

# Chapter 2

## Key issues and committee view

- 2.1 This chapter of the report discusses three key issues raised during the inquiry:
- the lack of consultation with communities, CDP providers and other stakeholders prior to the introduction of the bill;
  - concerns in relation to the provisions in the bill for substantial matters in relation to the CDP to be dealt with through legislative instruments; and
  - whether the remote income support scheme is discriminatory.

### Lack of consultation

2.2 One of the themes in submissions and in evidence at the public hearing was frustration at the lack of consultation with communities and CDP providers prior to the introduction of the bill. Jobs Australia, the national peak body for non-profit organisations that assist unemployed people to prepare for and find employment, has approximately 20 CDP providers as members. In its submission, Jobs Australia stated:

[T]o date, there has been no formal consultation on any aspect of the CDP arrangements. To the extent that consultation has occurred, it has been limited to discussions with some individual communities and individual CDP providers. Of the 31 provider staff who dialled in to Jobs Australia's teleconference consultation on the Bill, none had been consulted on any aspect of this Bill before it was introduced in December, nor were they aware of any such consultation having taken place.<sup>1</sup>

2.3 The lack of consultation was also reflected in the submissions and evidence of individual CDP providers. The Tangentyere Council Aboriginal Corporation, a CDP provider who provides services in the Town Camps of Alice Springs, stated:

We were surprised that the tabling of the Bill in December was the first opportunity for CDP providers to receive notice of the significant changes proposed for the program that we administer. To our knowledge, there has been no consultation with the Town Camp communities in our region about these proposals, and the lack of genuine engagement with Aboriginal job seekers is of great concern.<sup>2</sup>

2.4 Mr Dickie Bedford, Chief Executive Officer of the Marra Worra Worra Aboriginal Corporation, based in Fitzroy Crossing in Western Australia, described the consultation so far regarding the reforms in the bill as 'ad hoc' and lacking in substance and detail.<sup>3</sup>

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1 *Submission 11*, p. 5.

2 *Submission 10*, p. 2. See also Tiwi Island Training and Employment Board, *Submission 4*, p. 1; Campbell Page, *Submission 12*, p. 1; Central Land Council, *Submission 25*, p. 6.

3 *Proof Committee Hansard*, 19 February 2016, p. 39.

2.5 In its submission the Department of the Prime Minister and Cabinet (PM&C or department) indicated that the Minister and the department have met with providers in a number of states and the Northern Territory to explain the model proposed. PM&C's submission also referred to a two day meeting in Cairns with all providers in February 2016 which 'will include initial consultation and discussion of the proposed reforms and will provide an opportunity for the department and providers to work together to ensure the successful continuation of current CDP arrangements'.<sup>4</sup>

2.6 At the public hearing in Melbourne, Mr Richard Eccles, Deputy Secretary, Indigenous Affairs, PM&C, asserted that there had been ongoing consultation on the reforms in the bill, and the measures proposed in the legislative instruments to be made pursuant to the bill, for a considerable period of time:

Consultation with the providers has been by any judgement quite comprehensive, going back more than a year. There have been meetings and discussions at quite some level of detail with individual providers but there has also been collectively an opportunity for providers to gather on at least four occasions as a group to work with us, to workshop some of the issues we are discussing and work a way forward.<sup>5</sup>

2.7 Noting that CDP did not commence until 1 July 2015, the committee sought to clarify whether earlier consultations had involved broader issues surrounding the change from the earlier Remote Jobs and Communities Program to the CDP. However, Mr Eccles was confident that:

[I]t would have been [in March 2015] or not long after that we, on behalf of the government, outlined the ambition or the intention to pursue more fundamental reforms, which had those things that are at the very basis of this: weekly payments, because that is what communities are telling us would be most useful for them.<sup>6</sup>

### **Ministerial determinations**

2.8 The fact that significant details regarding the activity and compliance regime for remote income support recipients will be contained in Ministerial determinations was the subject of much consternation in submissions. In particular, concerns centred around:

- the lack of parliamentary scrutiny for delegated legislation, such as the Minister's determinations; and
- the level and nature of consultation which would occur prior to the Minister making a determination.

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4 *Submission 9*, p. 10.

