



Submission by the
Commonwealth Ombudsman

**INQUIRY INTO THE *SOCIAL SERVICES LEGISLATION
AMENDMENT (WELFARE REFORM) BILL 2017***

CONDUCTED BY
SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

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August 2017

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Introduction and Summary

The Commonwealth Ombudsman welcomes the opportunity to respond to the Senate Community Affairs Legislation Committee's Inquiry into the *Social Services Legislation Amendment (Welfare Reform) Bill 2017* (the Bill).

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 law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Commonwealth Ombudsman has jurisdiction to investigate the administrative actions and decisions of Australian Government agencies, including the Department of Human Services (DHS). 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 concerns. 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, our Office can build up a detailed picture of an agency's operations.

The Commonwealth Ombudsman does not comment on matters of government policy. This submission focusses instead on foreseeable issues in administration that may be of interest to the Committee, based on our experience. This submission addresses:

- the proposed removal of intent to claim provisions (Schedule 11)
- the proposed expansion of income management through the establishment of a drug testing trial (Schedule 12 of the Bill) and
- the proposed introduction of new section 28C (Schedule 13).

Removal of intent to claim provisions – Schedule 11

Schedule 11 of the Bill removes the 'intent to claim' provisions in the *Social Security (Administration) Act 1999*.

Currently, a person can be deemed to have made a claim from the date they initially contact DHS about making a claim, provided that they were qualified from that date, DHS had acknowledged

the contact by written notice and they subsequently lodged a claim within 14 days of the initial contact.¹ The effect is that the person may be back-paid to the date of initial contact.

The stated purpose of removing these provisions is to ‘encourage claimants to take greater personal responsibility for understanding their payment entitlements, and submit claims in a timely manner’.² It is asserted that the 14 day ‘intent to claim’ provisions were introduced when DHS mailed claim forms to people that were returned by mail and that ‘with the advent of technology that allows people to gather and submit documentation quickly and easily (such as online banking, email, and electronic storage of information), and the progressive rollout of online claiming, this level of assistance is no longer necessary or appropriate’.³

As we found in our recent investigation into DHS’ Online Compliance Intervention system for debt raising,⁴ when administering measures that require⁵ a person to engage in an online environment, government must ensure that adequate supports are available for people to engage effectively.

Our Office recently conducted outreach to remote Aboriginal communities in the Northern Territory.⁶ Some communities did not have mobile coverage, and not all community members had telephones. We understand that one community we visited is currently without its Centrelink Agent and DHS Remote Servicing Teams are resourced to visit communities on a 12 weekly basis. When the telephone lines did not work, there was extra demand for the sole computer in the community. Most of the people we spoke to could not speak English and were experiencing problems with homelessness and food security.

While many people are capable of (and may prefer) to lodge a claim online, our concern is that people who experience additional barriers to engaging through digital channels may be disproportionately affected by this measure. This may delay the date at which a person becomes payable. It may take them longer to access an internet ready device and/or the help they need to use it to lodge their claim. They may be less likely to use online banking, email and electronic storage, as envisaged in the Explanatory Memorandum, and may face extra barriers in obtaining basic information readily available to most people.

We suggest that further consideration be given to the disproportionate impact this measure may have on vulnerable customers. If the measure is passed, we suggest that consideration be given to what additional supports vulnerable customers may need to lodge their claims, particularly those in remote areas.

¹ Sections 13 and 14 of the *Social Security (Administration) Act 1999*

² Explanatory Memorandum p 61

³ Explanatory Memorandum p 61

⁴ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system*, April 2017 accessed at <http://www.ombudsman.gov.au/publications/investigation-reports>.

⁵ In the sense that they may be disadvantaged if they do not engage through online channels.

⁶ Outreach conducted in June 2017.

Income Management in the Drug Testing Trial – Schedule 12

Background - the Commonwealth Ombudsman's oversight of income management

The Bill aims to implement a mandatory drug testing trial for 5,000 new recipients of Newstart Allowance and Youth Allowance in three regions over two years. Income support recipients who test positive to a drug test will be subject to income management for at least 24 months.

Income management is designed to ensure that income support payments are used to pay for necessary goods and services rather than discretionary items and activities. When people are subject to income management, it means they can only access a portion of their income support payments in cash (50% in most cases, but sometimes less), while the remaining portion is managed by the DHS through its Centrelink program. Initially affecting primarily Indigenous Australians living in remote and very remote communities, income management has gradually been extended more broadly to different groups across different regions of Australia.

