Regulatory Institutions Network (RegNet)
Australian National University

Submission to the Senate Standing Committee on Community Affairs

Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

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The Centre for International Governance & Justice at the Regulatory Institutions Network welcomes the opportunity to make submissions on the welfare reform initiatives set out in the above three bills, particularly in relation to the new scheme for welfare payments in selected locations throughout Australia ("the income management regime"). We note that the actions of the government are directed to the enormity and the gravity of a number of social ills, many of which are related to material deprivation. However, the measures taken – first, in relation to extending the duration and scope of income management for the Aboriginal communities who reside in the selected locations, and secondly, in relation to extending income management to welfare recipients more generally – are disproportionate and interfere unacceptably with the dignity and human rights of individuals in Australia.

We endorse the submissions prepared by a number of other organisations, including the Human Rights Law Resource Centre, Amnesty International, the Australian Council of Social Service (ACOSS), and the Law Institute of Victoria, which have set out the ways in which the income management regime is discriminatory in impact, and does not represent a special measure. We endorse the view that the income management regime is incompatible with a number of fundamental human rights laws, including the *Racial Discrimination Act 1975* (Cth), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Racial Discrimination (CERD).

We make additional comments in relation to the proposed scheme's compatibility with fundamental human rights. In particular, this submission presents the question whether the proposed extension of the income management regime is consistent with Australia's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). Australia ratified the ICESCR on 10 December 1975 and its performance of its obligations are scrutinised by the United Nations Committee on Economic, Social and Cultural Rights. Moreover, the government has made a specific undertaking that these reforms will be consistent with Australia's international human rights obligations. As a secondary matter, we question the compatibility of the income management regime with the recommendations of the National Human Rights Consultation Report of 2009, which confirmed the importance of economic, social and cultural rights for all Australians.

In short, we submit that the involuntary nature of the income management regime is likely to infringe a number of human rights, including the rights to social security, privacy and family life, freedom of movement, cultural life and self-determination, and the right to be free from discrimination on prohibited grounds.

Overview of reforms to the income management regime

The proposed amendments will replace the current income management regime operating in the Northern Territory under the NTER measures. Starting from 1 July 2010, the new scheme will be initially applied to disadvantaged communities across the Northern Territory, before being rolled out nationally.

The following categories of people whose usual place of residence is in a 'declared income management area' will have between 50% and 100% of their welfare payments quarantined under the scheme:

- *Disengaged youth*: Individuals aged 15 to 24 who have been in receipt of specified welfare payments for more than three of the last six months;
- *Long-term welfare payment recipients*: Individuals aged 25 and above on specified welfare payments for more than one year in the last two years;
- *Vulnerable welfare payment recipients*: Individuals assessed by Centrelink social workers as requiring income management due to vulnerability to financial crisis, domestic violence or economic abuse; and
- *Child protection*: Individuals referred for compulsory income management by child protection authorities.

People in the first two categories may be exempted from the scheme if they are assessed as undertaking responsible parenting, or, for those without dependent children, engaging in study or participating in employment. The Minister may also specify a class of exempt welfare payment recipients by legislative instrument.

The quarantined payments may be accessed through a system of vouchers and/or stored value cards to purchase only food and other prescribed 'priority need' items at outlets specifically licensed under the scheme.

While the scheme also makes provision for voluntary participation, our submissions are directed to its involuntary aspects.

1. **The compulsory income management regime may infringe a number of economic and social rights, including the right to social security:** The extension of the income management regime to the Aboriginal communities living in disadvantaged regions, and to the specified members within the general class of welfare recipients, may constitute an unreasonable and arbitrary interference with current arrangements to provide social security (ICESCR, art. 9), including for every child (CRC, art. 26) and to provide for an adequate standard of living (ICESCR, art. 11).

   (a) First, the speed in which the reforms have been decided may interfere with the duty to allow beneficiaries to participate in the administration of the social security system. In its recent recommendations for Australia, the Committee on Economic, Social and Cultural Rights emphasised the need for adequate consultation with Indigenous communities. See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia (May 2009) (UN Doc E/C.12/AUS/CO/4). This duty extends to all affected beneficiaries: see Committee on Economic, Social and Cultural Rights, General Comment No. 19 on the Right to Social Security (UN Doc E/C.12/GC/19), para 26;

(b) Second, the replacement of a system of cash assistance to a system of compulsory income management, which limits choice in the provision of a good and denies the role of the beneficiary in the exchange of resources, may be inconsistent with the duty to allow for participation, as well as the duty to avoid retrogressive measures: General Comment No. 19 (UN Doc E/C.12/GC/19), paras 26, 42;

(c) Third, the method of roll-out and the substance of the income management regime are likely to infringe the duty to pay full respect to the principle of human dignity in social security: General Comment No. 19 (UN Doc E/C.12/GC/19), paras 1, 22, (see further at 2(a), below);

(d) Fourth, the Committee has emphasised the duty of state parties to take particular care that indigenous peoples are not excluded from social security systems through direct or indirect discrimination: General Comment No. 19 (UN Doc E/C.12/GC/19) para 35, (see further at 5, below);

(e) Finally, the adequacy of the benefit may be a greater concern in the system of income management, if the transaction costs of the scheme are placed on the beneficiaries. The adequacy of social security is important to the realisation of the right to family protection and assistance, and an adequate standard of living and adequate access to health care: ICESCR, arts 10, 11 and 12; General Comment No. 19 (UN Doc E/C.12/GC/19) para 22.

