



**Australian  
Human Rights  
Commission**  
*everyone, everywhere, everyday*

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# **Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act***

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Australian Human Rights Commission

11 November 2009

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## **1. Introduction**

1. Section 20(d) of the *Racial Discrimination Act 1975* (Cth) (RDA) provides the Australian Human Rights Commission with a function to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA' of the Racial Discrimination Act.<sup>1</sup>
2. The Commission has issued these draft guidelines to provide practical assistance to Parliament and the Government in designing and implementing income management measures that protect human rights and are consistent with the RDA. They are also intended to increase awareness among affected communities about the application of the RDA to income management regimes.
3. While not legally binding, they provide important guidance as to the operation of the RDA and will be relevant in assisting the resolution of complaints.<sup>2</sup>
4. The draft guidelines contain two sections which should be read concurrently:
  - Section one: poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this.
  - Section two: provides background information on the legal basis for the different elements discussed in the first section. It also provides the background on existing income management regimes nationally and considers the extent to which they are consistent with the RDA.
5. In the Commission's view, taking the approach set out in these draft guidelines will not only ensure that such measures are compliant with fundamental human rights and discrimination laws, they will also help to ensure that they are effective.
6. The guidelines provide a framework to ensure that competing human rights concerns can be balanced in a manner that is appropriate and consistent with Australia's human rights obligations.
7. These guidelines have been released in draft format on the Commission's website to encourage feedback and comments. The Commission particularly wants to hear how the guidelines could be modified and improved to be a more useful and practical tool.
8. Comments should be provided to the Australian Human Rights Commission by close of business, **Friday 12 February 2010**.

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<sup>1</sup> Part II relates to the prohibition of racial discrimination and Part IIA to the prohibition of offensive behaviour based on racial hatred.

<sup>2</sup> Note that these guidelines do not alter the operation of the RDA and compliance with them does not constitute a defence to an allegation of discrimination under the RDA.

9. The Commission aims to finalise the guidelines in early 2010.

## 2. Key questions

10. This section poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this. The key questions are:

- Where the measure is established by legislation, does it ensure equality before the law?
- Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
- Is the measure a 'special measure'?

### 2.1 Does the income management measure ensure equality before the law?

11. Where income management measures are established by law, the measure should ensure human rights are enjoyed equally by all racial groups (s10 of the RDA).<sup>3</sup>

12. Income management measures may impact upon the enjoyment of a number of human rights including, most prominently, the right to social security. This is a right relevant to both adults who may be entitled to social security and their children under Article 26 of the *Convention on the Rights of the Child*.

13. In determining whether an income management measure ensures equal human rights for all, you should ask:

- (a) Does the measure have a disparate impact upon the ability of people of a particular race to enjoy a right? If it does, the measure may be discriminatory.

It is not necessary that the measure *target* a particular racial group, *apply* only to that racial group or *intend* to have a disparate impact upon members of that group. What matters is the practical effect of a measure. If, in practice, it has a greater impact upon people of a particular race, then it may be discriminatory.

- (b) Is any limitation on the right a legitimate one, intended to achieve a non-discriminatory purpose? If it is not, the measure will be discriminatory.

To be legitimate, any limitation on a right should meet the following criteria:

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<sup>3</sup> For the purposes of these guidelines, the term 'race' is used as shorthand for 'race, colour or national or ethnic origin'.

- The purpose of the limitation should be directly linked to the promotion of another human right, such as those protected by the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC'). Administrative convenience or efficiency will not be a legitimate purpose to justify racial distinction.
- The limitation must be *proportionate* to the benefit being sought by the measure. This in turn requires that:
  - the benefit be clearly identified, and
  - the measure be the least restrictive/interfering option available to achieve that benefit.

In practice, other ways of achieving the relevant benefit that do not have a disparate impact upon the rights of people of a particular race should be considered first. Only if the purpose of the measure cannot reasonably be achieved by those other methods can a limitation be described as 'proportionate', and therefore legitimate.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation in any decision is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should always be applied (see key elements of free, prior and informed consent in Appendix 1).

## **2.2 Does implementation of the measure involve discrimination?**

14. Discretionary actions and decisions taken in the implementation of an income management measure must also avoid 'direct' and 'indirect' racial discrimination (sections 9(1) and 9(1A) of the RDA).

*'Direct discrimination': s 9(1)*

15. There are two central questions in assessing whether an income management measure may involve 'direct' discrimination. These include:

- (a) Are there any discretionary acts done in the implementation of the income management measure that involve a distinction, exclusion,

restriction or preference based on race? If so, the acts may be discriminatory.

An act will be 'based on race' where there is a sufficient connection between the act and the race of a person or group. It is not necessary to show a causal connection or that a person had an intention to discriminate - discrimination can be unintentional and unconscious.

- (b) Does the act have a negative impact on the equal enjoyment of rights in public life by people of that race?

The practical effect of an act 'based on race' must be considered. If its practical effect is to limit the enjoyment of a human right, it is discriminatory.

*'Indirect discrimination': s 9(1A)*

16. 'Indirect discrimination' occurs when a term, condition or requirement is imposed *generally* that is unreasonable and has a disparate impact on people of a particular race.
17. In assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:
- (a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?
- (b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?
- (c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?
18. If the answer to all of these questions is 'yes', the implementation of the income management measure is indirectly discriminatory.

