BACKGROUND NOTE

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Income management and the Racial Discrimination Act

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Introduction

Income management refers to a policy under which a percentage of the welfare payments of certain people are set aside to be spent only on ‘priority goods and services’ such as food, housing, clothing, education and health care. Compulsory income management was introduced by the Howard Coalition Government in 2007 as part of the legislation for the Northern Territory Emergency Response (NTER). At this time, income management schemes were also established as part of the Cape York Welfare Reform Trial, for situations of child neglect and for situations where children of welfare recipients are not enrolled at and/or attending school. Provisions were also introduced for people to have their income managed voluntarily.

The policy of compulsory income management of welfare payments has been one of the most contentious changes to Australia’s income support system in recent history. One of the most controversial aspects of income management has been its relationship to the Racial Discrimination Act 1975 (RDA), the legislation that gives effect to Australia’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

The original legislation introducing income management contained provisions that limited the application of the RDA and Northern Territory and Queensland anti-discrimination legislation. This was done in order to avoid the possibility that it (and the various elements of the NTER) would undermine the RDA and other anti-discrimination legislation. This possibility arose because the legislation and the NTER generally treated people differently on the grounds of race (given that the overwhelming majority of people subject to income management are Indigenous) and/or it could not be regarded as a form of ‘positive discrimination’, which is generally permitted under the RDA.

The suspension of the RDA was widely criticised, including by the Law Council of Australia, which described the move as ‘utterly unacceptable’ and ‘in direct and unashamed contravention of [Australia’s] obligations under relevant international instruments’. Further, the United Nations Human Rights Committee stated in its 2009 report on Australia’s performance under the International Declaration on Civil and Political Rights that it was ‘particularly concerned at the negative impact of the NTER measures on the enjoyment of the rights of indigenous peoples and at the fact that they suspend the operation of the Racial Discrimination Act 1975 and were adopted without adequate consultation with the indigenous peoples’.

1. Explanatory Memorandum, Social Security and Other Legislation (Welfare Payment Reform) Bill 2007, p. i.
In 2010, the provisions limiting the application of the RDA were removed by the Rudd Government, in fulfilment of a commitment made prior to the 2007 election. This was accompanied by changes to income management in the Northern Territory (and the NTER, more broadly) designed to comply with the RDA. These changes included the transformation of income management under the NTER from a scheme targeting remote Indigenous communities to what was called a ‘non-discriminatory’ national scheme targeting disadvantaged communities to be rolled out initially in the Northern Territory. The two main aspects of this new income management scheme are what are known as the ‘Participation/Parenting’ and ‘Vulnerable Welfare Recipient’ measures.4

In June 2011, the Government sought to address continuing criticism of the NTER with a series of consultations with Aboriginal people about ‘what has worked well and where improvements can be made’—consultations which were informed by a discussion paper, *Stronger Futures in the Northern Territory*5. In November 2011, on the basis of these consultations, the Government introduced three Bills making changes to the NTER.6 These Bills seek to amend a number of aspects of the NTER but not the main income measures operating in the Northern Territory. Notably, income management was not nominated by the Government as one of its ‘eight areas for future action’ to be discussed in consultations. Indeed, the Stronger Futures discussion paper stated that ‘as income management applies in other areas of Australia it is no longer part of the [NTER].’ 7

Despite the 2010 changes to income management, some have argued that the tension between income management and the RDA has not been resolved. For example, in March 2011, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, is reported to have said that it is likely that some time in the future a complaint will be lodged with the Australian Human Rights Commission (AHRC) in relation to income management on the grounds that ‘it’s possible to have a policy that in theory is non-discriminatory but if it impacts disproportionately on one group of people it can be’.8

The extent to which the various compulsory income management measures are compliant with the RDA is not entirely clear and the AHRC have thus far been reluctant to draw any conclusions in this respect. Nonetheless, if a complaint such as that suggested by Mr Gooda were upheld, this would amount to a significant test of one of the main pillars of the Australian Government’s welfare reform agenda.