5 *Proof Committee Hansard*, 19 February 2016, p. 48.

6 *Proof Committee Hansard*, 19 February 2016, p. 51.

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### *Parliamentary scrutiny*

2.9 The Central Land Council, among others, expressed concern that the bill 'vests an inappropriate level of power in the responsible Minister thereby avoiding critical Parliamentary scrutiny of social security laws'.<sup>7</sup> The Aboriginal Peak Organisations Northern Territory (APONT) argued:

Social security law is a core responsibility of the Australian Government and delegation of critical decisions to one Minister would undermine the fundamental responsibility of the Parliament to hold the Government to account.<sup>8</sup>

2.10 The Welfare Rights Centre emphasise the extent of the Minister's powers pursuant to the bill:

The effect of [the Ministerial determinations] is concerning: it will empower a Minister to make new rules without any recourse to the Parliament.

Under these powers the Minister (and any future Minister) could change anything without prior approval from the Parliament. Legislative instruments are, of course, disallowable, but this is an inferior standard of Parliamentary scrutiny than that which applies to legislation. Providing social security payments to people in need of support is a fundamental area of Government responsibility.

To delegate such extensive powers to one Minister is a fundamental abrogation of the Parliament's responsibility which should hold the Government of the day to account.<sup>9</sup>

2.11 In its submission PM&C addressed this concern, noting:

The Bill will not reduce the level of Parliamentary oversight in relation to the social security law or the protections that this provides to job seekers. Compliance arrangements will be determined in a legislative instrument subject to the usual rules for possible disallowance by either House of Parliament. In relation to the determination of remote income support regions, the Minister must consider service provider capacity and fulfil the consultation requirements under the Legislative Instruments Act before the relevant legislative instrument is made. Again, this instrument would be subject to disallowance by either House of Parliament.<sup>10</sup>

2.12 At the public hearing Ms Nadine Williams, First Assistant Secretary, Community and Economic Development, PM&C, reiterated these checks on the Minister's power pursuant to the bill:

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7 *Submission 25*, p. 2.

8 *Submission 23*, p. 8.

9 *Submission 26*, p. 8.

10 *Submission 9*, p. 3.

The compliance arrangements will be set out in a disallowable instrument. There are quite significant checks and balances via the parliament, as part of that process. The ability for the minister to also trigger a region, so to include a region in the scheme or not, is governed by those disallowable instruments and, again, the parliamentary scrutiny that comes with that. As you mentioned, obviously the consultation arrangements around those sorts of instruments are fairly robust.<sup>11</sup>

### *Comments by the Scrutiny of Bills Committee*

2.13 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) commented on the central elements of the scheme being determined by legislative instrument. The Scrutiny of Bills Committee noted that the EM contains 'a detailed justification of the need for differentiated CDP arrangements in remote communities'.<sup>12</sup> The Scrutiny of Bills Committee concluded:

While these matters are very significant and may be considered more suitable for Parliamentary enactment, in light of the detailed explanation provided the committee draws this matter to the attention of Senators, but leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.<sup>13</sup>

2.14 The Scrutiny of Bills Committee has, given the importance of the issues involved, sought advice from the Minister as to whether consideration can be given to including a reporting requirement to evaluate:

- (a) the operation of the scheme; and
- (b) the appropriateness of the use of delegated legislation (to be tabled in Parliament to facilitate parliamentary scrutiny).<sup>14</sup>

### *Consultation*

2.15 The nature and extent of consultation that would be undertaken with communities and CDP providers prior to the Minister making a determination about a region was also identified by some organisations as a matter of concern. For example, APONT noted that the bill contains no requirement for input or consultation with local people prior to an area being the subject of a Minister's determination.<sup>15</sup>

2.16 The National Congress for Australia's First Peoples acknowledged that the Explanatory Memorandum (EM) contains assurances that the Minister will consult

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11 *Proof Committee Hansard*, 19 February 2016, p. 49.

12 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2016*, 3 February 2016, p. 37.

13 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2016*, 3 February 2016, p. 37.

14 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2016*, 3 February 2016, p. 37.

15 *Submission 23*, p. 8. See also National Congress of Australia's First Peoples, *Submission 28*, p. 6.

