



human  
rights

law  
resource  
centre

Human Rights Law Resource Centre Ltd  
Level 17, 461 Bourke Street  
Melbourne VIC 3000  
P: + 61 3 8636 4450  
F: + 61 3 8636 4455  
[admin@hrlrc.org.au](mailto:admin@hrlrc.org.au)  
[www.hrlrc.org.au](http://www.hrlrc.org.au)  
ABN: 31 117 719 267

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Mr Graeme Innes AM  
Race Discrimination Commissioner  
Australian Human Rights Commission

By email: [graeme.innes@humanrights.gov.au](mailto:graeme.innes@humanrights.gov.au)

Dear Commissioner

**Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act 1975* (Cth)**

The Human Rights Law Resource Centre (HRLRC) welcomes the opportunity to provide feedback on the Australian Human Rights Commission's "Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*" (**Draft Guidelines**).<sup>1</sup>

In addition to the specific comments outlined in this letter, we refer generally to the HRLRC's recent submission to the Senate Community Affairs Legislation Committee's inquiry into proposed legislation that seeks to reinstate the operation of the *Racial Discrimination Act 1975* and expand income management.<sup>2</sup> The Centre's submission discusses Australia's human rights obligations in respect of the Northern Territory Emergency Response measures, and in particular the income management provisions.

***The importance of a human rights-based approach to income management***

The HRLRC strongly endorses a human rights approach to income management and welcomes the Australian Human Rights Commission's development of the Draft Guidelines. The HRLRC considers that the adoption of a human rights framework will ensure that:

- measures such as income management that are designed and implemented to address serious Aboriginal disadvantage are effective;
- the relationship between Australian governments and Aboriginal Australians is one of mutual respect and trust, and that Aboriginal communities are empowered and supported; and

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<sup>1</sup> The Draft Guidelines are available on the Australian Human Rights Commission website at [www.humanrights.gov.au/racial\\_discrimination/publications/RDA\\_income\\_management2009\\_draft.html](http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html).

<sup>2</sup> The HRLRC submission is available at <http://www.hrlrc.org.au/files/Reinstatement-of-the-RDA-and-Welfare-Reform-HRLRC-Submission.pdf>.

- Australia complies with its international legal obligations and acts consistently with its commitment to international human rights leadership.

The HRLRC recommends that the Draft Guidelines could be strengthened by making more explicit reference to the UN Declaration on the Rights of Indigenous Peoples. In particular, we consider that the discussion in Section 3 could, at the outset, refer to the Declaration as a significant instrument that establishes a framework for the human rights that already exist in international law and their specific application to Indigenous peoples.

### ***Relationship with other fundamental human rights***

While we acknowledge that the Draft Guidelines have been prepared pursuant to the Commission's functions under the *Racial Discrimination Act 1975*, the HRLRC considers that the Draft Guidelines could place further emphasis on the "flow on" effects that racial discrimination often may have on the realisation of a range of other fundamental rights.

By way of specific comments on the Draft Guidelines:

- the Introduction could be more explicit about the right to equality and non-discrimination being fundamental to the equal enjoyment by all persons of *all* human rights;<sup>3</sup>
- more of an emphasis could be placed on the obligation to, and importance of, ensuring *substantive* equality, particularly in the Introduction and in Section 2.3 on "special measures";<sup>4</sup>
- in addition to the right to social security, paragraph 12 of the Draft Guidelines could also make reference to a number of other rights that may be impacted, including the right to an adequate standard of living and the protection of families and children; and
- specific reference could also be made in the Draft Guidelines that any measures designed to protect the rights of women and children must be implemented in a way that is not racially discriminatory.

### ***The Racial Discrimination Act must be immediately reinstated***

The HRLRC considers that the Draft Guidelines could be made more explicit to clarify that the *Racial Discrimination Act 1975* must be immediately reinstated and that its suspension, in and of itself, represents a serious violation of international law and Australia's human rights obligations.

In this respect, the HRLRC recommends that the Draft Guidelines explicitly clarify that not all differential treatment will necessarily violate the prohibition against non-discrimination. Indeed, as referred to below under the discussion of "special measures", in some circumstances differential treatment will be *required* to ensure that particular groups are able to achieve substantive equality.

The HRLRC suggests that the Draft Guidelines could emphasise that, either way, there is no justification for the suspension of the *Racial Discrimination Act 1975*. Income management, and indeed the other Northern Territory Emergency Response measures, is either:

- *beneficial* for Aboriginal people, in which case it can be justified as being either a "special measure" or "reasonable" in pursuance of a legitimate and non-discriminatory purpose; or

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<sup>3</sup> See for example Human Rights Committee, *General Comment No. 18: Non-discrimination* (10 November 1989), [1].