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4. These were introduced in the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act)* Act 2010.
This Background Note provides information on the relationship between income management and the RDA and the issues that are likely to arise if this question comes before the AHRC for determination. As shall be discussed below, it would seem that the measure most vulnerable to challenge in relation to compliance with the RDA is the Parenting/Participation measure in the Northern Territory. This is because, unlike other income management measures, it:

- (a) applies income management automatically to particular classes of welfare recipient (rather than as a last resort); and
- (b) is applied indefinitely, rather than for a defined period.

**Income management**

‘Income management’ (also known as ‘welfare quarantining’) is the term used by the Australian Government to refer to arrangements whereby a percentage of the income support and family payments of certain people is set aside to be spent only on ‘priority goods and services’. While the total amount owing to a person subject to income management is not reduced, that person loses the discretion to spend a percentage of their welfare income on things other than those deemed to be priorities by the Government.

Under income management, welfare payments of those subject to the scheme are directly reduced and the remaining amount diverted to be paid into a special account. As noted above, funds in this account may only be spent on priority items such as:

- food
- clothing
- health items
- education and training
- child care
- housing
- household utilities
- public transport and
- acquisition, repair, maintenance or operation of motor vehicles (used wholly or partly for purposes in connection with any of the above needs).

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10. **Priority needs** are defined in section 123TH of the *Social Security (Administration ) Act*1999. The Minister may expand on the list by making a legislative instrument. The full list of items currently defined as priority needs can be found at
Income managed funds may be spent using the BasicsCard, a reusable, PIN protected card that may be used at approved stores and businesses through the EFTPOS system. Alternatively, people subject to income management can organise direct payments to goods and service providers such as stores, landlords, or utility providers.

There is, furthermore, an explicit ban on certain goods and services which must not be bought with income managed funds (a list the Minister can add to by legislative instrument):

- alcoholic beverages,
- tobacco products,
- pornographic material,
- home brew concentrates and home brew kits and
- gambling services.\(^{11}\)

People who may be subject to compulsory income management include (Social Security Administration Act 1999 (SSA Act) reference in brackets):

- welfare recipients in the Northern Territory deemed by the Government to be ‘Disengaged Youth’ (section 123UCB), ‘Long-term Welfare Recipients’ (section 123UCC) or ‘Vulnerable Welfare Payment Recipients’ (section 123UCA)
- welfare recipients in the Northern Territory and parts of Western Australia\(^ {12} \) whom a child protection officer has referred to Centrelink to have their income managed (‘Child Protection Income Management’) (section 123UC)
- welfare recipients in Cape York whom a statutory body, the Family Responsibilities Commission (known in legislation as the ‘Queensland Commission’), has ordered should be subject to income management for engaging in dysfunctional behaviour (section 123UF) and
- from 1 July 2012, welfare recipients living in one of five targeted communities who have been referred for Child Protection Income Management or the Vulnerable Welfare Payment Recipients measure (known as ‘Place Based Income Management’).\(^ {13} \) People may also become subject to
income management voluntarily (section 123UFA). The Government has also introduced legislation that will give particular state and territory agencies the power to refer people for income management in a similar way to which the child protection measure operates (to be known as the ‘Supporting People at Risk’ measure). In the initial roll out of this measure, Northern Territory authorities will have the power to refer people for income management for alcohol related problems.  

This measure was announced as part of the Government’s Stronger Futures package, (as noted above) a set of changes to the NTER following consultations in Northern Territory communities and town camps, and at public meetings in major towns.

There has been an unresolved tension between compulsory income management and the RDA since the introduction of the scheme in 2007. The remainder of the Background Note examines the relationship between compulsory income management and the RDA by examining issues associated with the scheme introduced by the Coalition Government in 2007 and subsequent changes made by the Labor Government in 2010 (and proposed for 2012).

**Racial Discrimination Act and subsequent legislation**

The RDA gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and seeks to promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin, and to make discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.

The Act is divided into parts which deal with a number of different issues, including establishing the Race Discrimination Commissioner and Offensive Behaviour Based on Racial Hatred. It is Part II which defines race discrimination and makes it unlawful.