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with communities and CDP providers before implementing new regulations, but noted that there is no formal requirement for consultation.<sup>16</sup>

2.17 The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, highlighted the importance of consultation with communities prior to an area becoming subject to a Ministerial determination:

Aboriginal and Torres Strait Islander people who will be affected by the proposed changes to the operation of the social security system ought to be afforded meaningful and effective consultation, utilising the standard of free, prior and informed consent, before relevant decisions are made. Such a consultation process should occur before the Minister determines a community to be part of a remote income support region. The Minister should only make a determination that a community is part of a remote income support region where the community has consented to the determination.<sup>17</sup>

2.18 In its submission PM&C stated:

[U]nder the legal requirements that govern the making of legislative instruments, there is a requirement to consult with those people likely to be affected by a legislative instrument. [PM&C] is committed to consulting with CDP providers and communities to gauge interest and support and to explain the potential changes under the new scheme.<sup>18</sup>

2.19 A number of witnesses at the public hearing spoke of the opportunities presented by the bill, but cautioned that this would depend on communities and CDP providers being fully involved in the consultations to develop the legislative instruments. For example, Mr Jeremy Kee, Chief Executive Officer of Miwatj Employment and Participation (MEP), stated:

More than anything MEP believe that a compliance framework which fosters individual responsibility and individual accountability is the first step towards achieving significant improvement for Indigenous people in our region. The current compliance system that we experience is, without a doubt, an extremely slow, opaque, complicated and non-proportional compliance system. It operates, in our region at least, as a tool of disempowerment. When I say that I mean that a person's actions no longer have a comprehensible effect for themselves on their own life. They either do not feel the effects of their actions for a long time, or they do not see the inner workings of how they work.

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We are aware that the proposed legislation before parliament does not mention the devil in the detail but seeks to enable a legislative instrument to be created—and we obviously cannot see it at the moment. But despite the uncertainty around the nature of this future compliance framework, MEP is

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16 *Submission 28*, p. 6.

17 *Submission 21*, p. 3.

18 *Submission 9*, p. 10.

very, very keen to embrace a new opportunity, and we hope more than anything to leave the current compliance framework—what we would see, currently, as the failed compliance framework—to history. We look forward to a compliance framework that vests welfare recipients with agencies that will enable them to trust that their own actions will have consequences on their own life, and that these consequences in their own life can be improved by their own actions.<sup>19</sup>

2.20 Mr Kee argued that the 'greatest risk' with the proposed legislation 'would be a legislative instrument developed without design input from the communities and service providers who are affected'.<sup>20</sup> Mr Kee suggested that a further reference should be included in the bill that the legislative instrument be drafted in collaboration with communities and service providers.<sup>21</sup>

2.21 Mr Liam Flanagan, Community Services Manager, Arnhem Land Progress Aboriginal Corporation, described the bill as a 'great opportunity to lay a strong foundation'. Mr Flanagan continued:

These changes will make some positive changes straightaway and push some power back to community. But it is the opportunity that is going to come to develop those other legislative tools afterwards around the compliance framework that are going to let us develop appropriate, contextualised, place-based models to a degree. You will still have to have some standardisation and some controls obviously. But there is going to be an opportunity—you would hope—to have a really high degree of consultation and to have a strong partnership between providers and Prime Minister and Cabinet to develop those things. As has been stressed by everyone you have spoken to, the compliance framework is going to be one of the pivotal make-or-break things for it, and that is where it is going to be absolutely essential to have that high level of consultation and partnership.<sup>22</sup>

2.22 At the public hearing, Ms Williams, PM&C, reiterated that it is the intention of the Minister and the department to work with communities and providers on legislative instruments:

[T]he minister has made a very firm commitment to work with providers, stakeholders and others on the detail in the legislative instruments. That is really important because, as you are aware, that is where all the content sits at the moment. The other point is that when we met with providers last week, we agreed that we would sit down with any provider that was keen to be involved in assisting us in developing those instruments, so that it would be a genuine co-design process. I think that is really important. It is really the content of those legislative instruments where all the detail sits.

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19 *Proof Committee Hansard*, 19 February 2016, p. 31.

20 *Proof Committee Hansard*, 19 February 2016, p. 31.

