Social Security Legislation Amendment (Community Development Program) Bill 2015

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Date introduced: 2 December 2015
House: Senate
Portfolio: Indigenous Affairs

Commencement: Sections 1–3 on Royal Assent; Schedule 1, Part 1 and Schedule 2, Part 1 on the day after Royal Assent. There are two contingent commencements:
Schedule 1, Part 2 commences immediately after the commencement of item 1 of Schedule 1 to the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Act 2015; Schedule 2, Part 2 commences immediately before the commencement of Schedule 1 to the Social Services Legislation Amendment (Youth Employment) Act 2015. If either contingent condition is not satisfied the relevant provision does not commence.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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The Bills Digest at a glance
The Bill is a significant shift in Coalition policy on employment and welfare policy in remote areas with predominantly Indigenous populations, creating more local administrative flexibility, opportunities for intermittent part-time and casual employment, and recognising that remote employment markets may not create sufficient full-time work and so transitions between employment and welfare may be frequent. The proposed amendments raise the income threshold at which social security payments are reduced, and create opportunities for ‘work-like’ behaviour doing community work, as opposed to welfare dependency. It is justified with reference to the ‘positive elements’ of the former Community Development Employment Projects program (CDEP), a program which was strongly opposed and largely dismantled by the former Howard Government in favour of bringing remote and Aboriginal social security recipients under the regular social security payment system. This process was slowed, but continued by the Rudd and Gillard Governments under the Remote Jobs and Communities Program (RJCP), which is being converted to the current Government’s Community Development Program (CDP).

It should be noted that, while they share a title, the Community Development Program exists independently of the current Bill. The Department of the Prime Minister and Cabinet explains that the CDP commenced on 1 July 2015 and:

… is delivered in 60 regions and more than 1,000 communities. These regions, dispersed across 75 per cent of Australia’s land mass, are characterised by weak labour markets which make it difficult to find work or gain work experience and skills.

The Explanatory Memorandum and second reading speech give support to:

• making payments weekly
• a simplified and more rapidly responding compliance framework capable of levying proportionate penalties for the number of hours of Work for the Dole work not attended
• social security payments being made by local CDP providers
• provisions for cultural business and illness
• community willingness to participate (to be ascertained through ‘extensive community consultation’) and
• a new community investment fund which will reinvest payments withheld due to non-participation penalties.

However, very few of the policy changes proposed in the second reading speech or the Explanatory Memorandum are contained in the Bill, apart from changes to the income threshold and allowing CDP providers to manage social security payments. Instead, the Bill grants the Minister a wide ranging power to use disallowable regulatory instruments to change social security administration in designated remote areas.

This has given rise to concerns that Parliamentary oversight of social security administration in remote areas will be weakened, protections currently applying to social security recipients providing for review of decisions before penalties are imposed may be weakened or removed, and remote income support recipients’ privacy may be endangered, as their personal information and payments will be administered by local Community Development Program Providers, who may know them personally, rather than the Department of Human
Some CDP Providers have expressed similar concerns, adding that their staff may be endangered or placed in culturally untenable positions if they are in the position of deciding on welfare payments for their relatives and community members and that they are ill-equipped to deal with the added administrative burden.  

Some of the policies proposed in the second reading speech, Explanatory Memorandum and other statements by Minister Scullion or the then Assistant Minister to the Prime Minister, Alan Tudge, have been criticised by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, as being potentially indirectly discriminatory. This is because the proposed schemes impose more strenuous Work for the Dole requirements on a predominantly Indigenous population.  

Lisa Fowkes of the Centre for Aboriginal Economic Policy and Research (CAEPR) criticises the policy as potentially leading to lower incomes and harsher penalties for recipients, even given the higher income thresholds.  

There is an argument that social security requirements and administration need to be tailored to the particular circumstances of each region if better outcomes are to be obtained. However, there are questions as to whether the Bill is in line with its stated intentions. The Bill may benefit from amendments bringing its legislative effect in line with the policy statements from the government. CDP providers and subject matter experts have pointed to ‘reform fatigue’ caused by the frequent changes in remote employment schemes over the last few years (see Background discussion below) and called for extensive community consultation requirements, both before the Bill is passed and to be incorporated into the Bill. Amendments requiring, for example, that the community consultation and consent called for in the Explanatory Memorandum take place, as suggested by some CDP providers, or bringing work requirements more into line with those in non-remote areas so as to avoid concerns about indirect discrimination, would set minimum standards for a remote income support region scheme without significantly diminishing policy flexibility.

**Purpose of the Bill**

The purpose of the Social Security Legislation Amendment (Community Development Program) Bill 2015 (the Bill) is to amend the Social Security Act 1991 (the Act), and the Social Security (Administration) Act 1999, to create greater incentives for activity-tested income support recipients in remote communities within selected regions to engage with activity requirements and find and remain in paid work. Approximately 84 per cent of the 37,000 current Newstart recipients in Community Development Program (CDP) areas are Aborigines and/or Torres Strait Islanders.

**Structure of the Bill**

- This Bill is divided into two Schedules, each of which has two Parts.

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17. M Gooda, op. cit.  

• The main amendments to the Act and to the Social Security (Administration) Act 1999 which aim to achieve the Bill’s purpose are in Schedule 1, part 1.

• Schedule 1, part 2 is a contingent Amendment ensuring harmony between the Bill and the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Act 2015, in the event that that Act commences.

• Schedule 2, part 1 repeals a number of clauses of the Act and the Social Security (Administration) Act 1999 related to the Northern Territory CDEP Transition Payment and the CDEP Scheme, which are now spent.

• Schedule 2, part 2 is a contingent Amendment ensuring harmony between the Bill and the Social Security Legislation Amendment (Youth Employment) Act 2015, in the event that that Act commences.