To constitute race discrimination as defined in the Act by Part II there are three questions which must be answered (or two questions with the first question being in two parts). The first question is

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15. Stronger Futures also includes measures for addressing alcohol abuse including strengthened arrangements for local alcohol management plans. The Supporting People at Risk measure is intended to complement these other Stronger Futures alcohol measures. The measure (also known as the State or Territory Agency Referral measure) will be established through the creation of a new form of income management in the SSA Act under the *Social Security Legislation Amendment Bill 2011*. The new measure will allow referrals for income management from a recognised state or territory authority by inserting references to a ‘recognised state or territory’ into Part 3B of the SSA Act: items 2–4 of Part 1 of Schedule 1 to the Bill.

whether there is direct discrimination (subsection 9(1)). That is whether there is a racially discriminatory condition or requirement. The next question is whether there is a condition or requirement which may not involve direct discrimination but nevertheless involves indirect discrimination (subsection 9(1A))—that is, there is a condition or requirement which is not explicitly racially discriminatory but which has that effect in practice as implemented. Finally, if one of these questions is answered in the affirmative, there is a question as to whether the condition or requirement constitutes a ‘special measure’ as defined in section 8. If it constitutes a ‘special measure’ then, despite the fact there are distinctions relying on race, it is not unlawful under the Act.

Section 8 defines a ‘special measure’ by incorporating into Australian law the International Convention’s definition of a ‘special measure’:

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 have been achieved.

There is further discussion of ‘special measures’ in a subsequent section of this paper.

A final provision of the Act which it is relevant to note is section 10. Subsections 10(1) and (3) operate together to place ‘some limits on the reach of the special measures exemption. [The RDA] does not apply to laws that authorise property owned by an Aboriginal or Torres Strait Islander person to be managed by another without their consent.’

As discussed below, when the NT Intervention legislation was first introduced there were exemptions from the RDA included. It is important to note here the well established principle that subsequent legislation prevails over earlier legislation. Parliament is presumed to be familiar with the extant body of law and when it enacts legislation inconsistent with earlier enactments then, to that extent, the earlier legislation may be subject either to an explicit or implied repeal. The RDA is not a ‘bill of rights’; it is not constitutionally entrenched, and it is, therefore, subject to repeal by subsequent legislative action.

If the original NTER legislation had been enacted without reference to the RDA then, to the extent it enabled measures which would have been precluded by the RDA, then the RDA could have been subject to an implied repeal. One of the difficulties with this arrangement is that the implied repeal would have been of uncertain extent—that is the repeal would have operated to the extent that the provisions were necessarily inconsistent with the RDA, yet in effect only a court could have resolved

the question as to how far, if at all, the NTER’s provisions were inconsistent with the RDA’s provisions. There would also be the question as to whether the Parliament intended the two Acts to operate together and the extent to which the legislation could be so interpreted. As a consequence of these difficulties there is a sense in which the provisions of the NTER which explicitly excluded the RDA also effectively saved it from being subject to an implied repeal of uncertain extent. Alternatively the Parliament could have preserved the RDA by specifying that the income management provisions were to be interpreted subject to the RDA’s provisions.

When the provisions which exempted the legislation from the RDA were repealed the AHR argued that not only should they be repealed but in order to prevent any implied repeal when re-enacting arguably discriminatory provisions in the legislation there should also be a ‘notwithstanding clause’ enacted.

In its submission to the Senate Community Affairs Committee Inquiry into the legislation which repealed the exclusion clauses, the AHRC, while it welcomed the lifting of the suspension of the RDA for the NTER legislation, also noted that the proposed changes to the NTER legislation would not ensure full consistency with the RDA. As such, the Commission expressed particular concern regarding the following: ...

...a ‘notwithstanding clause’ ought to be inserted in order to specify that the provisions of the RDA are intended to prevail over the NTER legislation and that the NTER legislation does not authorise conduct that is inconsistent with the provisions of the RDA ...