**2.3 Is the measure a 'special measure' that meets the requirements of the RDA?**

19. If a measure is non-discriminatory, then it is not necessary to consider whether it is a 'special measure'.
20. For an income management measure to meet the requirements of a special measure it must comply with all of the following criteria:
- the measure must confer a *benefit* on some or all members of a class of people
  - membership of this class must be based on race, colour, descent, or national or ethnic origin

- The *sole purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
  - The protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
  - The measure must not have already achieved its objectives.
21. To meet the requirement outlined above that the sole purpose of the measure is to secure adequate advancement of the beneficiaries, the following should be considered:
- When assessing the 'adequate advancement' of a group, it is necessary to consider their views. Because income management measures operate by limiting certain rights, both consultation with and consent of the group to whom it applies is essential.
  - In dealing with Indigenous communities, the standard of free, prior and informed consent should be applied. See Appendix 1 for an overview of the key elements of the standard of free, prior and informed consent.
  - The consultation process must be a real opportunity for engagement. It should aim for full and equitable participation across and between affected communities. (For a brief guide to good practice for community consultations see Appendix 2).
22. In relation to the requirement that the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others, you should be aware that:
- If the benefits of the measure can be achieved without making a racial distinction, the measure will not be necessary.
  - Demonstrating necessity requires evidence - current and credible evidence which shows that the measure will be effective. The data must be reliable, credible and where possible, supported by both qualitative and quantitative sources.
  - All parts of the measure must be appropriate and adapted to meet the intended purpose.
  - The measure must also be monitored and evaluated to ensure that it is working effectively. Without this it is not possible to establish whether the measure is necessary or not. (For a brief guide to good practice for monitoring and evaluation see Appendix 3).
23. To meet the requirement that the measure must not have already achieved its objectives - regular monitoring and evaluation is also required to assess if the objectives of the measure have been met. This includes:



- whether the measures are appropriate and suitably adapted to their stated purpose
- whether the measures are having the intended (immediate/short-term and/or long-term) effect
- whether there are any emerging, unintended consequences of the measures
- whether there are any negative flow on effects from the measures?
- whether there is a continuing need for the measures, that is, have they already achieved their stated purpose?

### 3. Commentary

24. This section provides background information on the legal basis for the different elements discussed in the first section. It also provides background on the recent income management measures and considers the extent to which current income management measures are consistent with the RDA.

#### 3.1 Background

25. On 21 June 2007, the Australian Government announced the Northern Territory Emergency Response (NTER) to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.

26. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) was part of the package to enable the NT intervention. Schedule 1 of the Act authorises a variety of income management measures.

27. The purpose of the income management measures is to promote socially responsible behaviour, particularly in relation to the care and education of children, by quarantining the suspended payments to ensure that they are only spent on food and other essential items. The quarantined income can not be used to purchase alcohol, tobacco products or pornographic material.<sup>4</sup>

28. The Act provides for five different types of income management measures for people receiving welfare, including:

- **Declared relevant Northern Territory area**

A person can be subject to an income management measure if the person lives in a declared relevant Northern Territory area (s 123UB).

- **Child protection notices**

Child protection officer of a State or Territory can require a person to be subject to the income management regime (s 123UC).

- **School enrolment in declared primary school area and declared secondary school area**

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<sup>4</sup> The objects of the legislation under section 123TB are as follows:

- (a) to promote socially responsible behaviour, particularly in relation to the care and education of children
- (b) to set aside the whole or a part of certain welfare payments
- (c) to ensure that the amount set aside is directed to meeting the priority needs of:
  - I. the recipient of the welfare payment
  - II. the recipient's partner
  - III. the recipients children
  - IV. any other dependants of the recipient.

A person can be subject to an income management measure if the person, or the person's partner, has a child who does not meet school enrolment requirements (s 123UD).

- **School attendance in declared primary school area and declared secondary school area**

A person can be subject to an income management measure if the person, or the person's partner, has a child who has unsatisfactory school attendance (s 123UE).

- **Queensland Commission**

A person can be subject to an income management measure if required by the Queensland Commission (s 123UF).

29. While the first measure is specific to the Northern Territory and the last measure only operates in specific areas of Queensland, the remaining measures have a national application and can be introduced in any State or Territory of Australia.
30. At the time the NTER measures were introduced, the *Social Security (Administration) Act* stated that: 'a decision under Part 3B of this Act that relates to a person who is subject to the income management regime under section 123UB cannot be reviewed by the Social Security Appeals Tribunal' (and subsequently the Administrative Appeals Tribunal).
31. However, an individual can ask the original decision maker or an authorised review officer to review the decision; can seek review under the *Administrative Decisions (Judicial Review) Act 1977*; or lodge a complaint with the Commonwealth Ombudsman. Also, payment suspensions due to a failure to respond to the income management letter, or attend an income management interview, are not made under Part 3B of the *Social Security (Administration) Act* and are subject to the usual review and appeals process.
32. In June 2009, the *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009* amendments were passed enabling the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to review a decision made under Part 3B of the *Social Security (Administration) Act* about a person who is subject to the Northern Territory income management regime.

### **3.2 Current status of income management measures**

33. To date, the following income management measures have been introduced:
- 73 prescribed communities in the Northern Territory have been determined to be declared areas in the NT for the purposes of income management;
  - The Families Responsibilities Commission was established in Queensland (*Family Responsibility Commission Act 2008* (Qld)) for the

Cape York Welfare Reform Trial and operates in the Aurukun, Coen, Hope Vale and Mossman Gorge communities and associated outstations.