Background

The Bill is shaped by the recent history of Aboriginal social security, employment and welfare programs since the winding down of the CDEP, which began in 2004 with the program’s transfer to the former Department of Employment and Workplace Relations (DEWR) from the former Aboriginal and Torres Strait Islander Commission (ATSIC). The Bill’s second reading speech explicitly refers to ‘positive features’ of the former CDEP.10

Summary of CDEP

A detailed history of the CDEP is outside the scope of this Digest, but a short summary will highlight the issues involved. The CDEP began in a few remote Aboriginal communities in 1977, administered by the then Fraser Government’s Department of Aboriginal Affairs. At the program’s peak in 2002–03, it employed some 35,200 Indigenous people (approximately 25 per cent of all Indigenous employment) in 272 communities, both remote and non-remote, with a total budget of $484.4 million.20 However, by this period, concerns were being expressed that, despite a focus on training and employment outcomes, CDEP employment was not leading to non-CDEP employment or employable skills for participants, and work requirements were not being enforced.21 This triggered a still ongoing debate over whether the CDEP was diverting participants from seeking mainstream employment (a position associated with the late Helen Hughes, Noel Pearson, the Centre for Independent Studies and the Howard Government), or whether it represented the only realistic option for employment in remote Aboriginal communities with limited labour markets (a position associated with Jon Altman and some other scholars at the Australian National University’s Centre for Aboriginal Economic Policy Research (CAEPR)).22

After the CDEP’s transfer to the then Department of Employment and Workplace Relations (DEWR) in 2004, review of the program led to it being gradually withdrawn from non-remote areas, which was assisted by the buoyant labour market of the time. In the range of measures associated with the Northern Territory Emergency Response (ENTER) in 2007, it was announced that CDEP would be wound up. Some of those formerly employed under CDEP to deliver government services (e.g. Indigenous teachers’ aides) were to be employed by local and state governments in regular jobs while others would be transferred to unemployment programs, in keeping with a criticism of the time that CDEP was being used as a Commonwealth subsidy to provide services that should be provided by other levels of government. The change of government slowed this process as the Rudd Government undertook consultations on the future of the CDEP,23 but the new Government arrived at a similar policy position that the CDEP was not delivering employment outcomes and was subsidising local and state/territory responsibilities.24 The process of closing non-remote CDEP programs continued, with participant numbers declining to approximately 10,500 by 2011. In 2012–13, all remaining CDEP participants, as well as clients of Job Services Australia, Disability Employment Services and the Indigenous Employment Program in remote areas, were transferred to the Remote Jobs and Communities Program (RJCP), which administers

22. BH Hunter and MC Gray, op. cit.
programs broadly similar to non-remote unemployment, disability and Work for the Dole programs, although some participants continue to work on CDEP rates under grandfathering arrangements.\textsuperscript{25}

A recurring criticism of these changes,\textsuperscript{26} which now appears to be agreed to by Minister Scullion\textsuperscript{27} and Shadow Parliamentary Secretary for Indigenous Affairs Snowdon\textsuperscript{28}, was that the shift from a ‘workfare’ program such as the CDEP to more standard welfare programs would lead to an increase in passivity, ‘sit-down money’, and associated social ills as work requirements were no longer attached to payments. Responding to this emerging problem has led to increasing work-for-the-dole requirements under the Community Development Program, in response to a recommendation by Andrew Forrest.\textsuperscript{29}

Evaluations of the CDEP program over the last 20 years consistently found that CDEP participants had better social, health and economic outcomes than unemployed and not in the labour force Indigenous people, but much worse outcomes than Indigenous people in non-CDEP employment.\textsuperscript{30} How these results have been interpreted has largely depended upon the interpreters’ view of whether there is sufficient non-CDEP employment available and the broader viability and desirability of small remote Indigenous communities. If the alternatives are CDEP or unemployment, this is a good outcome;\textsuperscript{31} if CDEP has diverted people from other employment opportunities, it is an indictment.

**Key features of CDEP**

Under the CDEP, unemployment payments of participants were pooled and administered by a local Indigenous organisation, which used the money to employ participants at or around minimum wage rates, doing various forms of community work. Participants might also be employed by the organisation beyond the minimum hours required using other sources of funds, for example government grants to deliver community services, an arrangement generally referred to as ‘top-up’, which became controversial due to its potential use as a cross-subsidy for services. This enabled local level flexibility and responsibility, rapid response to problems by local organisations on the ground, and welfare that encouraged participation in the community and the workforce rather than ‘sit-down money’.

While some of these features are captured by the proposed Bill and the suggested policy around it, there are some key differences between the proposed CDP and the former CDEP, which may result in different outcomes:\textsuperscript{32}

- The former CDEP scheme was voluntary; participants could choose either to participate in it or in the standard social security system. The proposed system would be compulsory for all remote income support recipients in designated areas.
- The former CDEP based work requirements on minimum wage rates, effectively requiring about 15 hours work per week to earn the equivalent of Newstart. The proposed 25 hour a week requirement is equivalent to a below-minimum wage of approximately $10.50 an hour.
- CDEP was managed by local Indigenous organisations which had considerable discretion in their choice of activities and administration of payments. Current CDP providers have very little discretion in whether or not to penalise job-seekers, and about half are non-local, non-Indigenous and for-profit providers, who have less incentive or ability to take community views or individual problems into account. The Minister has suggested that the current high rates of ‘no show no pay’ penalties being levied on CDP participants are partly due to administrative complexity, confusion and delay stemming from centralised DHS administration of the remote population, and turning over these responsibilities to local CDP providers would lead to penalties being more

\textsuperscript{25} BH Hunter and MC Gray, op. cit.
\textsuperscript{27} S Martin, *Communities told to get to work*, *The Australian*, 2 July 2015, p. 6, accessed 14 January 2016.
\textsuperscript{29} S Martin, op. cit.
\textsuperscript{30} BH Hunter and MC Gray, op. cit., pp. 16–18.
\textsuperscript{32} L Fowkes, op. cit., p. 6.
rapidly and fairly assessed, leading in turn to more responsible behaviour from participants.\textsuperscript{33} However, without CDP providers having more discretion in the administration of Work for the Dole requirements and breaches, there seems little reason to suppose that the proposed scheme, which involves an increase in Work for the Dole requirements, would lead to a decrease in non-attendance.\textsuperscript{34}

In summary, while the proposed schemes under the Bill do duplicate some features of the CDEP, they do so while potentially applying much tighter government control over the nature of community work and participation requirements, and at much lower rates of pay for participants.