The Commission’s recommendations were not accepted and the legislation which removed the exclusion clause did just that. Schedule 1, for instance, was entitled ‘Repeal of laws limiting anti-discrimination laws’. The difficulties of statutory interpretation which could be involved in any subsequent case challenging the Intervention’s measures will, however, be expedited by having the explicit intention of the Government in relevant interpretive documents, such as the second reading speech and the Explanatory Memorandum to that Bill. These make explicit the government’s intention that actions following on from the current income maintenance regime should be subject to the RDA.

The paper now moves to a discussion of the specific income management measures, beginning with the Coalition Government scheme.

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19. Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010, Schedule 1. It is interesting to note that the amending Act did, however, emphasise section 8 of the Acts Interpretation Act 1901 (as it then was), which limited the effect of a repeal so that, for instance, no provisions which were repealed by the now-repealed legislation should be seen as reinstated.
Coalition Government scheme

Income management was initially introduced by the Howard Coalition Government as part of the Northern Territory Emergency Response in prescribed areas of the Northern Territory, including 73 remote Northern Territory communities, associated outstations and 10 town camp regions. This formed part of the Howard Government’s response to high levels of alcohol and substance abuse that were linked to the child protection issues described in the Little Children are Sacred Report in April 2007.\(^\text{20}\) At this time, the Coalition Government also established the income management arrangements that currently apply in Cape York and Western Australia. The Coalition Government also established a form of income management linked to school enrolment and attendance but this measure has not been implemented.

The original legislation introducing the Northern Territory Emergency Response (including income management) contained provisions that limited the application of the RDA and Northern Territory and Queensland anti-discrimination legislation.\(^\text{21}\) The purpose of this was to avoid the possibility that elements of the NTER would contravene the principles of the RDA and other anti-discrimination legislation.

At this time, there were two possible ways in which the NTER might have been seen to contravene the RDA. First, it could have been seen as treating affected Indigenous people differently on the grounds of race. While the differentiating feature was geographical location rather than race, the NTER would potentially have fallen within the definition of prohibited ‘indirect discrimination’. That is, the geographic discrimination would predominantly affect members of a particular race.

In this context the ‘prescribed areas’ set out in the Northern Territory National Emergency Response Act 2007 (the NTNER Act), are defined as areas covered (in part) by the definition of Aboriginal land in the Aboriginal Land Rights (Northern Territory) Act 1976, and land granted to an association under subsection 46(1A) of the Lands Acquisition Act (NT), namely land excised as an Aboriginal community area. Subsection 4(3) of the NTNER also provides that the Minister can declare areas in the Northern Territory known as town camps to be prescribed areas.

Under the Social Security (Administration) Act 1999 (SSA Act), the Minister can declare areas to be either an ‘income management area’ (section 123TFA), or a ‘voluntary income management


area’ (section 123TGA). In 2010, declarations under both provisions were made for the Northern Territory.  

Second, there was a view that the Government’s arrangements were not ‘special measures’, the term used to refer to the fact that while there is a general prohibition against racial discrimination in the RDA, there is also recognition that ‘special measures’ (that is, discriminatory measures) are legitimate to promote the position of members of a particular race when that race is disadvantaged. ‘Special measures’ are also referred to as ‘affirmative action’ or ‘positive discrimination’. Generally, these are measures designed to give members of a disadvantaged racial group access to a benefit in order to promote substantive equality. For example, Abstudy, the Commonwealth Government allowance for Indigenous students, has been held to be a special measure. The question of what may be considered a special measure will be discussed in a later section of this Background Note.

The suspension of the RDA was achieved through the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (WPR Act), which made changes to the SSA Act. Clause 4 of the WPR Act ensured that the provisions underpinning the NT (remote community and school enrolment/attendance) or Queensland (Cape York) income management measures were both defined as ‘special measures’ (subclause 4(2)) and excluded from the operation of Part II of the RDA (subclause 4(3)). This served to prevent a court from ruling on the question of whether the measures satisfied the established definition of a ‘special measure’.