21 *Proof Committee Hansard*, 19 February 2016, p. 31.

22 *Proof Committee Hansard*, 19 February 2016, pp 41-42.

The minister, it is true, has talked to a number of communities significantly about the framework of the reforms that he has proposed to the parliament, but really the bulk of the consultation will need to occur around the content of those instruments. It is our very firm intention to develop those instruments in consultation with providers and communities. That is really critical, because how the compliance framework works and how it interacts with the obligations that people have on the ground are the things that are most important to providers and communities. It is a good opportunity to also talk to them about [how] this could be simpler administratively, easier to manage and easier for them, as the primary service providers in remote Australia, to administer and run on the ground.<sup>23</sup>

### *Matters for further consultation*

2.23 A number of issues raised during the course of the inquiry will need to be considered in further detail through the consultation phase, including:

- the administration of the system by CDP providers and the level of support and resources for training, IT, legal assistance and staff security;<sup>24</sup>
- education regarding the operation of the CDP payments system, including the new income thresholds, to avoid confusion regarding payments administered by providers and payments administered by the Department of Human Services;<sup>25</sup>
- clarity in regards to the operation of the appeals mechanism with respect to CDP provider staff;<sup>26</sup> and
- CDP participant's coverage by workers compensation and occupational health and safety schemes.<sup>27</sup>

2.24 PM&C has provided the committee with the 'core components' which will be used for consultation and developing further detail on the legislative instruments.<sup>28</sup>

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23 *Proof Committee Hansard*, 19 February 2016, p. 49.

24 See, for example, Mr Jeremy Kee, Chief Executive Officer, Miwatj Employment and Participation, *Proof Committee Hansard*, 19 February 2016, pp 33-34; Roper Gulf Regional Council, *Submission 13*, p. 2; Ironbark Aboriginal Corporation, *Submission 27*, p. 2.

25 See, for example, Jobs Australia, *Submission 11*, pp 8-9; Welfare Rights Centre NSW, *Submission 26*, p. 3.

26 Mr Liam Flanagan, Community Services Manager, Arnhem Land Progress Aboriginal Corporation, *Proof Committee Hansard*, 19 February 2016, p. 42; Jobs Australia, *Submission 11*, p. 8; Welfare Rights Centre NSW, *Submission 26*, p. 3.

27 See ACTU, *Submission 7*, p. 10; Ms Kara Keys, Indigenous Officer, ACTU, *Proof Committee Hansard*, 19 February 2016, p. 22.

28 See Ms Nadine Williams, First Assistant Secretary, Community and Economic Development, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 19 February 2016, p. 51. See also answers to questions on notice from PM&C, received 26 February 2016.

## **Remote income support scheme may be discriminatory**

2.25 Some submissions argue that the foreshadowed activity and compliance arrangements for remote income support recipients would discriminate against Aboriginal and Torres Strait Islanders. For example, Jobs Australia observed:

Fundamentally, the Bill establishes a separate system for some welfare payments that are paid in remote Australia with arrangements that most likely discriminate against Indigenous people.<sup>29</sup>

2.26 The Statement of Compatibility with Human Rights in the EM states:

The measures are aimed at remote job seekers, on the basis that there are particular obstacles faced by job seekers in remote Australia, including less robust job markets, higher levels of dependence on welfare, lower levels of literacy and numeracy, and persistent and entrenched disadvantage. The measures will apply equally to all job seekers who reside within remote income support regions across Australia.

These measures will be beneficial to remote income support recipients and have a positive impact by providing a simplified compliance framework and penalties that are easier to understand, as well as allowing job seekers who comply with their obligations to engage in higher levels of paid work before taper rates that reduce their amount of income support are applied.

...[A] determination will not be applied on the basis of racial, cultural, gender, religious, or political status of people residing in remote income support regions.<sup>30</sup>

2.27 Jobs Australia refuted the claims in the Statement of Compatibility with Human Rights that the bill is not discriminatory:

Firstly, while the text of the Bill does not explicitly target Indigenous people, there is a clear connection between a particular race and the areas in which the measures in the Bill will apply. The overwhelming majority of unemployed people in remote areas are Indigenous: of the 37,000 unemployed people in the regions that are currently considered remote, 31,000 (or 84%) are Indigenous. Besides, if the legislation was not targeted to Indigenous people, then the Minister for Indigenous Affairs would not be the responsible Minister.