**Committee consideration**

**Senate Selection of Bills Committee**

The Selection of Bills Committee referred the Bill to the Senate Finance and Public Administration Legislation Committee on 3 December 2015. The reasons for referral were:

- to fully evaluate the impact of the measures on remote communities
- to enable the views of communities and providers to be taken into account to ensure that the proposed changes deliver the best practical outcomes and
- to determine the impact of the measures in the Bill on various types of families.\textsuperscript{35}

**Senate Finance and Public Administration Legislation Committee**

The reporting date for the Senate Finance and Public Administration Legislation Committee’s inquiry (‘the Inquiry’) is 29 February 2016. Details of the inquiry are at the inquiry webpage.\textsuperscript{36} A hearing was held on 19 February 2016.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills has considered the bill in its first Alert Digest for 2016.\textsuperscript{37} The Committee considers that, given the extensive delegation of parliamentary powers to the Minister to be exercised via legislative instrument, the Bill may delegate legislative powers inappropriately and it may be insufficiently subject the legislative powers to parliamentary scrutiny.\textsuperscript{38} The committee noted that the Explanatory Memorandum contained a detailed explanation that this level of delegation and flexibility was necessary given the need to tailor social security policy to the requirements of specific regions and communities. They suggest a reporting requirement should be added, to evaluate the scheme’s operation and the appropriateness of the use of delegated legislative power for the purpose.\textsuperscript{39}

**Policy position of non-government parties/independents**

At the time of writing, the non-government parties and independents had not expressed a view of the Bill. Warren Snowdon, ALP shadow parliamentary secretary for Indigenous affairs, has expressed general support for reform of RJCP to bring back positive features of the former CDEP scheme.\textsuperscript{40}

**Position of major interest groups**

Many peak bodies, CDP providers and other interest groups have made submissions to the Senate Finance and Public Administration Legislation Committee’s inquiry into the Bill (‘the inquiry’). As many of these raise the same or similar issues, they are summarised here and the issues raised are addressed in more detail under ‘Key Issues and provisions’ below.

\textsuperscript{33} Explanatory Memorandum, op. cit., p. ii.
\textsuperscript{34} L Fowkes, op. cit., p.5.
\textsuperscript{37} Senate Standing Committee for the Scrutiny of Bills, Alert digest, 1, 2016, The Senate, 3 February 2016, accessed 3 February 2016
\textsuperscript{38} Ibid., p. 46.
\textsuperscript{39} Ibid., p. 45.
\textsuperscript{40} M Gordon, ‘Remote communities may benefit in new work scheme’, The Age, 2 December 2015, p. 5, accessed 14 January 2016; M Garrick, op. cit.
As mentioned above, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has raised a number of concerns about the Bill in the Social Justice and Native Title Report 2015.41 Mick Gooda also made a submission to the inquiry repeating and extending these concerns and recommending that the Bill not be passed in its current form.42

A number of academics with experience in Indigenous affairs, including Lisa Fowkes, Dr Kirrily Jordan, and Professor Jon Altman, have made similar submissions to the inquiry.43 Collectively, they argue that the Bill is misconceived because, contra the Explanatory Memorandum, high rates of non-attendance at work for the dole and penalty imposition in remote areas are not driven by misunderstanding of a complex administrative system. Rather these problems are caused by aggressive enforcement of extremely high (25 hours per week) work requirements by CDP providers who lose money if they do not enforce penalties. They argue that the CDP scheme will not boost employment, as work for the dole schemes have historically failed to do so. They instead call for much greater analysis and consultation with Aboriginal communities on the design of a new scheme more closely resembling the former CDEP, such as the Remote Participation, Employment and Enterprise Development Scheme (RPEEDS) proposed by Aboriginal Peak Organisations Northern Territory (APO NT).

Jobs Australia,44 the peak body for not-for-profit employment services providers, and a number of CDP providers45 have raised objections to the Bill in submissions to the Inquiry. These objections include:

• a lack of consultation
• the wide and potentially discriminatory powers granted to the Minister
• the implications for job seeker income of the work requirements
• staff safety being compromised, and
• the additional administrative burden on CDP providers.

Some CDP providers have lodged submissions supporting the Bill,46 or providing in-principle support but raising similar concerns as those opposed.47 Marra Warra Warra Aboriginal Corporation and Winun Ngari Aboriginal Corporation, who support the Bill, have expressed a desire that the fund of withheld penalty payments promised in the second reading speech be administered and distributed by CDP providers, rather than being distributed through the Indigenous Advancement Strategy budget.

The National Employment Services Association (NESA), the peak body for all employment service providers, state that a majority of their members consulted opposed the Bill, although approximately a third of members supported it.48 They raised concerns about lack of transparency in process and proposed changes, inadequate information on the selection of regions, the lack of an independent evaluation framework, and potential costs, administrative burdens and dangers faced by CDP providers.