The WPR Act also provided that:

- acts done by the Family Responsibilities Commission as part of the Cape York Welfare Reform Trial in relation to income management and

- any provisions of any laws made or any acts done in relation to the establishment or operation of the Family Responsibilities Commission

were both ‘special measures’ (subclause 4(4)) and excluded from the operation of Part II of the RDA (subclause 4(5)).

The WPR Act also suspended the operation of the laws of Queensland or the NT dealing with discrimination. Clause 5 provided that provisions underpinning the NT (remote community and school enrolment/attendance) or Queensland (Cape York) income management measures would

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‘apply to the exclusion of, or have effect despite, any discrimination laws of Queensland or the Northern Territory, unless provided otherwise by the Minister in a legislative instrument’. 24

The Coalition Government’s rationale for Clauses 4 and 5 was outlined in the Explanatory Memorandum:

The provisions of the bill that relate to the Northern Territory national emergency response and the Queensland Commission recognise the importance of Australia’s obligations under international law:

- The Convention on the Rights of the Child requires Australia to protect children from abuse and exploitation and ensure their survival and development and that they benefit from social security. The International Convention for the Elimination of All Forms of Racial Discrimination requires Australia to ensure that people of all races are protected from discrimination and equally enjoy their human rights and fundamental freedoms.

- Preventing discrimination and ensuring equal treatment does not mean treating all people the same. Different treatment based on reasonable and objective criteria and directed towards achieving a purpose legitimate under international human rights law is not race discrimination. In fact, the right not to be discriminated against is violated when governments, without objective and reasonable justification, fail to treat differently people whose situations are significantly different.

The impact of sexual abuse on Indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia’s obligations under human rights treaties. In doing so, it will take important steps to advance the human rights of the Indigenous peoples in communities suffering the crisis of community dysfunction.

In the case of Indigenous people in the Northern Territory, there are significant social and economic barriers to the enjoyment of their rights to health, development, education, property, social security and culture.

The provisions of this bill that relate to the Northern Territory national emergency response and the Queensland Commission reforms are the basis of action to improve the ability of Indigenous peoples to enjoy these rights and freedoms. This cannot be achieved without implementing measures that do not apply in other parts of Australia. The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms. In a crisis such as in the Northern Territory, the Northern Territory measures in the bill are necessary to ensure that there is real improvement before it is too late for many of the children. 25

The rationale was therefore that the provisions in the WPR Act relating to income management in the Northern Territory and Queensland were necessary to assist affected Indigenous people to enjoy

24. Explanatory memorandum, p. 3.
25. Ibid., pp. 2-3.
their rights and freedoms. The Coalition deemed that this required measures that did not apply elsewhere in Australia. Clauses 4 and 5 imply a recognition that these measures were likely to have contravened the RDA and Northern Territory/Queensland anti-discrimination laws either because they treat people differently on the grounds of race or could not be regarded as ‘special measures’.

The removal of the suspension now leaves open the question of whether the current income management measures are consistent with the RDA.

**Labor Government scheme**

**Background**

The then Rudd Opposition committed to reinstate the RDA in the 2007 election campaign. In its October 2008 interim response to the review it commissioned into the NTER, the Rudd Government said it would introduce in the spring sittings of 2009, legislation removing the provisions in the NTER Acts that exclude the operation of the RDA. 26

In mid-2009 domestic and international pressure on the Government to introduce such legislation increased, especially with the United Nations High Commissioner for Human Rights Special Rapporteur, James Anaya, reporting at the end of an August 2009 visit to Australia that:

> Of particular concern is the Northern Territory Emergency Response, which by the Government’s own account is an extraordinary measure, especially in its income management regime, imposition of compulsory leases, and community-wide bans on alcohol consumption and pornography. These measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities. 27

He added that:

> ... any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional, and necessary to achieve the legitimate objectives being pursued. In my view, the Northern Territory Emergency Response is not. In my opinion, as currently configured and carried out, the Emergency Response is incompatible with Australia’s obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as

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incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.\textsuperscript{28}

At the same time, the Rudd Government had also committed to ‘closing the gap in the Northern Territory’ and to continue those NTER measures which could be said to contribute to that aim. This led to a series of consultations on the ‘redesign’ of the NTER during 2009.\textsuperscript{29} Importantly, the Government was committed to ensuring any redesigned NTER measures would survive any legal challenges once the provisions excluding the operation of the RDA were removed.