The Commonwealth Ombudsman's Office has been involved in the oversight of income management since it was first introduced in the Northern Territory in 2007. Since this time, our Office has investigated a number of complaints and systemic issues, has compiled several reports and submissions relating to the scheme, and has observed the rollout of various aspects of the scheme in remote Northern Territory communities. Our Office has been instrumental in identifying problems with the scheme's operation and administration, and in bringing these to the attention of government.

To date, our public reports and submissions focusing on income management and related schemes include:

- Department of Families, Housing, Community Services and Indigenous Affairs and Centrelink: *Review rights for income managed people in the Northern Territory* (Report 10/2010)⁷
- *Review of Centrelink Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions* (Report 4/2012)⁸
- submission to the inquiry into the *Social Services Legislation Amendment (No. 2) Bill 2015*⁹
- submission to the inquiry into the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*¹⁰
- *Administration of Income Management for 'Vulnerable Youth': Department of Human Services, Centrelink and Department of Social Services* (February 2016).¹¹

⁷ http://www.ombudsman.gov.au/_data/assets/pdf_file/0015/30309/fahcsia-centrelink_review-rights-income-managed-people-nt.pdf

⁸ http://www.ombudsman.gov.au/_data/assets/pdf_file/0006/30030/June-2012-Review-of-Centrelink-Income-Management-Decisions-in-the-Northern-Territory.pdf

⁹ http://www.ombudsman.gov.au/_data/assets/pdf_file/0012/24420/Submission-to-the-Senate-Community-Affairs-Legislation-Committee-June-2015.pdf

¹⁰ http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/25348/Submission-to-the-Senate-Community-Affairs-Legislation-Committee-Sept-2015.pdf

¹¹ http://www.ombudsman.gov.au/_data/assets/pdf_file/0032/36878/Centrelink_Admin_of_Income_Manag_for_Vulnerable_Youth_Final_Report.pdf

Submission

There are four aspects of the new income management regime proposed in the Bill, which our Office would like to draw to the Committee's attention and provide comment. These are:

- Foreseeable risks in the expansion of income management
- Exemptions – the new subsection 123UFAA(1D)
 - Under the Bill, the Secretary may exempt a person from income management if they are satisfied that being subject to the regime poses a serious risk to the person's wellbeing. The Secretary is *not required* to consider the potential impact of income management on the person's wellbeing when commencing the person on income management.
- Deductable Portion of income management
 - The Bill allows the Minister to alter the portion of a person's welfare payment that is subject to income management when a person is placed on income management as a result of having a positive drug test. It is not clear how much the income management portion of a person's payment might be increased (or decreased), because the percentage is to be specified in a legislative instrument.
- Need for an exit strategy
 - While the Bill provides discretion for the Secretary to extend a person's income management for longer than the 24 month trial period (new subsection 123UFAA(1B)), it does not provide a clear strategy for participants to exit income management where appropriate.

Foreseeable risks in the expansion of income management

Income management's core objective is to reduce immediate hardship and deprivation by ensuring participants' priority needs and those of their families are met through the proper expenditure of their income support money.¹² Problems with the program's administration may mean these objectives are not always met. Our Office has investigated complaints from income management participants who had difficulty meeting medical costs, or paying rent or board when they were subject to income management. For some people, being subject to income management can exacerbate a person's housing instability and place them at risk of homelessness.

For example, in a case our office discussed in our 2016 report, *Administration of Income Management for 'Vulnerable Youth': Department of Human Services, Centrelink and Department of Social Services*, the complainant was required to pay \$400 rent each fortnight. His income managed funds totalled less than \$200 a fortnight and were therefore insufficient to completely cover his rent. This resulted in two rental payments each fortnight: one from his income managed funds, and a separate payment he needed to arrange himself from his remaining (discretionary) funds.

In another complaint, a young woman said her landlord would not accept payment of her rent from Centrelink through income management. As a result, this complainant made an arrangement with her landlord to pay him all the money available out of her discretionary funds and give him her BasicsCard to spend \$100 to make up the balance of her rent. This complainant told us she had also been diagnosed with a serious medical condition and had found it difficult to arrange payment of her medical expenses through income management.

¹² See s 123TB of the *Social Security (Administration) Act 1999*

Both complainants were taken off income management following intervention by our Office, but had experienced numerous problems in attempting to exit the scheme.

We suggest that any decision to expand income management is supported by robust, and well considered frameworks, including clear guidelines, and quality complaint, review and evaluation processes that are accessible to those affected. People should also be provided with clear information and advice, through letters and conversations, about their rights and obligations (including review and exclusion rights), and information about how the scheme is likely to affect them.