- A trial in the Logan area (across Woodridge, Kingston, Logan Central and Eagleby), Queensland. This is the first welfare reform trial in Australia that targets a densely populated, urban mainstream community.
- In conjunction with the Western Australian Government, an income management measure for child protection was introduced in selected areas of WA (Cannington and Kimberley region). Under this measure a case manager from the WA Department for Child Protection can refer a person to Centrelink for income management.

34. In addition, the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) 2008 Act*, established an income management measure for school enrolment and attendance in two metropolitan locations in Western Australia and six Northern Territory communities (Hermannsburg, Katherine, Katherine town camps, Wallace Rockhole, Wadeye and Tiwi Islands).
35. There are also examples of voluntary income management measures. Such measures have been introduced under the Cape York Welfare Reform Trial and under the child protection income management measure in WA.<sup>5</sup>
36. There also continues to be provision under social security legislation to make regular payments to a registered service provider directly from Centrelink payments.<sup>6</sup>
37. This provision has been the basis for voluntary income management measures, such as the Tangentyere Council's food voucher system, which has been in operation for 25 years, pre-dating the income management measures under the NTER. Under the food voucher system, people receiving Centrelink payments can choose to have a nominated amount of money deducted from their Centrelink payments every fortnight. This money is then provided to them in the form of a food voucher, which is issued through the Tangentyere community banking service. The Council supports over 800 Aboriginal people under this voluntary measure.<sup>7</sup>
38. Of the four income management measures outlined above (not including the voluntary income management measures) the 'School enrolment and attendance measure (WA/ NT)' is the only one that is not exempted from the RDA and state/territory anti-discrimination legislation.

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<sup>5</sup> Section 123TGA of the *Social Security (Administration) Act 1999* also provides for the Minister to declare a specified State, Territory or area as a declared voluntary income management area for the purposes of this Part.

<sup>6</sup> Centrelink, *Voluntary Income Management* (2008). At [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508\\_0808/\\$file/co508\\_0808en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508_0808/$file/co508_0808en.pdf) (viewed 1 October 2009).

<sup>7</sup> Tangentyere Council, 'Tangentyere's Voluntary Food Voucher System'. At [http://www.tangentyere.org.au/services/finance/food\\_voucher/](http://www.tangentyere.org.au/services/finance/food_voucher/) (viewed 1 October 2009).

39. All four of the income management measures now allow for Commonwealth and state review processes and appeal rights, but, with the exception of the 'School enrolment and attendance measure (WA/ NT)', only for decisions made after 1 July 2009.
40. The '73 prescribed communities measure (NT)' applies mandatory quarantining within a declared area. In contrast, the 'Cape York Welfare Reform Trial measure (QLD)', the 'Child protection measure (WA)' and the 'School enrolment and attendance measure (WA/ NT)' are based on an opt-in or last-resort suspension model<sup>8</sup>

### **3.3 Racial discrimination and income management measures**

41. To date, income management measures have been introduced primarily under the NTER legislation, which declares that the whole legislation is a special measure, as well as exempting the legislation and acts done under it from the RDA.<sup>9</sup>
42. The Commission and Indigenous communities have expressed concerns that the measures involve breaches of human rights.<sup>10</sup> In particular, concerns have focused on the potentially racially discriminatory impact of the measures, the characterisation of the measures as 'special measures' accompanied by the exclusion from the protection of racial discrimination laws, and the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the measures. Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the

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<sup>8</sup> An example of the last-resort suspension model can be seen in the Cape York Welfare Reform Trial which operates as follows: A person is referred by an agency to the Families Responsibilities Commission if:  
a person's child is absent from school three times in a school term, without reasonable excuse  
a person has a child of school age who is not enrolled in school without lawful excuse  
a person is the subject of a child safety report  
a person is convicted of an offence in the Magistrates Court, or  
a person breaches his or her tenancy agreement - for example, by using the premises for an illegal purpose, causing a nuisance or failing to remedy rent arrears.

Once the Commission receives an agency notice, a process is followed where it is determined if the person is within the jurisdiction of the Commission. Upon determination of jurisdiction, the matter is then referred to the Local Commissioners for a decision about whether to order the person to attend a conference. A conference proceeds where the client may be encouraged to enter in an agreement, or an order is made to refer the person to community support services. The matter is then case managed by the Commission for the period of the order/agreement. Where a person does not comply, show cause proceedings are initiated and the client is ordered to appear before the Commission to explain reasons for non-compliance and if necessary an order for Conditional Income Management (CIM) may be made. (Families Responsibilities Commission, *Quarterly Report No. 3 January – March 2009, Report to the Family Responsibilities Board and the Premier of Queensland* (2009). At <http://www.atsip.qld.gov.au/government/families-responsibilities-commission/documents/frc-quarterly-report-3.doc> (viewed 1 October 2009).)

<sup>9</sup> *Northern Territory National Emergency Response Act 2007* (Cth), s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(3), (5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4 (2).

<sup>10</sup> Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html). (viewed 1 October 2009). See also: James Anaya, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia*, Canberra, 27 August 2009. At <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf>

overall well-being of these communities in both the short and longer term than measures that respect their human rights.

43. In its response to the NTER Review, the Government has committed to introducing legislation into the Parliament in the Spring sittings of 2009 to remove the provisions in the current NTER Acts that exclude the operation of the RDA and state/territory anti-discrimination legislation.
44. On 21 May 2009, the Government released a discussion paper setting out proposals for the measures affected by the RDA, including the income management measures. Community consultations are underway to assess how these measures might be improved and amended to conform with the RDA.
45. These guidelines are aimed at ensuring that income management measures are designed and implemented so as to be consistent with the RDA and accordingly Australia's international legal obligations under the International Convention on the Elimination of All Forms of Racial Discrimination<sup>11</sup> (ICERD), upon which the RDA is based.