Following the consultations, the Government released a policy statement in which it set out its decisions (and the bases for them) and introduced the awaited Bill.\textsuperscript{30} The statement explained how NTER measures would be modified so that they might either not be deemed discriminatory or could be deemed beneficial forms of discrimination. The modifications to the income management provisions (which have since passed into law) were in the first category.\textsuperscript{31}

Changes to income management were explained in terms of the Government’s broader intention of introducing major reforms to the welfare system ‘based on the principles of engagement, participation and responsibility’.\textsuperscript{32} Thus, the Government announced that:

As part of major reforms to the welfare system, the Australian Government will introduce a new [national] income management system to protect children and families and help disengaged individuals.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{28} Ibid.
\item \textsuperscript{31} Those provisions concerned with alcohol, prohibited material, the acquisition of interests in land, the licensing of community stores and the powers of the Australian Crime Commission were in the second category.
\item \textsuperscript{32} J Macklin (Minister for Family Affairs, Housing, Community Services and Indigenous Affairs) and W Snowdon (Member for Lingiari), Major welfare reforms to protect children and strengthen families, joint media release, 25 November 2009, viewed 14 February 2012, \url{http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/welfare_reforms_protect_children_25nov2009.aspx}
\item \textsuperscript{33} Ibid.
\end{itemize}
The extension of income management beyond Indigenous communities in the Northern Territory was thus intended not only to secure the Northern Territory scheme from RDA-based challenges, but to advance the Government’s broader welfare reform agenda.

Indeed, it is notable that over time the Government’s rationale for its policies on the NTER and income management shifted in emphasis from the need to ensure consistency with the RDA to expressing broader longer-term policy goals in Indigenous and social welfare policy. Thus the Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, at the beginning of her second reading speech placed the measures in the Bill in the context of the need to ‘tackle the destructive, intergenerational cycle of passive welfare’. 34 Similarly, she suggested that the redesigning of the NTER was part of a new partnership with Indigenous Australians and part of guaranteeing better longer-term outcomes. 35

New ‘race-neutral’ income management

Those aspects of the SSA limiting the RDA and Northern Territory and Queensland anti-discrimination legislation were repealed by Schedule 1 of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (WRRRDA Act). 36 Schedule 2 of the WRRRDA Act repealed the existing income management measure that applied only in prescribed areas in the Northern Territory and introduced the new income management regime to apply in the Territory generally.

Under the new approach, the following income management measures replaced the Coalition Government measures applying to the 73 remote Indigenous communities:

- the Participation/Parenting measure, applying to people who are:
  - aged 15-24 years and have been receiving Youth Allowance, Newstart Allowance, Special Benefit or Parenting Payment (Partnered or Single) for three of the last six months (‘disengaged youth’)  
  - aged 25 years and above and have been receiving Youth Allowance, Newstart Allowance, Special Benefit or Parenting Payment (Partnered or Single) for more than one of the last two years (‘long-term welfare recipients’)

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35. Ibid.

• the Vulnerable Welfare Payment Recipient measure, applying to people who have been referred for income management by a Centrelink Social Worker.

As with the Coalition Government scheme, people subject to these measures have 50 per cent of their regular payments, and 100 per cent of lump sum payments, income managed. Similarly, income managed funds are spent on priority items by using the BasicsCard, Centrepay or similar arrangements through Centrelink.

As noted above, the new measures were intended to be national in scope, rather than based only in prescribed Northern Territory communities and hence intended to operate alongside the RDA. According to the Explanatory Memorandum for the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, the new model of income management was ‘to be used in selected locations throughout Australia, in relation to people who meet objective criteria independent of their race or ethnicity’. However, to date, these new measures have been implemented in the Northern Territory only.