2. **The compulsory income management regime may infringe the right to privacy and family life:** The challenges to privacy represented by the information requirements of the income management regime have been canvassed by the submission of the Privacy Commissioner and we endorse this analysis. Furthermore, we note that the emphasis on external management of a person's personal expenditures may constitute an additional infringement of the right to privacy and family life by undermining individual choice, capacity and the dignity of the person: see ICCPR, art. 17.

(a) The separation of the person from the daily choices so inherent in Australia's cash society may constitute a further infringement of privacy and autonomy. The right to privacy includes concepts such as the dignity of the person. The equivalent right under the European Convention on Human Rights has been interpreted to include `the right to establish and develop relationships with other human beings': *Niemietz v Germany* A 251-B (1992) para 29 (European Court of Human Rights), *Kroon v Netherlands* A 297-C (1994) para 31 (European Court of Human Rights). In this aspect, people subject to income management will be excluded from a normal social life in a very visible way through the enforced use of vouchers and BasicsCards. We note that the UN Special Rapporteur on indigenous human rights, James Anaya, described the income management regime under the current NTER measures as stigmatising already stigmatised communities: see http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf.

3. **The compulsory income management regime may infringe cultural rights and self-determination:** The problems represented by the scheme to the principle of self-determination have been addressed in other submissions, including by the Nura Gili Indigenous Programs (UNSW) and the Public Interest Law Clearing House (PILCH), which we endorse. Furthermore, we point to the incompatibility between the income management regime and the right of everyone to take part in cultural life: ICESCR, art. 15.

   (a) The compulsory nature of the scheme restricts individual and cultural autonomy by tying decisions relating to food and basic needs to a pre-established and geographically confined provider. Contrary to the income management regime, we note that the voluntary food voucher system established by the Tangentyere Council, on which some of the provisions appear to be based, allows recipients to suspend their food-voucher deductions while they are away, "going out bush for cultural reasons": see http://www.tangentyere.org.au/services/finance/food_voucher/.

4. **The compulsory income management regime may infringe the right to freedom of movement:** The right to free movement, including unhindered interstate travel, may be infringed by the income management regime. Because it restricts the provision of the nominated goods and services to a number of licensed stores, beneficiaries may be bound to remain there and their mobility is likely to be unreasonably curtailed: ICCPR, art. 12.

5. **The compulsory income management regime may be discriminatory in impact, and does not represent a special measure:** The amendments reinstate the *Racial Discrimination Act 1975* (Cth) but intend to retain and expand the application of the compulsory income management regime as 'special measure' under s 8 of the Act (and CERD). However, as has been extensively canvassed in other submissions, the proposed scheme is unlikely to meet the established criteria for a special measure. In particular, it does not adequately take account of 'the wishes of the beneficiaries [which] are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement': *Gerhardy v Brown* (1985) 159 CLR 70 (Brennan J, at 135). The assessment of adequacy is informed by the range and scope of the communities which took part in the consultation.

6. **Proportionality is the test for determining whether a limitation of the rights discussed above is permissible:** Any limitation of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. In essence, the inquiry into the proportionality of a limitation on rights involves asking whether compulsory income management serves an important and significant objective; whether there is a rational connection between this objective and the limitation on rights; whether there is a less restrictive means of achieving this objective; and whether the limitation has a disproportionately severe effect on particular individuals.

7. **Several elements of the proposals raise particular questions of proportionality:** While addressing disadvantage is clearly a legitimate aim, there is a lack of objective evidence that compulsory income management is an effective means to achieve that end. We have pointed to a number of possible infringements of economic, social and cultural rights, and of the rights of privacy and free movement, which suggest an unreasonable distance between the aim of the scheme and the means employed. Other submissions have presented concrete examples of this distance; see, for example, submission by Anglicare Australia. Moreover, the blanket application of the scheme to broad categories of welfare recipients, as opposed to on the basis of individualised assessments, may be arbitrary and unreasonable.

   (a) Furthermore, measures which may meet the proportionality test in the short term may result in violations of rights if they continue over an extended period. The proposed scheme appears to contemplate income management as a permanent, ongoing measure for certain classes of welfare recipients. There is no provision for an exit strategy for those who may repeatedly fail to satisfy the exemption criteria. There is a risk that such individuals may be subject to 'rolling' determinations, which increases the likelihood of substantive breaches occurring. We note that income management under the current NTER is allowed to operate only up to a maximum of five years. At the very least, these amendments should specify that the normally applicable statutory provisions for welfare support should apply after a reasonable fixed period has elapsed.

8. **The lack of a legislated domestic human rights framework in which to assess the necessity and proportionality of these proposals does not remove the relevance of international obligations**: Many of these human rights obligations may not be actionable domestically, but as a party to these treaties, Australia is no less bound to respect, protect and fulfill them. The lack of a legislated domestic human rights framework, such as a National Human Rights Act recommended by the National Human Rights Consultation Report of 2009, does not remove the relevance of such obligations. We note, however, that the introduction of a National Human Rights Act would enable the tests of reasonableness and proportionality to be more clearly assessed within Australia. Such principles are essential – and must be the basis – for evaluating reforms to Australia's welfare system as significant as these. In particular:

   (a) If the scheme is intended to be consistent with human rights, this should be included as either an overriding principle or as an explicit factor that decision-makers should be obliged to take into account when exercising powers under the legislation.

   (b) The government accepted the NTER Review Board's recommendation that its actions in undertaking these reforms must respect Australia's international human rights obligations (http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm). We would therefore call on the government to table its advice on the human rights compatibility of these amendments prior to the resumption of debate on these bills.