The Australian Council of Trade Unions (ACTU) have lodged a submission to the inquiry raising concerns about CDP Work for the Dole workers becoming a second class of workers for CDP providers, potentially doing the
same jobs for below-minimum wage, and unprotected by Occupational Health and Safety or Workers Compensation laws. They argue that this will undermine employment and is potentially discriminatory and in breach of human rights. 49 The Community and Public Sector Union (CPSU) has supported these concerns, and expressed concerns about staff safety and the impact on Aboriginal public servants currently employed to deliver administrative services if these roles are transferred to CDP providers. 50

The National Welfare Rights Network, a peak body for community legal services, including Aboriginal legal services, have raised concerns about the breadth of power granted to the Minister, potential discrimination against remote income support recipients, the potential for the changes to reduce incomes, and whether the proposed changes will actually reduce penalty rates. They call for the projected budget of the Bill to be invested in improving DHS services. 51

The Northern Land Council opposes the bill on the grounds of the breadth of power granted to the Minister, the potentially discriminatory nature of the changes, and the lack of a clear appeals process (as the appeal process is to be specified in the legislative instrument). They call for a more community-centric model with greater local autonomy, to be designed in collaboration with Indigenous communities. 52

The New South Wales Aboriginal Land Council (NSWALC) has expressed concerns that the Bill’s proposed s1061ZAA2A(4) excludes participants in Work for the Dole activities from the Work Health and Safety Act and other acts relating to workers’ safety and compensation. 53 According to the Explanatory Memorandum, these exclusions also apply to current Work for the Dole participants in non-remote areas. 54 The NSWALC also expressed concerns that the Bill would create a class of second-class workers working at below minimum wage levels in remote areas and the wide scope of powers of the Minister, and called for more consultation. They expressed a positive view of the current CDP scheme, with some reservations about whether it created long-term opportunities for participants.

The Australian Council of Social Service (ACOSS) opposes the Bill on the grounds that determination of social security schemes by legislative instrument, and the powers granted to the minister may weaken the protections currently embedded in the Act for vulnerable people, and reduce transparency in government policy towards them. They agree with the concerns raised by the Parliamentary Joint Committee on Human Rights (discussed below) about potential discrimination and immediate application of penalties before appeal. ACOSS suggests that the Bill is unlikely to reduce penalty rates or increase employment levels, and may exacerbate vulnerability and poverty in remote areas. 55

APO NT, a peak organisation covering the North Australian Aboriginal Justice Agency (NAAJA), Central Australian Aboriginal Legal Aid Service (CAALAS), Aboriginal Medical Services Alliance NT (AMSA NT), Central Land Council (CLC) and the Northern Land Council (NLC), have made a submission opposing the bill, objecting to the increased range of powers granted to the Minister, and calling for further inquiry into the reasons for high penalty rates and community consultation and input on policy design. They also suggest a number of specific changes, including:

- reducing the proposed 25 hours of work a week to the 15 hours applied to non-remote income support recipients
- work for the dole to be paid at minimum wage rates, and
- counting hours of paid employment towards the work requirements.

APO NT have put forward a proposed alternative model called the Remote Participation, Employment and Enterprise Development Scheme (RPEEDS) and request that the Minister consider trialling it. 56 The CLC have made a submission which echoes the submission of the APO NT. 57

The National Congress of Australia’s First People (NCAFP) have made a submission opposing the Bill on the grounds that it is discriminatory, grants too much power to the Minister, has not made sufficient information available about the content of the proposed legislative instrument(s), and does not meet the criteria of ‘free, prior and informed consent’ set by the United Nations Declaration on the Rights of Indigenous Peoples (discussed below under ‘Consultation requirements’). They propose:

- that CDP providers should only be local community controlled Indigenous organisations (under the current system, non-Indigenous, non-local and for-profit organisations can tender to be CDP providers)
- that CDP providers should be compensated for additional administrative and IT expenses
- that Work for the Dole in remote areas should be limited to 15 hours per week as it is in non-remote areas,
- and they express support for RPEEDS. 58

**Financial implications**

The Bill’s Explanatory Memorandum states that approximate costs for establishment and rollout of the proposed amendments for up to 2,000 people are $31 million over four years. 59 This is approximately $3,900 per participant per year.

If the same total costs (over four years) per person applied to a hypothetical further rollout to all approximately 36,000 recipients of social security payments in CDP areas, then the total cost would be approximately $558 million. However, the actual cost per person is likely to be lower given that some percentage of the cost is non-repeated establishment costs.

As a basis for comparison, the ongoing cost per person of Income Management in the Northern Territory was approximately $5,600 per participant in 2011–12. 60 The annual maximum Newstart income of a single recipient is $13,608. 61

A number of submissions to the Inquiry by CDP providers have raised concerns about the administrative cost and burden of taking over payment processing in the manner suggested by the Bill. 62 The Explanatory Memorandum does not state whether the $31 million includes assistance to CDP providers to upgrade their systems.

Given the Productivity Commission’s recent (repeated) call for ‘a much greater emphasis on policy evaluation’ in Indigenous policy, and the Senate Standing Committee for the Scrutiny of Bill’s call for an evaluation reporting requirement to be added to the Bill, 64 Members and Senators may wish to establish whether this amount includes an adequate budget for evaluation of the new CDP framework, and whether any evaluation will be tabled in parliament. NESA and a number of CDP providers have also expressed concerns that recent changes introducing CDP have not yet been evaluated before this new CDP is introduced. 65 A commonly cited rule of

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59. Explanatory Memorandum, op. cit., p. iii.
64. Senate Standing Committee for the Scrutiny of Bills, op. cit.
thumb in social and economic development literature is that a program should allocate between five and ten percent of its budget to monitoring and evaluation, although this amount may be proportionally smaller for larger programs.

### Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. 

Mick Gooda has expressed concern that some aspects of the Work for the Dole schemes which are proposed to be enacted under the Bill may give rise to indirect discrimination and have a negative impact on the ability of Aboriginal and Torres Strait Islander peoples to enjoy their rights. This concern is echoed in many of the submissions to the Inquiry. This is discussed further in the ‘Key Issues and provisions’ section below.

### Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights has expressed concern that:

- By enabling the creation of a different system of obligations and penalty arrangements for remote job seekers, the bill engages and may limit the right to social security and the right to an adequate standard of living, and the right to equality and non-discrimination.

The key issues raised by the Parliamentary Joint Committee on the right to social security and an adequate standard of living are:

- New obligations and [proposed] immediate penalties may result in payments being reduced or lost altogether, limiting the right to social security.
- Application of immediate penalties means that appeals can only occur after the penalty has already been imposed.
- It is unclear why obligations [of remote income support recipients] are to be determined by legislative instrument rather than set out in legislation.
- Because the obligations and penalties have not been set out in legislation and the proposed legislative instrument has not been provided, the committee cannot determine whether they have a legitimate objective and are rationally and proportionately connected with that objective. Therefore, the committee cannot determine whether the obligations and penalties, and the Bill enabling them, are compatible with human rights. As it stands, the Bill engages and limits the right to social security.