In the various materials supporting its changes to the NTER, the new income management scheme was held out to be consistent with the RDA because it was designed to apply in a non-discriminatory way to any citizen in the Northern Territory within the specified categories. In the Minister’s words:

From 1 July 2010, a new income management scheme will start across the Northern Territory—in urban, regional and remote areas—as a first step in a future national rollout of income management to disadvantaged regions. It will apply to all welfare recipients within the specified categories and is thus a non-discriminatory measure and consistent with the Racial Discrimination Act.

The Government noted further that:

A complaint in relation to the administration of the new scheme of income management can be made in the usual way to the Australian Human Rights Commission, and then to a court, or, if there are disputes about the operation of the legislation itself, these can be raised in proceedings in a court. Of course, whether there has been a breach of the RDA in a particular case will still need to be determined by the Commission or the court.
This raises the question of how the AHRC—the statutory body with responsibility for resolving complaints of discrimination or breaches of human rights under federal laws such as the RDA—would be likely to respond to a complaint made in relation to income management and the RDA. While the Commission’s findings do not have the legal weight of a court they are still recognised as having these responsibilities not just for complaints but also for promoting human rights. Consequently we will examine the issues with their guidance.

**AHRC and income management**

In November 2009, the AHRC issued 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’. According to the AHRC, ‘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’. At the time of publication of this Background Note the guidelines still had ‘draft’ status but were in the process of being finalised by the AHRC.

The guidelines state that 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.

Of these, the AHRC says that ‘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’.

The AHRC posed three key questions in relation to the two ways of ensuring income management measures are consistent with the RDA:

- where the measure is established by legislation, does it ensure equality before the law (section 10 of the RDA)?

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40. Australian Human Rights Commission, op. cit. It was proposed in the draft guidelines that they would be finalised in 2010 after feedback, however they have not yet been finalised.
41. The AHRC noted that ‘the 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’. Ibid, p. 3. While the guidelines were and are still in draft form they give a clear indication of the Commission’s thinking on these issues, and, as commented elsewhere, it is the Commission which has an authority in this area and it is the first point of complaint when discrimination is in question.
42. AHRC official, personal communication with author (Kirsty Magarey), 19 March 2012.
44. Ibid, p. 22.
• is the measure implemented in a way that avoids both ‘direct’ and ‘indirect’ discrimination (section 9 of the RDA)? and

• is the measure a ‘special measure’ (section 8 of the RDA)?

Equality before the law

In terms of the question of equality before the law, the AHRC indicated that a measure that has a disparate effect on the ability of a particular racial group to enjoy a right may be discriminatory:

> It is not necessary that the measure target a 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.  

However, the AHRC draft guidelines also state that:

> As most rights are not absolute, it may be permissible to limit them in pursuit of a legitimate, non-discriminatory goal.

The guidelines suggest that to be legitimate any limitation on a right should be:

• directly linked to the promotion of another human right (administrative convenience or efficiency will not be regarded as a legitimate purpose)

• proportionate to the benefit being sought by the measure (the benefit must be clearly identified and the measure the least restrictive/interfering option available)

• based on work done with affected groups in the design and implementation of the measure (following the standard of ‘free, prior and informed consent’).

The AHRC proposed that income management measures should meet the following criteria:

• 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 allowing 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

45. Ibid, p. 5.
46. Ibid, p. 5.
47. Ibid, p. 17.
48. Ibid, pp. 5-6.
• 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 for welfare recipients, safe houses for women and men, alcohol and substance abuse programs.⁴⁹

The extent to which these criteria are met by each of the various compulsory income management schemes (including the new ‘non-discriminatory’ model of income management for the Northern Territory) will be considered in a later section of the paper.