### **3.4 Making income management consistent with the RDA**

46. There are two ways to ensure income management measures are consistent with the RDA:
  - ensure that the structure and implementation of an income management measure avoids racial discrimination, or
  - develop and implement the measure as a 'special measure' under the RDA.

#### *Option 1: Avoiding discrimination in the structure and implementation of the income management measure*

47. The RDA seeks to ensure that laws do not breach the rights of people of a particular race (the right to equality before the law, s 10) and prohibits actions that discriminate against people based on their race, colour or national or ethnic origin (the prohibition on discrimination ss 9, 11-5).
48. In the context of income management regimes, it is necessary to consider both
  - the laws that establish the regime to ensure that such laws do not impair the right to equality before the law, and
  - the manner in which such laws are implemented to ensure that such acts do not discriminate based on race.

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<sup>11</sup> Opened for signature 21 December 1965 (entered into force 4 January 1969 except for art 14 which came into force 4 December 1982). ICERD entered into force for Australia on 30 October 1975 and art 14 with effect from 28 January 1993.

## Right to equality before the law

49. Section 10 of the RDA creates a general right to equality before the law. The section is concerned with ensuring the equal enjoyment of rights of all persons under law.<sup>12</sup>

50. It provides:

### 10. Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

51. It is not necessary for a law to single out people of a particular race for it to engage s 10(1). The section is directed at 'the practical operation and effect' of laws and is 'concerned not merely with matters of form but with matters of substance'.<sup>13</sup>

52. Determining whether s 10(1) has been breached requires asking:

- whether there is a relevant 'right' or 'rights' that are affected by the impugned law, and
- whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law. This requires asking:
  - does the law limit the enjoyment of a right by people of a particular race relative to others, and
  - is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?<sup>14</sup>

What are the relevant 'right' or 'rights' that are affected?

53. Article 5 of ICERD sets out an extensive list of rights, covering civil, political, economic, social and cultural rights. However, s 10(2) makes clear that the rights covered by s 10(1) are not limited to those referred to in ICERD.

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<sup>12</sup> *Gerhardy v Brown* (1985) 159 CLR 70 ('Gerhardy'), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 ('Ward'), [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>13</sup> *Jango v Northern Territory* (2007) 159 FCR 531 [115]; *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward* (2002) 213 CLR 1, 107 at [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>14</sup> *Bropho v State of Western Australia* [2008] FCAFC 100 ('Bropho'), [81]-[83].

54. The rights protected by s 10 should be understood very broadly. It is not necessary that a right be one that is recognised in Australian law.<sup>15</sup>
55. A 'right' under s 10 should be understood to exist where there is 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights'.<sup>16</sup> A law will engage a right if it impacts upon a persons ability to 'live in full dignity', 'engage freely in any public activity' or 'enjoy the public benefits of... society'.<sup>17</sup>
56. This approach is consistent with the broad purpose of s 10. As its title makes clear, s 10 is intended to guarantee equality before the law. That purpose is also clear from the second reading speech of the Racial Discrimination Bill 1975: 'The Bill will guarantee equality before the law without distinction as to race'.<sup>18</sup>
57. In the context of income management measures, the right to social security is clearly one right that is engaged. Such measures may also impact upon the right to privacy where they allow for, or require, the disclosure of information in determining which people can be made the subject of a measure.<sup>19</sup>

Do persons of a particular race not enjoy a right or enjoy it to a more limited extent than persons of another race by reason of the law?

58. As noted above, there are two aspects to this question.
59. *First, does the law limit the enjoyment of a right by people of a particular race relative to others?*
60. Section 10 (1) of the RDA is engaged where there is unequal enjoyment of rights between racial groups by reason of the law that is being considered. It is not necessary to show that this effect is the intention or purpose of the law. The focus is on its practical operation and effect.<sup>20</sup>
61. The central issue here is whether a law has a disparate impact upon people of a particular racial group.<sup>21</sup>

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<sup>15</sup> *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo No. 1*'), 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).

<sup>16</sup> *Mabo No. 1* (1988) 166 CLR 186, 229 (Deane J).

<sup>17</sup> *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).

<sup>18</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (James McClelland, Minister for Manufacturing Industry).

<sup>19</sup> Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), 278. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html). (viewed 1 October 2009).

<sup>20</sup> *Bropho* [2008] FCAFC 100, [73]; *Ward* (2002) 213 CLR 1, 103.

<sup>21</sup> The CERD Committee has noted in General Recommendation 32: 'The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration'. (Committee on the Elimination of Racial Discrimination,



62. In the case of income management, where a measure operates in a particular location that is predominantly populated by people of a particular race, the measure is likely to have a disparate impact upon people of that racial group.
63. *Second, is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?*
64. As most rights are not absolute, it may be permissible to limit them in pursuit of a legitimate, non-discriminatory goal. In determining whether a limitation is 'legitimate', the following principles should be applied:
- When determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the law-maker lacks a discriminatory motive or intention.
  - Proportionality will be a vital factor in making assessments of what is legitimate – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality the following should be considered:
    - Is the measure applied only for a specific purpose and directly related to a specific need?
    - Is the regime the least restrictive one available to achieve the lawful objectives pursued? The measure must involve the least possible interference with the right to be free from race discrimination.
  - The legitimacy of any limitation upon a right must be assessed in the context of the right in question: not all rights can necessarily be limited in the same ways. Where a right is one that is expressly protected by a convention it is necessary to consider what limitations are permitted under that convention and/or what, if any, limitations are recognised for that specific right.<sup>22</sup>
  - Because the 'balancing' of rights is taking place in the context of the right to racial equality before the law and non-discrimination, legitimacy should be judged against the objectives and purposes of ICERD and other relevant human rights instruments such as the ICCPR, ICESCR, CEDAW and the CRC.<sup>23</sup>

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*General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 8. At

<http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009)).