On equality and non-discrimination, the Committee expressed a similar point of view to the Aboriginal and Torres Strait Islander Social Justice Commissioner, that although the legislation was not directly discriminatory, there was potential for indirect discrimination as more than 80 per cent of the affected population were Aboriginal and Torres Strait Islander people. Such measures are justifiable if they pursue a legitimate objective, are rationally connected to the objective, and are proportionate, or are a special measure designed to assist or protect a disadvantaged group. The committee accepted that the aim of reducing disadvantage for remote job seekers is a legitimate outcome and that creating a different system of obligations and penalties for this group is

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67. The Statement of Compatibility with Human Rights can be found at pages 38–44 of the Explanatory Memorandum to the Bill.
70. Ibid., para 1.38.
71. Ibid.
72. Ibid., para 1.39.
73. Ibid., pp. 7–10.
74. M Gooda, op. cit.
75. Parliamentary Joint Committee on Human Rights, op. cit., paras 1.51–1.52.
76. Ibid., para 1.53.
rationally connected. However, the committee was unable to assess whether the proposed measures were proportionate and whether they would disproportionately affect Indigenous Australians.\textsuperscript{77}

The committee has sought the advice of the Minister for Indigenous Affairs on the compatibility of the Bill with human rights given the matters raised\textsuperscript{78} and has recommended that the government release an exposure draft of the proposed legislative instrument, setting out the obligations and penalties for remote income support recipients.\textsuperscript{79}

Key issues and provisions

Substance of Amendments

The major ways in which the Bill amends the Act and the \textit{Social Security Act 1999} are:

Firstly, to create a new category of social security recipient, defined by \textbf{item 3} of the Bill as a \textit{remote income support recipient} in a clause inserted into subsection 23(1) of the Act.

Remote income support recipients are the recipients of disability support pension, parenting payment, youth allowance, Newstart allowance or special benefit, who live in a \textit{remote income support region}, are subject to activity tests and/or participation requirements, and receive their payment(s) from a Community Development Program Provider rather than directly from the Department of Human Services. Remote income support recipients are exempted from the activity tests, participation requirements and employment pathway plans required of other recipients by \textbf{items 4–24} of the Bill. Instead, their obligations will be determined by a \textit{scheme} determined by the Minister through a legislative instrument under the \textit{new section 1061ZAAZA} of the Act, created by \textbf{item 25} of the Bill, and administered by the local Community Development Program Provider.

Remote income support recipients also have the income threshold above which social security payments are reduced significantly raised, from $143–$162 per fortnight\textsuperscript{80} to $1,300 per fortnight or $33,800 per year, above which income support tapers at a rate of 50 cents reduced per dollar earned. This is approximately the annual earning of a full-time minimum wage job. The policy intent is to encourage recipients to take up part-time, seasonal, intermittent or casual work opportunities, which may be the only work available in remote areas,\textsuperscript{81} without being dissuaded by becoming ineligible for social security benefits.

Secondly, to enable the Minister to determine, by legislative instrument, a region of Australia to be a \textit{remote income support region}. The Minister must consider the following in making the determination:

\begin{enumerate}
\item whether the region is remote;
\item the level of social and economic disadvantage within the region, including the levels of unemployment, social welfare and education of persons living in the region;
\item whether there is likely to be a Community Development Program provider capable of providing remote income support payments to persons residing in the region.
\end{enumerate}

Delegation of legislative powers to the Minister

It should be noted that although the government, in the Explanatory Memorandum and second reading speech, has indicated a range of policies intended to be applied in remote income support regions by means of the Bill, the range of policy options opened to the Minister by the bill are significantly wider than these expressed policies. The Bill does not require (although it does ‘make provision for’, given that they are potential options) payments to be made weekly, provision for illness or cultural business, a maximum of 25 hours of activities being required, community consultation or willingness to participate, or provide any constraint on the nature of ‘worklike activities’.

\textsuperscript{77} Parliamentary Joint Committee on Human Rights, op. cit., pp. 10–12.
\textsuperscript{78} Ibid., paras 1.43 and 1.55.
\textsuperscript{79} Ibid., para 1.44.
\textsuperscript{80} Existing earning thresholds for the various payments are shown inter alia in items 27, 29, 31 and 41 of the Bill, and vary between $143–$162 per fortnight for various categories, except for Youth Allowance for full time students or apprentices who can earn up to $427 per fortnight.
\textsuperscript{81} N Scullion, ‘Second reading speech: Social Security Legislation Amendment (Community Development Program) Bill 2015’, op. cit. p. 73.
In theory, the Bill’s item 25, which proposes a new section 1061ZAAZA of the Social Security Act, gives the Minister the power to determine, by disallowable legislative instrument, that remote income support recipients in a designated region work any number of hours at yet to be specified tasks (for instance these are not provided for in paragraphs 1061ZAAZA(2)(a-b)), with indefinite penalties to be applied (for instance these are not provided for in paragraph 1061ZAAZA(2)(c)). Furthermore, there are no explicit legislative provisions dealing with exemption for illness, cultural business, or any other reason (for instance these are not provided for in paragraph 1061ZAAZA(2)(d)), and the decision review process is also to be determined by the Minister (paragraph 1061ZAAZA(2)(g)), with appeal to the Administrative Appeals Tribunal only available after this initial review process is exhausted (item 50, revising paragraph 144(da) of the Social Security Administration Act). The breadth of the regulation making capacity would also make it possible to impose additional requirements on disability support recipients, parenting payment recipients, or youth allowance recipients, beyond those required of non-remote income support recipients (subsection 1016ZAAX(2)). This not only provides the Minister with quite wide ranging powers, but also limits Parliamentary scrutiny to the power to disallow an instrument instantiating a particular scheme. The Senate Standing Committee for the Scrutiny of Bills has expressed concern that this may be an inappropriate and insufficiently scrutinised delegation of legislative power to the Minister.  

