvements in the agencies' processes for scrutinising and responding to decisions of the SSAT and the Administrative Appeals Tribunal.

In 2012, we conducted an investigation by auditing of a category of Centrelink's IM decisions. This investigation formed the basis our report, *Review of Centrelink Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions (Report 4|2012)*. We identified flaws in Centrelink's decisions not to exempt a person from IM because they were considered to be financially vulnerable and also in Centrelink's decisions about applying IM to a person because they were considered vulnerable. In response to our investigation, Centrelink took substantial action to improve its IM decision-making, including reviewing training, tools and templates, policy and guidelines, and developing a quality framework for IM decisions.

In September 2014, the Social Policy Research Centre at the University of New South Wales released the *Final Evaluation Report, Evaluating new income management in the Northern Territory* (the Final Evaluation Report) That report, commissioned by the Department of Social Services noted that changes implemented in response to our office's 2012 investigation report had resulted in improvements to the income management exemption process, including:

...more stringent reporting about reasons for not allowing an application for an exemption, and new processes to ensure that customers subject to the compulsory income management measures are regularly informed of their right to apply for exemptions when engaging with Centrelink regarding other matters. Many of these changes were welcomed by the exemptions staff interviewed for the evaluation, and they noted they now felt clearer about the process and more comfortable in granting exemptions than before the Ombudsman's report:

There were a lot of exemptions being rejected at first because sometimes it wasn't always clear and there's a fine line of what we saw as being financially vulnerable. The Ombudsman came in and that led to changes in how we did documentation and assessed change. Now it's quite a process to reject an exemption. (Centrelink Customer Service Officer)²

² *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p241

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SUBMISSION IN RELATION TO THE BILL

Schedule 1 – Part 2 - Vulnerable Welfare Payment Recipients

Ensuring IM meets its purpose

IM decisions have far-reaching consequences for affected people, who are often amongst the least empowered to pursue review rights or complaints mechanisms. They may also geographically remote or isolated and be disadvantaged by language, literacy and knowledge barriers. Customers identified as Vulnerable Welfare Payment Recipients (VWPRs) are at the more severe end of this spectrum of disadvantage, being considered to be 'vulnerable to factors including financial hardship, economic abuse or financial exploitation and homelessness/risk of homelessness'.³

It is therefore essential, in this office's view, that there are safeguards in place to ensure that the application of IM to individuals does not work against the scheme's intended purpose. Those legislated objects include reducing the immediate hardship and deprivation of welfare recipients by ensuring that their priority needs and those of their children, are met through the proper expenditure of their income support money.⁴

The Explanatory Statement to the current legislative principles notes that:

... the Principles, in supporting the application of the vulnerable measure of income management do not unreasonably limit a person's rights to freely dispose of their resources. The purpose of these limitations is to help vulnerable people stabilise their circumstances and address issues of vulnerability, and the Principles assist in only limiting these rights where necessary and appropriate.⁵

Research suggests that income management does not always result in positive outcomes for the customers it affects. The Final Evaluation Report outlined several instances in which IM had reportedly caused further disadvantage for people, including increased financial hardship and emotional distress,⁶ the accrual of debts,⁷ duplication, overpayment and delayed payment of rent,⁸ and problems accessing medication through pharmacies and traveling interstate.⁹

To minimise the risk of adverse outcomes, VWPR customers dealt with under Part 2 of the current *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013* (the Principles) are required to be identified and assessed by a Centrelink social worker as experiencing an indicator of vulnerability. Additionally, before placing these customers on IM, a social worker must be of the view that IM would be an appropriate response to the customer's particular vulnerability, and that the customer would benefit from it.¹⁰

The current regime recognises that IM may not always be the most appropriate way to address an individual's particular vulnerabilities. Applying VWPR IM is therefore just one of a number of tools that Centrelink social workers have available to them to assist vulnerable

³ Guide to Social Security Law 11.4.1.10 at <http://guides.dss.gov.au/guide-social-security-law/11/4/1/10>

⁴ See s123TB of the *Social Security (Administration) Act 1999*.

⁵ See page 13 of the Explanatory Statement to the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*.

⁶ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p198

⁷ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p 239

⁸ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p 240-241

⁹ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p201

¹⁰ See section 7 of the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*.

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customers. Other tools available to assist vulnerable Centrelink customers with financial management include:

- Voluntary Income Management
- weekly payments of income support
- Centrepay and direct transfers to stores and service providers
- referral to support services and
- money management courses.