<sup>4</sup> See for example Committee on Elimination of Racial Discrimination, *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), [6].

- *detrimental* for Aboriginal people, in which case it cannot be justified and is therefore racially discriminatory.

### ***The nature and scope of “special measures”***

The HRLRC welcomes the very useful discussion in Section 2.3 on “special measures”. We consider that the section could be clarified and strengthened in the following ways:

- as referred to above, it could highlight that the *purpose* of a “special measure” is to achieve substantive equality and eliminate racial discrimination; and
- in this respect, it could also be clarified that “special measures” are not an *exception* to non-discrimination, but rather an essential component to achieving substantive equality.<sup>5</sup>

### ***Limitations on human rights must be demonstrably justified and evidence-based***

The HRLRC welcomes the explanation provided in paragraph 13(b) of the Draft Guidelines regarding limitations on human rights. The HRLRC considers that the significance of giving proper consideration to the circumstances in which it may be permissible to limit human rights may warrant a separate sub-heading in the Draft Guidelines.

The HRLRC also considers that the discussion of the circumstances in which it may be permissible to limit human rights could elaborate further on the requirement that any limitation must be *demonstrably justified* by the party that is seeking to impose the limitation. The Draft Guidelines could therefore be more explicit about the need for credible and compelling evidence to substantiate that a limitation is reasonable, necessary and proportionate.

The HRLRC notes that international and comparative law has clearly established that any limitation on a human right requires a “very high degree of probability” and evidence to support the justification for the limitation as being permissible.<sup>6</sup> This imposes a “stringent standard of justification”,<sup>7</sup> and the evidence should be “cogent and persuasive and make clear the consequences of imposing or not imposing the limit.”<sup>8</sup>

### ***Income management must involve the free, prior and informed consent of affected groups***

The HRLRC welcomes the discussion from paragraph 85 onwards, and in particular paragraph 94 onwards, in relation to the requirement for participation of affected communities. We also welcome the particular discussion of the principle of free, prior and informed consent and its particular importance to Aboriginal people.

The HRLRC considers that reference could also be made in this section of the Draft Guidelines that obtaining the free, prior and informed consent of Aboriginal people is also vital to ensuring, on a pragmatic level, that the measures are more likely to be effective.

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<sup>5</sup> Ibid, [20].

<sup>6</sup> See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6.

<sup>7</sup> *R v Oakes* [1986] 1 SCR 103, [67].

<sup>8</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [147] (per Warren CJ).

***A human rights-based approach will ensure that income management is effective***

The HRLRC shares the Commission's view that an approach to income management that is compatible with human rights standards and principles will also ensure that the measure is far more likely to be effective. In this respect, we consider that the Draft Guidelines could reiterate this point in a number of instances already discussed above, as well as, for example:

- in paragraph 13(b) of the Draft Guidelines, under the third bullet point, following the reference to the importance of ensuring the participation of affected groups in the design and implementation of measures, an additional sentence could be added to the effect that such a community based approach is also essential to ensuring that any measures that are developed are likely to be more effective if they have the buy-in and support of the affected community; and
- after paragraph 99, by way of conclusion.

***Structure of the Draft Guidelines***

As a final comment, the HRLRC considers that the current structure of the Draft Guidelines, which requires the two sections to be read concurrently, is slightly confusing and disjointed.

As a suggestion, the HRLRC recommends that:

- the first part of the Guidelines contain a general discussion of relevant human rights principles and standards, including direct and indirect discrimination, "special measures", limitations on human rights, and participation and consent of affected groups (in other words, removing any references to income management); and
- the second part could then contain a discussion of how the human rights principles and standards should be applied in the specific context of income management and its application to Aboriginal people.

The HRLRC considers that such a structure might also be of broader utility in the sense that the first part of the Guidelines containing the general principles and standards of non-discrimination could be used in contexts other than income management. The section could be used to provide guidance in the development, implementation and review of other laws and policies, including in particular the other measures of the Northern Territory Emergency Response.

Thank you once again for the opportunity to comment on the Draft Guidelines. Please contact us should you require any further information.

Yours sincerely



**Ben Schokman**  
Senior Lawyer  
Phone (03) 8636 4451  
Email: [ben.schokman@hrlrc.org.au](mailto:ben.schokman@hrlrc.org.au)



**Prabha Nandagopal**  
Seconded Lawyer  
Phone: (02) 8396 7642  
Email: [prabha.nandagopal@dlaphillipsfox.com](mailto:prabha.nandagopal@dlaphillipsfox.com)