This delegation of legislative power is compounded by a ‘Henry VIII’ clause in proposed section 1061ZAAZC, which grants the Minister the power to use a legislative instrument to suspend or alter any provision of the Act with respect to remote income support recipients. Section 125 of the Social Security Administration Act would exempt any decision made under such an instrument from the social security law, and so exempt it from the normal appeals process. The Explanatory Memorandum states that this power is needed to address ‘any unforeseen or unintended consequences’ of interactions between the new scheme and the current or future social security law, and because this power is limited to remote income support payments and recipients, it is an appropriately limited delegation of legislative power to the executive. However, it is not limited in scope or time period in its application to these people. In her submission to the Inquiry, Dr Kirrily Jordan states:

Just because non-remote social security recipients would still be afforded the protections of existing social security legislation (and parliamentary scrutiny of any changes to that legislation), this does not mean that removing these protections from remote social security recipients is less concerning.

Some stakeholders have suggested amendments that could alleviate these concerns. For example, Miwatj Employment & Participation, a CDP provider for East Arnhem Land, have suggested that the legislative instruments made by the Minister be required to be made in ‘consultation and collaboration with both communities and service providers.’ The Aboriginal and Torres Strait Islander Social Justice Commissioner has recommended that Work for the Dole should be a voluntary, opt-in scheme.

**Will the changes reduce No Show No Pay penalties?**

Lisa Fowkes and others argue that current high penalty rates for non-attendance by Work for the Dole participants in remote areas are driven by over-zealous application of unrealistic work requirements rather than misunderstandings of a complex and distant system, as the Explanatory memorandum and second reading speech suggest. Fowkes suggests that despite the stated intent of the bill being to reduce non-compliance and high penalty rates among CDP participants, the imposition of higher work requirements, potentially harsher penalties and less flexibility in considering individual circumstances for ‘no-show’ means that penalty rates may rise rather than fall. As CDP providers are only paid by DHS when participants attend, provide timely and reasonable excuses or are penalised, there is an immediate incentive to penalise a lack of compliance. Thus, ‘a direct conflict of interest would arise between the CDP providers’ financial interest in compliance and the...
traditional obligations of those that administer welfare payments to ensure that people have access to the income support safety net.\textsuperscript{89} This concern and analysis are echoed in a number of submissions to the inquiry.

\textbf{Indirect Discrimination}

Mick Gooda has expressed concerns that a number of aspects of the proposed scheme under the Bill would impose harsher penalties on job seekers in remote communities. As these are predominantly Indigenous people, this may give rise to indirect discrimination and a negative impact on the ability of Aboriginal and Torres Strait Islanders to enjoy their rights. Whether this occurred would depend upon the nature of the scheme laid down by the Minister using the powers granted by the Bill. This concern has also been raised by the Parliamentary Joint Committee on Human Rights,\textsuperscript{90} discussed above.

Specific points Mick Gooda has raised include:

- Job seekers in non-remote areas are required to participate in Work for the Dole for 6 months of the year, but the Minister has proposed that remote income support recipients participate for the entire year (with standard allowances for leave, holidays and so on.)

- Job seekers in non-remote areas in Work for the Dole programs are currently required to participate in Work for the Dole for 25 hours a week if aged under 30, and 15 hours a week if aged 30–49. The proposed scheme would extend the 25 hour requirement to this older age bracket.

- There is no legislative protection against a potentially harsher penalty being applied to no-show remote income support recipients than that applying to no-show Work for the Dole participants in non-remote areas. The Bill exempts remote income support recipients from Division 3, Part 3A of the \textit{Social Security Administration Act}, which spells out how penalties for non-compliance are assessed. This currently requires the Department of Human Services to conduct a Comprehensive Compliance Assessment, taking the individual’s personal circumstances into account, before levying serious penalties. The Bill replaces this requirement with a scheme to be devised by the Minister to assess penalties, and there is negligible legislative guidance as to the form of this scheme.

Mick Gooda states that there is no clear benefit in applying more work requirements to job seekers in remote communities than in non-remote communities, particularly given that Work for the Dole has not been shown to boost employment prospects and providers may have difficulty finding enough activities for the recipients.\textsuperscript{91} In this he is partly supported by the recent evaluation of Work for the Dole by the Social Research Centre for the Department of Employment, which found that Work for the Dole only increased job placement rates and movement off income support by 2 per cent (for both Indigenous and non-Indigenous participants), and Indigenous Australians were less likely to be referred to Work for the Dole activities and less likely to commence them if referred.\textsuperscript{92} However, participation in Work for the Dole was found to have a strong positive effect on the psychological wellbeing of participants and was found valuable by community organisations employing Work for the Dole participants.\textsuperscript{93} Given that social and individual dysfunction caused by passive welfare reliance is a target of this Bill,\textsuperscript{94} the evaluation suggests Work for the Dole may have other positive outcomes for Indigenous communities, even if it does not raise employment levels.

\textbf{Financial and employment impact on recipients}

As mentioned above, analysis that Lisa Fowkes of CAEPR prepared for Jobs Australia raises the prospect that participants could be financially disadvantaged compared to current arrangements, despite the higher taper rates. Under existing CDP rules, paid employment can count towards the 25 hours per week of Work for the Dole required to receive Newstart. Furthermore, once the Newstart recipient hits the point at which income begins to taper, they are no longer required to participate in Work for the Dole projects. Under the scheme proposed in the Explanatory Memorandum and Second Reading Speech (though not explicitly required in the bill), paid

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} Ibid., pp. 4–6.
\item \textsuperscript{90} Parliamentary Joint Committee on Human Rights, op. cit., pp. 10–12.
\item \textsuperscript{91} M Gooda, op. cit., pp. 59–61.
\item \textsuperscript{93} Ibid., pp. 72–81, 82–86; M Cash (Minister for Employment), ‘\textit{Independent report finds Work for the Dole effective}’, media release, 16 November 2015, accessed 1 February 2016.
\item \textsuperscript{94} N Scullion, ‘Second reading speech: Social Security Legislation Amendment (Community Development Program) Bill 2015’, op. cit. p 72.
\end{itemize}
\end{footnotesize}
employment would not count towards the 25 hours required. Consequently, substantially more activity would be required to receive the same income, even though the Newstart payment would not be tapered by income.\footnote{L Fowkes, op. cit., p. 5.}

The following table lays out an example of a single non-parent Newstart recipient who also works part time for five hours, two days a week (20 hours per fortnight) at the minimum wage of $17.29 per hour, assuming that the recipient does not attend Work for the Dole activities for the same number of hours as they are attending paid work, and does not attend Work for the Dole at all if not required to, as is the case under the existing CDP.