<sup>22</sup> United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN4/1985/4, Annex (1985) ('Siracusa Principles'). This is also consistent with the approach adopted by the CERD Committee for ICERD in General Recommendations 14, 30 and 32 (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 8. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009)).

<sup>23</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, except Article 41 which came into force 28 March 1979). See the Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination* (Forty-second session), UN Doc A/48/18 at 114 (1994),

The purpose of the measure should be directly linked to the promotion of another human right. Administrative convenience or efficiency will not be a legitimate purpose upon which a racial distinction can be justified.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation and consent is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should be applied (see Appendix 1). These issues are discussed further above in the context of special measures in 2.3 of the first section.

65. The Commission notes that income management measures that are properly targeted to parents or families in need of assistance to prevent neglect or abuse of children and reduce family violence may limit rights in a manner that is legitimate and accordingly be non-discriminatory.
66. As currently formulated, however, the limitation upon the rights of Aboriginal people under the income management measure applied in declared NT areas under the NTER is not legitimate. This is because the measure has a disproportionate impact upon the rights of the people subject to it:
- The income management measures apply to all people receiving welfare payments in the relevant communities. This means that the measures apply to individuals that are not responsible for the care of children, are not problem gamblers, do not engage in family violence and do not abuse alcohol or other substances. They also apply equally to responsible and irresponsible parents. There is accordingly no connection for such people between the operation of the measure and the object of addressing family violence and abuse.
  - It is difficult for individuals to be exempted from the income management provisions. Exemption requires a decision by the Minister. It would be more appropriate for the decision making about the applicability of the measure to be inverted; that is, for the measure to operate in relation to a particular individual only if a decision is made, based on clearly defined criteria, that the measure should be applied to that individual.<sup>24</sup>
67. A model that complies with the RDA should include the following features:

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[2]; Human Rights Committee *General Comment 18: Non-discrimination*, (Thirty –seventh session), UN Doc A/45/40 (1989), [13]. For a list of some of the relevant human rights standards to consider see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html). (viewed 1 October 2009).

<sup>24</sup> See further Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) pp 19, 276-7. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html). (viewed 1 October 2009).

- it should be subject to the application of the RDA and state/territory anti-discrimination legislation
- it should not apply automatic quarantining – different options that should be considered may include allow for a voluntary/opt in approach or a last-resort suspension approach for income management
- it should provide for a defined period of income management, where the time-frame for compulsory quarantining would be proportionate to the context and/or subject to periodic review
- it must allow for review and appeal processes, and
- it should include additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills development for welfare recipients, safe houses for women and men, alcohol and substance abuse programs.<sup>25</sup>

### Discriminatory acts

68. Section 9 of the RDA contains broad prohibitions on acts of racial discrimination.<sup>26</sup> This section does not apply to laws that may be alleged to discriminate against people of a particular race,<sup>27</sup> but it does apply to discretionary acts done under those laws – for example, by administrators implementing the laws.

### 'Direct' discrimination

69. Section 9(1) prohibits what is generally known as 'direct' race discrimination. It provides:

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

70. To ensure that the implementation of an income management measure does not directly discriminate on the basis of race, those implementing the measure must take care not to include do acts that:

- involve a distinction, exclusion, restriction or preference

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<sup>25</sup> For effective human rights based approaches for addressing family violence and child abuse in Indigenous communities in Australia see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) ch 2. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/chap2.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap2.html) (viewed 1 October 2009).

<sup>26</sup> Sections 11 to 15 of the RDA also prohibit acts of race discrimination in specific areas of public life, including in the provision of goods and services (s 13).

<sup>27</sup> *Gerhardy* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo No.1* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho* [2008] FCAFC 100, [70].

- are based on race, and
- have a negative impact upon the equal enjoyment by people of a particular racial group of their rights and freedoms in public life.

71. An act will be 'based on' race where there is a 'sufficient connection' between the act and the race of a person or group. It is not necessary to show a *causal* connection.<sup>28</sup>

72. It is not necessary for race to be the sole or dominant reason for the act: it only needs to be a reason.<sup>29</sup>

73. It is also not necessary for a person to have a discriminatory intention or motive: an act can still be 'based on race' unintentionally or unconsciously.<sup>30</sup>

#### 'Indirect' discrimination

74. Section 9(1A) of the RDA describes what is generally known as 'indirect' race discrimination. It provides:

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

The act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

75. People implementing an income management measure may therefore indirectly discriminate on the grounds of race if:

- they impose an unreasonable term, condition or requirement

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<sup>28</sup> *Macedonian Teachers' Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 ('*Macedonian Teachers*'), 29-30 cited in *Bropho* [2008] FCAFC 100, [68].

<sup>29</sup> Section 18, RDA.

<sup>30</sup> *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74 (Sackville J); *Macedonian Teachers* (1998) 91 FCR 8, 39.

- a person of a particular race does not or cannot comply with that term, condition or requirement; and
- imposing the requirement has a negative impact upon the equal enjoyment of rights in public life by other people of the same race.

76. Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1* provides an example of how a discretion may be structured and exercised so as to limit the potential for discrimination.<sup>31</sup> See Text Box 1 below.