The need for checks and balances

The potential impact on the individual autonomy of those affected by income management and similar programs is significant. Through our complaint and own motion investigations, our Office has identified numerous administrative and legal errors in the scheme's application. This is perhaps unsurprising given the scheme's complexity. Despite this, our Office has noted a scaling back of the checks and balances built into the scheme as it expands.

For example, prior to July 2015, Centrelink staff were required to conduct mandatory eight-weekly priority needs reviews, where a Centrelink officer would ask the customer questions about priority areas, such as food, housing, utilities, clothing, footwear and medical needs.¹³ The Centrelink officer would allocate the customer's income managed payments to these priority needs. The purpose of the review was to ensure the legislative objectives of income management were being met.¹⁴

Since 1 July 2015, Centrelink staff are no longer required to conduct mandatory eight-weekly reviews for income management participants. Priority needs reviews are now only required at the initial assessment interview, when a change of circumstances is identified, or at the customer's request. Data provided to our office indicates the number of these reviews conducted by Centrelink has fallen dramatically.¹⁵ In our view, removing regular mandatory reviews increases the risk that customers' income managed funds may not be being directed appropriately and the legislative objectives of income management may not be met in all cases.

We recommend that in any proposed expansion of income management, consideration be given to strategies to ensure thorough and regular review processes are in place.

The need for effective communication

Since income management's inception, this Office has received a large number of complaints highlighting communication problems and confusion amongst customers about a range of income management issues, including:

- insufficient information provided to customers about income management processes and options, including exemptions, reviews, accessing balances, transferring funds and changing income management allocations

¹³ These Priority Needs are defined in s123TH of the *Social Security (Administration) Act 1999*.

¹⁴ The legislative objectives of income management are set out in s123TB of the *Social Security (Administration) Act 1999*.

¹⁵ For example, Centrelink data provided to our office on 5 May 2016, indicates that in the period July 2014 to March 2015, 121,088 priority needs reviews were conducted, compared to a total of 26,656 in the period July 2015 to March 2016.

- confusing or inadequate information provided in Centrelink letters
- difficulty in understanding income management account statements
- ensuring interpreters are used when explaining and discussing income management with customers, as appropriate.

These issues were discussed in detail in our own motion investigation into the *Administration of Income Management for 'Vulnerable Youth'*.¹⁶

Our office has worked successfully with government agencies to remedy problems and bring about significant improvements in the operation of income management. Based on this experience, in our view, before the trials commence, departments should:

- develop communication strategies which inform and explain all aspects of the scheme to participants
- prepare and review all letters associated with the drug testing trials against best practice decision making principles¹⁷ and relevant legislation.

Exemptions from income management

New subsection 123UFAA(1C)

The new subsection 123UFAA(1C) of the Bill states that the Secretary may determine that a person is not subject to the income management regime under subsection 123UFAA(1A) if the Secretary is satisfied that being subject to the regime poses a *serious risk* to the person's mental, physical or emotional wellbeing. This is a higher threshold than the current legislative principles which allow the Secretary to exempt a person from income management if that would place the person's mental, physical or emotional well-being at risk.¹⁸

As noted above, our Office has previously identified instances where the rights of income management participants to request an exclusion has not been made clear to them. In expanding income management in line with the drug testing trials, we recommend the right to request an exclusion from the measure is made clear to participants when income management commences.

New subsection 123UFAA(1D)

New subsection 123UFAA(1D) provides that when placing a person on income management, the Secretary is not required to consider whether to make a determination under new subsection 123UFAA(1C). This means that, unlike for other measures of income management, Centrelink will

¹⁶ Commonwealth Ombudsman, *Administration of Income Management for 'Vulnerable Youth': Department of Human Services, Centrelink and Department of Social Services* (February 2016) http://www.ombudsman.gov.au/_data/assets/pdf_file/0032/36878/Centrelink_Admin_of_Income_Manag_for_Vulnerable_Youth_Final_Report.pdf

¹⁷ See Administrative Review Council: *Decision Making: Evidence, Facts and Findings – Best-practice Guide* 3, August 2007

¹⁸ For example, see subsection 8(2) of the *Social Security (Administration)(Vulnerable Welfare Payment Recipient) Principles 2013*.

not be required to take active steps to assess a person before placing them on income management, to determine whether being subject to income management would risk their mental, physical or emotional wellbeing.