<table>
<thead>
<tr>
<th>Fortnightly Scheme:</th>
<th>Proposed CDP</th>
<th>Existing CDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income from work (20 hrs, $17.29/hr)</td>
<td>$345.80</td>
<td>$345.80</td>
</tr>
<tr>
<td>Income from Newstart (max. rate of $523.40)</td>
<td>$314.04 for 15 hours/week WfdT</td>
<td>$392.12</td>
</tr>
<tr>
<td>Reduction in Newstart income due to income tapered rate</td>
<td>$0</td>
<td>-$131.28</td>
</tr>
<tr>
<td>Proposed reduction in Newstart income due to substituting paid work for WfdT</td>
<td>-$209.36</td>
<td>$0</td>
</tr>
<tr>
<td>Work for the dole hours/fortnight</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>Total income/fortnight</td>
<td>$659.84</td>
<td>$737.92</td>
</tr>
<tr>
<td>Total hours worked/fortnight</td>
<td>50</td>
<td>20</td>
</tr>
<tr>
<td>Average income per hour worked</td>
<td>$13.20</td>
<td>$36.90</td>
</tr>
</tbody>
</table>

It can be seen that despite doing 30 extra hours of CDP work-like activities, this hypothetical part-time worker is $78 per fortnight worse off under the proposed scheme than under existing arrangements. To simply equal their previous income, they would have to do CDP work-like activities for an additional 7.5 hours a fortnight (which might be difficult to arrange if scheduled work-like activities clashed with their paid work) or find an additional 4.5 hours a fortnight paid work, outside the hours scheduled for CDP activities. Given the limited labour markets and available activities in remote communities, it is quite possible that there will be neither further CDP work nor paid work available. In effect, Fowkes argues, the proposed policy to be enacted under the Bill substitutes a steep time-based taper for a more gradual income-based taper. Allowing paid work to count for CDP activity hours, as suggested by Aboriginal Peak Organisations NT, would remove this problem.\footnote{N Scullion, ‘Second reading speech: Social Security Legislation Amendment (Community Development Program) Bill 2015’, op. cit.}

It should be noted that the Explanatory Memorandum and Second Reading Speech propose ‘a broad range of CDP activities’ would be eligible to be counted as activity requirements, such as ‘volunteering at the school canteen, participating in women’s support groups... supporting older and disabled people’\footnote{Explanatory Memorandum, op. cit., p.3.} or ‘vocational training; work preparation and foundations skills such as language, literacy and obtaining a driver’s licence; programmes to address pre-employment barriers such as drug and alcohol problems.’\footnote{N Scullion, ‘Second reading speech: Social Security Legislation Amendment (Community Development Program) Bill 2015’, op. cit.} However, the wider this net is cast, the less plausible it becomes to suppose that a person in part-time employment might not already be doing some or all of these activities without being required to document them. Furthermore, such arrangements...
might open the program to criticisms of the former CDEP, that it simply delivered ‘training for training’s sake’ or ‘activity for activity’s sake’ rather than any tangible or longer-term outcome.

The justification advanced for requiring this level of documented activity is that it promotes ‘work-like behaviour’ which can lead to gaining employment and exiting from welfare payments. However, as discussed above, while there is evidence that work-for-the-dole and similar programs promote psychological wellbeing among participants, there is little evidence that they lead to significantly improved job prospects. Given that, as the second reading speech recognises, work prospects in remote Australia are intermittent, there seems little purpose in imposing Work for the Dole obligations on those who are already working part-time. The Work for the Dole obligations imposed under the scheme may need to be commensurate with the relatively limited options available.

Lisa Fowkes\textsuperscript{100} and the Welfare Rights Centre Sydney\textsuperscript{101} have also commented that provisions to allow weekly Centrelink payments, and to return to a scheme similar to the CDEP, already exist in social security legislation and would not require legislation such as the Bill to enact.

**Privacy and safety concerns**

In order to enable social security payments to be administered by and made through local CDP providers, the Bill enables the employees or officers of a CDP provider to access protected information as defined by the Act (item 2, inserting subsection 23(1)(bb) in the Act) and to receive social security-related documents and information from remote income support recipients (item 55, inserting Schedule 6 in the *Social Security (Administration) Act*).

Concerns regarding privacy issues may become more acute because, as one of the rationales for the changes, payments are planned to be made by ‘the local CDP provider on the ground who has a direct relationship with the job seeker’\textsuperscript{102}. Given that CDP providers will be local organisations, there is reason to believe that the users and handlers of social security information within the CDP provider may know the remote income support recipient personally or in other contexts.\textsuperscript{103} Avoiding the inappropriate handling of private information becomes that much more crucial than when the information is held by more remote departmental staff who have been trained in proper handling of private information. There are also concerns about whether local providers would have adequate IT infrastructure to correctly handle and process social security payments.\textsuperscript{104}

The personal information will be governed by the confidentiality provisions of the *Social Security (Administration) Act* (Part 5—Information Management: Division 3, Confidentiality). These provisions will apply to staff of a CDP service provider since they are defined as an ‘officer’ by section 201A of the *Social Security (Administration) Act*:

\begin{itemize}
  \item[(c)] a person who, although not appointed or employed by the Commonwealth, performs or did perform services for the Commonwealth and who, as a result of performing those services, may acquire or has acquired information concerning a person under the social security law.\textsuperscript{105}
\end{itemize}

The privacy provisions of the *Privacy Act 1988* also govern the collection, protection, use and disclosure of all personal information by the government and certain private enterprises. Given the increased significance of privacy in these environments, it may be that the legislation could flag this issue more effectively. For instance the Minister could need to be satisfied that the ‘suitable Community Development Program provider’ (as proposed provision 10617AAZ(2)(a)(iii) requires), is capable of placing adequate privacy safeguards on the information received from remote income support recipients residing in the region.