**Text Box 1: Information to consider for discretionary decisions**  
(excerpt from Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1*)

(5) In deciding whether to make a determination under subsection (1), the Minister must have regard to the following matters:

(a) the availability in the relevant Northern Territory area of information setting out:

(i) the proposal to make the determination; and

(ii) an explanation, in summary form, of the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;

(b) the opportunities that have been made available to people in the area to discuss:

(i) the proposal to make the determination; and

(ii) the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB; with employees or officers of the Commonwealth;

(c) the opportunities that have been made available to potentially affected people in the area to:

(i) discuss their circumstances with officers of Centrelink; and

(ii) give Centrelink information about their expenditure;

(d) the extent to which it will be feasible for the Secretary to take action under Division 6 in relation to people who may become subject to the income management regime under section 123UB;

(e) such other matters (if any) as the Minister considers relevant.

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<sup>31</sup> Note, however, that section 123TE (6) allows for the Minister to make a discretionary decision that contravenes section 123TE (5). This undermines the effectiveness of such a clause.

*Option 2: Income management measure as a special measure*

77. The prohibitions in sections 9 and 10 of the RDA do not apply to ‘special measures’ that fall within Article 1(4) of ICERD.<sup>32</sup>

78. Article 1(4) of ICERD provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.

79. Special measures are typically ‘affirmative action’ measures that give members of a disadvantaged racial group access to a benefit that is intended to promote substantive equality. For example, Abstudy – a government allowance for Indigenous students – has been held to be a special measure.<sup>33</sup>

80. In the Commission’s view, it is preferable that measures that may limit the rights of people of a particular racial group, such as income management measures, are designed so as to be non-discriminatory, rather than justified as special measures.

Features of special measures

81. From the definition in Art 1(4) of ICERD, the following features of special measures can be identified:

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;

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<sup>32</sup> Note, however, that the special measures ‘exemption’ does *not* apply to laws that authorise management of property owned by Aboriginal or Torres Strait Islander people without their consent or restricts the ability of Aboriginal or Torres Strait Islander people to terminate the management of their property by another: ss 8(1), 10(3).

<sup>33</sup> *Bruch v Commonwealth* [2002] FMCA 29. The CERD Committee has also noted that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as...the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men. Such rights are permanent rights, recognised...in human rights instruments...The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 15. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009))

- the special measure must be for the *sole purpose* of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;
- the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
- the special measure must not already have achieved its objectives.<sup>34</sup>

82. All parts of a 'special measure' must be 'appropriate and adapted' to the relevant purpose.<sup>35</sup> In other words, the exemption for a special measure does not mean that if some aspects of a measure are a special measure, all aspects of that measure are immune from challenge.<sup>36</sup>

83. To be satisfied that a measure is necessary to ensure that the people it benefits can enjoy their human rights equally with others, you should ask:

- Could the benefits of the measure be achieved in a way that does not make a racial distinction?
- Is there current and credible evidence that supports the need for the measure and shows that it will be effective?
- Are the elements of the measure appropriate and adapted to meet the intended purpose?
- How will the measure be monitored and evaluated to ensure that it is working effectively?

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<sup>34</sup> *Gerhardy* (1985) 159 CLR 70, Brennan J (133). The CERD Committee in General Recommendation 32 has outlined similar requirements of a special measure under ICERD as follows:

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural<sup>34</sup> status and conditions of the various groups in the population and their participation in the social and economic development of the country'.

18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), pars 16-18. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009))

<sup>35</sup> *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).

<sup>36</sup> *Vanstone v Clark* (2005) 147 FCR 299, 354 [209] (Weinberg J), Black CJ agreeing.

## Consultation and consent

84. Consulting with the group that is intended to benefit from a special measure and obtaining their consent to the measure should be given special attention. The Commission is of the view that the level of consultation or consent required will vary depending on whether the measure to be introduced involves a limitation on certain rights or is entirely beneficial in nature.

## Consent to 'affirmative action' measures

85. In the context of 'affirmative action' measures (i.e. measures that give members of a racial group access to a benefit that is not available to people of other racial groups), the appropriate approach is to consider the wishes of the beneficiaries to be 'of great importance (perhaps essential)' in establishing whether the measure is a special measure. This means that, at a minimum, consultation with the 'beneficiary' group is essential and consent should be obtained unless there are legitimate reasons for not doing so (for example, because a measure is a short-term one to be introduced at short notice).
86. In the context of a law that granted land rights to a group of Aboriginal people, Brennan J in *Gerhardy v Brown* stated:

'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.<sup>37</sup>

87. It has similarly been observed that:

Legislators and social welfare administrators should resist their natural inclination to believe that they know better than the recipients what is good for them. Preferential programs should always, where remotely feasible, be developed in consultation with those being helped, and individuals should always be given the opportunity of receiving normal, non-preferential treatment should they so prefer. Where these conditions are not met, doubts about the benignity of a measure may be well founded.<sup>38</sup>

## Consent to measures that limit certain rights of a racial group

88. Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. This includes income management measures.

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<sup>37</sup> *Gerhardy* (1985) 159 CLR 70, 135.

<sup>38</sup> Gareth Evans, *Benign Discrimination and the Right to Equality* (1974) 6 FLR 26, 30.