Under the current VWPR regime, social workers are required to turn their minds to these other options when making a determination to apply VWPR IM, in order to establish the best intervention for the individual concerned.¹¹

The *Final Evaluation Report evaluating new income management in the Northern Territory*, summarised its findings about the overall efficacy of the current social-worker initiated assessment process as follows:

Overall it appears that the assessments, although burdensome for some workers, are an essential part of the process. They ensure that these clients have at least some regular contact with Centrelink, and that changes in their circumstances are recorded and assessed. The rigid criteria for vulnerability have the advantage that they facilitate consistency and fairness, but the disadvantage is that they limit the ability of the assessment to focus on the specific needs of the individual. Nevertheless, overall the system appears to be working well.¹²

The Final Evaluation report found that on the whole, the evidence it considered did not indicate that IM was achieving its objectives. However, it found there was some evidence to show that income management may be a successful intervention when used as part of an individually tailored program for individuals who had been specifically targeted as a result of their identified individual vulnerability or problem.¹³

The Final Evaluation report went on to comment that a consideration of a person's individual circumstances is more likely to lead to better outcomes:

In summary, where the targeting is based on individual assessment it appears to be successful in identifying those who are most vulnerable and with low skills. However, where the targeting is based on automatic criteria such as program type and duration, this is not the case.¹⁴

We note the Bill's intention to remove the case-by-case assessment of vulnerable welfare payment recipients by Department of Human Services' social workers and the statement in the Explanatory Memorandum that exemptions from the VWPR IM measure will be streamlined to refer solely to a person's rate of welfare payment, rather than to also require a subjective assessment of a person's circumstances. We are concerned that these proposed amendments could leave open the way for IM to be applied to customers in circumstances where it will not assist them and could be detrimental to their wellbeing. This is because the amendments would seem to remove many of the existing safeguards.

¹¹ See subsection 7(6) of the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*.

¹² *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p 271.

¹³ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p320

¹⁴ *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*, p319

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By not conducting an individual assessment of vulnerable customers when IM is applied, there is an increased risk that IM will be applied in cases where it is not appropriate and could be detrimental to the customer. Limiting the exemption reasons may also mean that some customers will be stuck in a system that could potentially exacerbate their disadvantage. This may work against the intended objectives of income management.

We are also concerned that the arrangements to streamline the exemptions from the VWPR IM measure will be implemented by way of an automated decision-making process. In our view, the design of the decision making model, and the triggers within that model for appropriate involvement of suitably trained and qualified officers to ensure will be critical.

Automated Decision-Making and Administrative law principles

In considering the issue of automated decision-making, this office acknowledges the efficiencies and benefits that the use of automated systems can offer in the realm of administrative decision-making. However, when using automated systems to assist with administrative decision-making, it is essential that the use of those systems accords with administrative law principles, including that:

- a) the use of expert systems in decision-making does not fetter the discretion of the decision-maker in the exercise of his or her power;
- b) the use of expert systems accurately reflects relevant government law and policy; and
- c) the use of expert systems does not interfere with natural justice by removing the opportunity for individuals affected by decisions to respond to the information relied upon to make a decision about them.¹⁵

The Administrative Review Council's 2004 report into *Automated Assistance in Administrative Decision Making* sets out a number of best-practice principles for using expert systems in administrative decision-making.¹⁶ We recommend that these principles be considered in any future use of automated decision-making processes in relation to income management.

Given the legislated objects of IM, we would be concerned if any new decision-making Principles did not contain safety net provisions similar to those which already exist to ensure that IM is not applied to vulnerable people in cases where it could be detrimental to their wellbeing. Similarly, we would be concerned if the scheme did not incorporate a mechanism for Centrelink to exit the customer from IM if a change in their circumstances results in IM becoming detrimental to their wellbeing. In both cases, this is likely to require a subjective assessment of customers' individual circumstances. In our view, this is not an assessment that can properly be performed without the involvement of a human decision maker with appropriate skills and training.

CONCLUSION

We consider that our office's position in being able to analyse and investigate administrative procedures and policies through complaints we receive, gives us a unique insight into the workings of government programs and the practical impact that errors and weaknesses in the arrangements to implement government policy can have for affected customers.

¹⁵ Administrative Review Council report no.46, November 2004: *Automated Assistance in Administrative Decision Making*

¹⁶ Administrative Review Council report no.46, November 2004: *Automated Assistance in Administrative Decision Making* p viii-xi.

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As noted above, our office has conducted a detailed assessment of the operation of the existing 'vulnerable youth' measure of income management following our investigation of an individual complaint and we have identified some procedural issues which we think may be of interest to the Committee.

If the Committee requires more detailed information about the issues discussed in this submission, we would be happy to provide a further briefing.