A similar concern has been expressed in submissions to the Inquiry about the safety of staff. Some CDP providers, peak bodies and the CPSU fear that if the power to determine payments and penalties is delegated to local CDP staff, the staff will be subjected to intimidation or violence from income support recipients. Indigenous

\begin{itemize}
  \item[100] L Fowkes, op. cit.
  \item[101] Welfare Rights Centre Sydney, op. cit.
  \item[102] Explanatory Memorandum, op. cit., p. 3.
  \item[103] Tiwi Islands Training and Employment Board, op. cit., p. 2.
  \item[104] Australian Human Rights Commission, Submission, op. cit., p. 3.
  \item[105] *Social Security (Administration) Act 1999*.
\end{itemize}
staff may be placed in culturally untenable positions if they are required to impose penalties upon members of their kinship or social networks.\textsuperscript{106}

**Consultation requirements**

A number of submissions to the Inquiry expressed concerns that despite references to ‘extensive community consultation’ and ‘community willingness’ in the Explanatory Memorandum,\textsuperscript{107} there are no consultation requirements in the Bill itself. Some suggest that consultation requirements should be embedded in the legislation.\textsuperscript{108} In their submission to the Inquiry, the Department of the Prime Minister and Cabinet argue that the Minister must ‘fulfil the consultation requirements under the Legislative Instruments Act before the relevant legislative instrument is made’.\textsuperscript{109}

Part 3 of the *Legislative Instruments Act 2003* lays out the requirements for consultation when making a Legislative Instrument. It states:

**Part 3—Consultation before making legislative instruments**

17 **Rule-makers should consult before making legislative instruments**

(1) Before a rule-maker makes a legislative instrument, and particularly where the proposed instrument is likely to:

(a) have a direct, or a substantial indirect, effect on business; or

(b) restrict competition;

the rule-maker must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken.

(2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation:

(a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and

(b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

  \textbf{Note:} Under subsection 26(1A), an explanatory statement relating to a legislative instrument must include a description of consultation undertaken or, if there was no consultation, an explanation for its absence.

18 **Circumstances where consultation may be unnecessary or inappropriate**

(1) Despite section 17, the nature of an instrument may be such that consultation may be unnecessary or inappropriate.

(2) The following are examples of instruments having a nature such that the rule-maker may be satisfied that consultation is unnecessary or inappropriate:

(a) an instrument that is of a minor or machinery nature and that does not substantially alter existing arrangements; or

(b) an instrument that is required as a matter of urgency; or

(c) an instrument that gives effect, in terms announced in the Budget, to a decision:

(i) to repeal, impose or adjust a tax, fee or charge; or

(ii) to confer, revoke or alter an entitlement; or

(iii) to impose, revoke or alter an obligation; or

(d) an instrument that is required because of an issue of national security; or

(e) an instrument in relation to which appropriate consultation has already been undertaken by someone other than the rule-maker; or

(f) an instrument that relates to employment; or

\textsuperscript{106} Tiwi Islands Training and Employment Board, op. cit., p. 2.

\textsuperscript{107} Ibid., pp. ii, 9.

\textsuperscript{108} Miwatj Employment and Participation Ltd, op. cit.

(g) an instrument that relates to the management of, or to the service of members of, the Australian Defence Force.

19 Consequence of failure to consult
The fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument.

These consultation requirements fall short of the standard referred to in the Explanatory Memorandum, ‘only where the community is willing’, or the standard set by Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which Australia has supported, which specifies that states should obtain the ‘free, prior and informed consent [of Indigenous Peoples] before adopting and implementing legislative or administrative measures that may affect them’. Whether consultation is adequate or not is determined by the Minister (subsections 17(1) and (2)), the level of consultation required is ‘opportunity to comment’ (paragraph 17(2)(b)) without any requirement that comments be considered, and, under section 19, failure to consult would not affect the legislative instrument. Furthermore, paragraph 18(2)(f) states that consultation is unnecessary for ‘an instrument that relates to employment’, which may include Instruments under the Bill.

Many submissions also expressed concerns that the Bill’s policy had not been discussed with stakeholders and Indigenous people before being presented to Parliament, and called for more consultation before any future CDP changes occur.

Potential to displace local employment
A potential unintended consequence is the scope for the Bill to recreate what were previously seen as some undesirable features of the CDEP scheme. One rationale for the CDEP’s abolition was that it was creating an underpaid workforce, who were frequently doing ‘real jobs’ for local or state/territory government and community services, but at below-minimum wages, ‘topped-up’ by Commonwealth-funded CDEP payments. Many of the organisations delivering CDP services are currently also service providers. They would have a financial incentive to use their CDP work-for-the-dole-force to deliver local services for which they would otherwise have to pay full wages. According to proposed section 1061ZAAZB, providers can be paid for ‘services, activities, assistance, infrastructure, or projects in relation to the making of remote income support payments’, which would seem to place no limit on what CDP participants can be required to do. Rather than encouraging people into the workforce, the limited job markets of remote and very remote Australia, and the domination of local job markets by employers who are also CDP providers, could mean that opportunities for paid jobs are displaced.


111. L. Fowkes, Proposed Social Security Legislation Amendment (Community Development Program) Bill 2015: Briefing by Lisa Fowkes for Jobs Australia, op. cit. p.5; ACTU, op. cit.