On the second point, the measures in the Bill are not an example of positive discrimination as the [Statement of Compatibility with Human Rights] attempts to suggest. The 'benefit' of the new legislation is supposedly a simplified compliance framework, but the new compliance framework is not part of the Bill. The Bill simply includes a delegation to the Minister for Indigenous Affairs to establish whatever compliance arrangements that Minister sees fit...The Minister (and if not the current Minister, then a future Minister) might choose to use the powers conferred by the Bill to

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29 *Submission 11*, p. 11.

30 Statement of Compatibility with Human Rights, pp 5-6.

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implement a harsher compliance regime for remote communities than exists in non-remote areas.<sup>31</sup>

2.28 It was also noted that the proposals pursuant to the bill come in addition to the current CDP requirements, which have a greater activity obligation for remote job seekers. On this point, the Central Land Council stated:

The CDP system imposes more onerous Work for the Dole compliance arrangements on remote participants than non-remote. Remote participants are required to work 25 hours per week spread over 5 days per week, while those in non-remote areas (other than Alice Springs town camps) are only required to attend 15 hours Work for the Dole in order to receive entitlements.<sup>32</sup>

2.29 The committee notes that the Parliamentary Joint Committee on Human Rights is seeking further advice from the Minister in relation to this matter and the committee makes no further comment on this issue.<sup>33</sup>

### **Committee view**

2.30 The committee notes the evidence it has received regarding concerns within remote communities about the continuous changes within this policy area.<sup>34</sup> However, the committee has also received evidence from CDP providers who welcome the opportunities presented by the bill and believe that the proposed changes will go some way to addressing the disengagement of people in remote communities.<sup>35</sup>

2.31 The committee understands some stakeholders are concerned about the measures in the bill and particularly the scope of determinations which the Minister will be able to make pursuant to the bill. The committee shares these reservations about the bill.

2.32 With regards to the scope of the Minister's discretion, the committee appreciates that this is to provide flexibility, so the Minister can consult with communities to determine participation requirements and compliance arrangements and make amendments to meet the changing needs of communities.<sup>36</sup>

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31 *Submission 11*, pp 11-12.

32 *Submission 25*, p. 10.

33 Parliamentary Joint Committee on Human Rights, *Thirty-third report of the 44<sup>th</sup> Parliament*, 2 February 2016, p. 12.

34 See, for example, Mr Gerard Thomas, Policy and Media Officer, Welfare Rights Centre NSW, *Proof Committee Hansard*, 19 February 2016, pp 9-10; Mr David Thompson, Chief Executive Officer, Jobs Australia, *Proof Committee Hansard*, 19 February 2016, p. 17.

35 See, for example, Mr Ben Burton, Deputy Chief Executive Officer and Manager of CDP program, Winun Ngari Aboriginal Corporation, *Proof Committee Hansard*, 19 February 2016, p. 2.

36 EM, p. 3.

2.33 The committee also recognises the issues caused by the disengagement of people in remote communities and shares the view that there will be opportunities to address this through the reforms proposed in the bill.

2.34 Clearly, the success of the measures in the bill, and the reforms to be introduced through legislative instruments pursuant to the bill, depend on the Minister and PM&C undertaking genuine consultation with communities and CDP providers.

2.35 The committee does not doubt that the meetings and conferences that have taken place so far with CDP providers and stakeholders have been undertaken with the best intentions. However, the committee has questions as to whether they have necessarily constituted proper consultation on the proposed reforms in the bill. Going forward, it is necessary for the Minister, and more particularly officers of PM&C, to work with communities and providers on measures to be included in the relevant legislative instruments. The committee strongly encourages PM&C to review the evidence provided to the committee and ensure that the concerns raised through the course of this inquiry are considered during the consultations to develop legislative instruments.

2.36 While the committee supports the bill, it is also cognisant that ongoing monitoring of the implementation of measures in the bill through the Senate estimates process will be important in the future.

### **Recommendation 1**

**2.37 The committee recommends that the Senate pass the bill.**

**Senator Cory Bernardi**

**Chair**