89. In the Commission's view, such measures will *not* be special measures where they are implemented without the consent of the group to whom they apply (Please refer to Appendix One)

90. An example of such a measure is a restriction on the sale of alcohol to Aboriginal people living in remote communities.<sup>39</sup> Such restrictions will only be special measures where they are introduced with the consent of the relevant community.<sup>40</sup>

91. In the context of measures that apply to Aboriginal and Torres Strait Islander peoples, the concept of 'special measures' must be understood consistently with the right of peoples to self-determination. It is inconsistent with the right to self-determination for a measure that limits the rights of a group to be imposed upon it without the consent of the group.

92. Article 1 of the ICCPR and the ICESCR provides:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>41</sup>

93. The Committee on the Elimination of Racial Discrimination has, in its General Recommendation 23, called upon parties to ICERD to:

ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent...<sup>42</sup>

94. The *Declaration on the Rights of Indigenous People*<sup>43</sup> has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' (FPIC) in dealings with Indigenous peoples. Article 19 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

95. An important part of the principle of FPIC is ensuring that accurate and clear information is provided to affected communities. Prescribed communities, as defined by the NTER legislation, cover over 500 Aboriginal communities and multiple language groups. Information regarding any significant developments with income management programs should be:

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<sup>39</sup> See Race Discrimination Commissioner, *Alcohol Report* (1995), pp 137-49.

<sup>40</sup> It is important to note, however, that alcohol restrictions that apply generally to a community and not just members of a particular racial group may not be discriminatory and may therefore be permissible under the RDA. As discussed above, the first question is whether the measures are discriminatory. Only then is it necessary to consider the question of special measures.

<sup>41</sup> See also art 1 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>42</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997) par 4. At <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed 1 October 2009).

<sup>43</sup> GA Res 61/295, UNGAOR, 62nd sess, 107th plen mtg, Annex, UN Doc A/Res/61/295 (2006).

- translated where necessary and also provided in a plain-English format
- comprehensible for members of affected communities
- provided in summary form so that community members are able to become familiar with content quickly.

96. Government officers should make appropriate use of interpreter services during any consultation process. This will require adequate advance notice to ensure that an interpreter from the required language group is available.

97. Where proposed special measures may have a vastly different impact on the male and female members of a racial group it is crucial to consider ways to maximise broad participation in a consultation process. For example, there may be compelling evidence of family violence across a community, as a result of which women are not necessarily in a position to participate in a general consultation process or consent to a proposed measure.<sup>44</sup>

98. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in commenting on States' duty to consult with indigenous peoples, has noted that where Indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations.

The strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.<sup>45</sup>

99. The Special Rapporteur further notes, that in order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. Having observed that, in many instances, consultation procedures are not effective because the affected indigenous peoples were not adequately included in the design and implementation of the consultation procedures.<sup>46</sup>

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<sup>44</sup> M Davis, *International Human Rights Law, Women's Rights and the Intervention*, 10, *Indigenous Law Bulletin* (2009), pp 11-14.

<sup>45</sup> J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 47. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf> (viewed 22 October 2009)

<sup>46</sup> J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 51. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf> (viewed 22 October 2009)

## Appendices

### **Appendix 1: Key elements of free, prior and informed consent<sup>47</sup>**

#### **WHAT?**

**Free** – should imply no coercion, intimidation or manipulation.

**Prior** – should imply consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect time requirements of Indigenous consultation/consensus processes.

**Informed** – should imply that information is provided that covers (at least) the following aspects:

- a. the nature, size, pace, reversibility and scope of any proposed project or activity
- b. the reason(s) or purpose of the project and/or activity
- c. the duration of the above
- d. the locality of areas that will be affected.
- e. a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle
- f. personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others)
- g. procedures that the project may entail.

**Consent** - Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

The inclusion of a gender perspective and the participation of Indigenous women are essential, as is the participation of children and youth as

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<sup>47</sup> Australian Human Rights Commission (formerly HREOC), the United Nations and the Queensland Government, *International Conference on Engaging Communities* (2005). At [http://www.humanrights.gov.au/social\\_justice/conference/engaging\\_communities/fpic\\_brochure.html](http://www.humanrights.gov.au/social_justice/conference/engaging_communities/fpic_brochure.html) (viewed 1 October 2009). See also Principle of Free Prior and Informed Consent. At <http://www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc> (viewed 1 October 2009).

appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it.

## **2. WHEN?**

Free, prior and informed consent (FPIC) should be sought sufficiently in advance of commencement or authorisation of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

## **3. WHO?**

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, Indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

## **4. HOW?**

Information should be accurate and in a form that is accessible and understandable, including in a language that the Indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of Indigenous peoples and their languages.

## **5. PROCEDURE AND MECHANISMS**

Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms. As a core principle of FPIC, all sides of an FPIC process must have equal opportunity to debate any proposed agreement/development project.

'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in Indigenous language(s) as appropriate, or through any other agreed means, on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples, or an impact on their rights to their territories and/or natural resources.

FPIC could be strengthened by establishing procedures to challenge and independently review these processes. Determination that the elements of FPIC have not been respected may lead to the revocation of consent given. Mechanisms and procedures should be established to verify FPIC, including mechanisms of oversight and redress, such as the creation of national mechanisms.

## Appendix 2: A brief guide to good practice for community consultations<sup>48</sup>

Following are good practice requirements for community consultations in relation to income management measures.