Our Office considered a related matter in some detail in our 2016 report - *Administration of Income Management for 'Vulnerable Youth'*.¹⁹ In that report, our office examined the way Centrelink was interpreting and applying subsection 8(2) of the relevant legislative instrument, the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*. That subsection effectively requires Centrelink to consider, before placing a person on the vulnerable welfare payment recipient (VWPR) measure of income management, whether subjecting the person to that measure of income management would place the person's mental, physical or emotional wellbeing at risk. This includes an assessment of whether the person:

- (i) is not able to meaningfully engage in the income management process due to mental health issues; or
- (ii) does not have the capacity to comprehend the operation of income management; or
- (iii) is experiencing serious instability in their housing or living situation and income management would affect their ability to direct funds to housing.²⁰

In our report, we recommended that Centrelink and its policy agency, the Department of Social Services (DSS), ensure Centrelink conducted this assessment at the initial interview. The departments agreed to review their processes and directions to Centrelink frontline staff.

In many cases, the people targeted by this measure will be vulnerable.²¹ In our experience, vulnerable people are the least likely to exercise their review rights and seek exemptions from income management. To avoid further disadvantage to vulnerable people, we suggest that Centrelink use its existing processes to assess whether subjecting a person to income management would risk their mental, physical or emotional wellbeing and identify instances where exclusion may be appropriate, *before* commencing customers on income management. We suggest these existing processes continue to be used if income management is to be expanded as part of the proposed drug testing trial.

Deductable portion of income management

The changes outlined at Item 27 of the Bill allow the Minister to make an instrument specifying that a different percentage of a person's income support be quarantined for income management, for persons subject to income management as a result of a positive drug test. Currently, most income management participants have access to 50% of their income support payments, with Centrelink managing the other 50%. The Bill does not elaborate on the percentage of a person's income support payment intended to be income managed by Centrelink.

¹⁹ http://www.ombudsman.gov.au/_data/assets/pdf_file/0032/36878/Centrelink_Admin_of_Income_Manag_for_Vulnerable_Youth_Final_Report.pdf

²⁰ Subsection 8(2)(a) of the *Social Security (Administration)(Vulnerable Welfare Payment Recipient) Principles 2013*

²¹ The *Guide to Social Security Law* published by the Department of Social Services states that 'income management is a key tool in supporting disengaged youth, long-term welfare payment recipients and people assessed as vulnerable': 11.1.130.

If the proportion of income managed funds is increased, this could result in financial detriment and social exclusion for those affected, by restricting their spending options and their access to cash. For people living on income support needing to stretch their income as far as possible, purchasing flexibility is important. People subject to income management under the drug testing trial will be restricted in their capacity to:

- buy second hand items
- access public transport and parking
- purchase goods or services from private sellers
- shop at garage sales or markets
- take advantage of 'cash only' discounts.

Need for an exit strategy

We note that the current Bill does not provide an exit pathway for participants who can show they have improved their situation under the scheme. In our view, by failing to include an exit strategy for customers who meet their social obligations, the incentives for the scheme to encourage socially responsible behaviour are limited.

In 2013, the Australian National Audit Office (ANAO), in its review of the Administration of New Income Management in the Northern Territory,²² suggested there would be merit in departments developing strategies to assist customers to exit income management where appropriate. This office supports the ANAO's position and suggests that, given the proposed drug testing trial has a similar objective of encouraging socially responsible behaviour, this recommendation should be considered in the context of the Bill.

Introduction of new section 28C – Schedule 13

Our office does not comment on government policy, and does not offer a view on the proposed drug testing trial or the exemptions to it. We will monitor its implementation if it is passed into law.

We observe there appears to be a lack of clarity about scope in the drafting of the proposed section 28C, which would give the Secretary power to modify the operation of 'the social security law' for a person who the Secretary determines is a 'declared program participant'.²³

Although the explanatory memorandum refers to the new provision in the context of exempting certain jobseekers from amendments contained in Schedules 13 and 15,²⁴ it appears to have been drafted in a way that may operate more broadly than the limited application envisaged by the explanatory memorandum.²⁵

²² Australian National Audit Office, *Administration of New Income Management in the Northern Territory*, Report 19/2012-2013 <https://www.anao.gov.au/work/performance-audit/administration-new-income-management-northern-territory>

²³ Schedule 13, Item 2, page 190.

²⁴ Explanatory Memorandum pp 81 and 92.

²⁵ Section 28C does not appear to limit the Secretary's power to modify the operation of the social security law to particular provisions of the *Social Security Act 1991* or *Social Security (Administration) Act 1999* (or any other enactments or policy guidelines which form part of the broader social security law).

As lack of clarity about the scope of legislative powers can give rise to uncertainty in their administration, we suggest that the Bill could more clearly define the intended scope of the provision.