### (i) Pre-consultation phase:

- **Involving Aboriginal and Torres Strait Islander people at the outset.** Community leaders (e.g. traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- **Ensuring that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting traditional land owners, the Prescribed Body Corporate (PEC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital. Peak bodies such as the National Aboriginal Community Controlled Health Organisation (NACCHO) and Indigenous Coordination Centers may also be good sources of knowledge.
- **Recognising the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.
- **Ensuring that the consultation process is accessible for broad cross sections of affected communities.** The consultation process should provide sufficient opportunity for grassroots communities to provide input, and not simply focus around individuals/community organisations that are high profile or easy to access. In other words, don't just dialogue with 'experts' or the usual suspects. Where consultations cannot be held across each affected community, free transport should be provided to the nearest local hub where a consultation has been scheduled.
- The consultation process should aim for a **gender balance** in relation to overall participant representation. Government officers should acknowledge the special role of women in discussions about income management. Aboriginal women are the heads of households in many cases and have caring responsibilities for their families and extended families. Consultation sessions should specifically seek information regarding the impacts and effectiveness of any measures on Aboriginal women who are caring

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<sup>48</sup> Australian Government, *Best Practice Regulation Handbook* (2007). At <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 22 June 2009).

for their grandchildren.

- Ensuring that the conduct of consultations allow affected communities to have control over timeframes. Notice of proposed measure/s must be given sufficiently in advance of its authorisation to allow time for the community to reach informed consent or to arrive at considered points of difference.

*(ii) Consultation phase:*

- Using various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation. It is important that government officers check for participant understanding periodically during the course of any consultation session.
- **Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- Acknowledging that it may not be possible to reach a community consensus or agreement about the merit or likely impact/s of a measure in all cases. Where consensus is not attainable, it is important to consult with the broadest cross section of the affected community, to be able to demonstrate that there has been appropriate and adequate consultation and weigh up the diverse views against current evidence.
- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with an income management regime, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- Being clear about what **outcomes(s)** the proposal seeks to achieve and what **issue(s)** the proposal seeks to address.
- Being clear about the potential and real **risks, costs** and **benefits** of the proposed measure. Be clear about what aspects of the proposed measure Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern. Consultation sessions should seek information regarding **unintended positive and negative consequences** of the income management measure.

- Identifying how you will **accurately collect** and **record data** during consultations. Provide people with a clear idea of **how their input** will be included in decision making processes.
- Special measures are temporary and therefore do not set out permanent rights or arrangements. Consultation sessions should ask for input regarding whether the measures build long-term capacity in affected communities, develop improved budgeting skills and healthier spending patterns.
- Considering what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures. Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- Reaching agreement with communities about **how feedback will be provided** after the consultation phase is concluded.

*(iii) Post-consultation phase:*

- Identifying the best ways to **keep communities informed** about developments regarding the issue/proposal. Explain to community members the likely timeframes for the first phase of implementation. Explain what, if any options community members have to call for a **review of decision making**.
- Government agencies should **publish their consultation protocols**. This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate/not feasible. Government agencies should evaluate and continuously improve their consultation processes.
- Remember that consent is *not* valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with *all* of the information relevant to a proposed measure.<sup>49</sup>

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<sup>49</sup> United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005). At [http://www.un.org/esa/socdev/unpfii/documents/workshop\\_FPIC\\_tamang.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc) (viewed 22 June 2009).

**Appendix 3: A brief guide to good practice for monitoring and evaluation<sup>50</sup>**

The following questions need to be considered when developing good practice for monitoring and evaluating income management measures.

*(i) Developing indicators and measures*

- What are your indicators and how are they measured? Are they sufficiently specific (focused around impacts of the measure) and holistic (the combined impact of the measure and other developments in a community)?
- Has the income management measure worked as a specific initiative or have other factors facilitated or been a barrier to impact/community benefit?
- How will you ensure that you evaluate both the quality of your consultation and overall process and the *impact* of the measure? How will you evaluate immediate, medium and long-term impacts?
- Has the measure caused any unintended positive or negative consequences?
- Have your results suggested that alternative, less intrusive strategies could have achieved similar, positive outcomes?
- What additional support services are required to increase the likely success of the measure?
- How will you know when the measure has achieved its stated purpose?

*(ii) Developing monitoring and data collection methods:*

- How will you monitor developments in the affected communities? Who will be responsible for the monitoring role in your agency? How will emerging data be captured?
- Do you have a system to collect, organise and analyse anecdotal evidence?
- Is your evaluation plan flexible enough to track and investigate emerging issues?

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<sup>50</sup> Australian Government, *Best Practice Regulation Handbook* (2007). At <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 22 June 2009).



- How will you reduce bias in your data collection and interpretation?  
Have you considered appointing an independent reviewer or observer?

*(iii) Designing an evaluation:*

- Will the evaluation be designed and conducted by an independent, external provider?
- Have you developed criteria as part of your procurement process to ensure that your supplier has adequate expertise and cross cultural competence?
- Is your contract with the supplier flexible enough to allow for process changes?
- Has your agency dedicated sufficient resources to plan and conduct a comprehensive evaluation? Has adequate consideration been given to the quantum and type of resources required?
- What is your methodology/evaluation plan? How will you make information regarding your plan available to members of affected communities?
- Has your evaluation been designed to adequately measure the stated objective of your special measure (for example, reducing the incidence of child abuse and family violence)?
- What are your key evaluation questions/themes? Have affected communities had input into the development of these questions/themes?
- Have you developed an evaluation schedule? Have you consulted community leaders in developing this schedule?

*(iv) Engaging community participation in the evaluation:*

- Have you developed strategies to ensure that you will capture a full or representative range of community views to be included in your evaluation process?
- Have you considered strategies to inform affected communities about your evaluation process and how they can participate?
- Have you considered the likely barriers to community participation in your evaluation process and how you will address them?
- Have you considered if and how you will share the outcomes or your evaluation process?