Avoidance of discrimination in implementation

The second question posed by the AHRC relates to the broad prohibition in the RDA on acts of racial discrimination. That is, the question is not whether particular laws may discriminate against people of a particular race but whether discretionary actions done under those laws are discriminatory. The guidelines give the example of actions taken by administrators implementing the laws relating to income management. The guidelines argue that such actions must avoid ‘direct’ and ‘indirect’ racial discrimination.⁵₀

The guidelines say that discretionary actions that may involve direct discrimination include those that involve a distinction, exclusion, restriction of preference based on race; or that have a negative impact on equal enjoyment of rights in public life based on race. Indirect discriminatory actions are those that occur when a term, condition or requirement is imposed generally that is unreasonable and has a disparate impact on people of a particular race.⁵₁

The guidelines highlight an example from the Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007 (section 123TE) of how a discretionary act may be structured and exercised so as to limit the potential for discrimination:

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⁴⁹. Ibid., pp. 18–19.
⁵₁. Ibid, pp. 6-7.
The guidelines note, however, that section 123TE(6) allows for the Minister to make a discretionary decision that contravenes section 123TE(5), suggesting that this ‘undermines the effectiveness of such a clause’.

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52. Ibid, p. 21.
Special measures

The AHRC specifies that if a measure is non-discriminatory, it is not necessary to determine whether it is a special measure. Where the intention is that an income management measure be considered a special measure, it would need to comply with section 8 of the RDA, already considered by the High Court, which specified certain basic criteria that must be met by a special measure.

As noted above, following its 2010 reforms, the Government regards income management as ‘non-discriminatory’. As such, the question of whether income management in the Northern Territory or elsewhere in Australia is a special measure would only become relevant if the AHRC determined that it did not meet the criteria necessary to be considered non-discriminatory.

The High Court has interpreted section 8 of the RDA as containing four elements:

- a special measure must confer a benefit on some or all members of a class
- the membership of the class must be based on race, colour, descent, or national or ethnic origin
- a 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 freedoms and
- the circumstances of the special measure must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others. 53

The guidelines also note that in this case it was also suggested by one of Australia’s most senior judges that it would be relevant whether the population affected were happy with the measures. To satisfy the criteria of ‘securing adequate advancement of the beneficiaries’ it may not be enough to show that the measure has been taken for the purpose of conferring a benefit, if the group affected does not seek or wish to have the benefit. Brennan J (as he then was) has reflected that 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’. He points out that:

The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. ...

‘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 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.54

If there were a legal challenge to the income management arrangements on the ground of racial discrimination, the court would most probably need to examine whether the arrangements qualify as ‘special measures’. The question of whether these measures were desired or requested by the relevant communities could be crucial. As the Law Council of Australia argued, the ‘lack of any consultation preceding the introduction of the NT intervention measures [would also have] significantly weak[ened] the basis for suggesting the measures are ‘special measures’’. 55

While there was clearly no consultation before the original Coalition Government measures were imposed, the current Government’s subsequent consultations could become relevant evidence. The AHRC has recently commented on this in its submission to the Senate inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills:

The Commission has previously brought [its] concerns to the attention of the government in relation to the inadequacy of the consultation process as outlined below:

– the timeframe for consultations was inadequate given the scope and depth of the issues raised in the Stronger Futures Discussion Paper

– significant measures such as income management were not listed for discussion during the Stronger Futures consultation process

– despite the Australian Government’s efforts to work with the Aboriginal Interpreter Service (AIS), there was neither sufficient time to translate the paper into the languages of Northern Territory communities nor to provide the Stronger Futures Discussion Paper to the interpreters sufficiently in advance of the consultations.

... These concerns were consistently raised with the Commission during visits to Aboriginal communities in the Northern Territory in late 2011.56

The AHRC also argued that the Australian Government-commissioned assessment of the consultation process by the Cultural and Indigenous Research Centre Australia CIRCA was inadequate.57

54. Gerhardy v Brown (1985) 159 CLR 70 at 135.
55. Law Council of Australia, op. cit. J Hungyor, op. cit., also provides an in-depth analysis of the significance of consultation (or lack thereof) to the legal interpretation of special measures.
The Government has rejected such criticisms of the consultation process. In evidence to the Senate Stronger Futures Bill inquiry, an official of the Department of Families, Housing, Community Services and Indigenous Affairs, Mr Michael Dillon, stated that:

The government has heard from many people that the way the NTER was introduced without consultation caused ongoing anger, fear and distrust amongst Indigenous peoples and communities. The Stronger Futures legislation, by contrast, has been developed after extensive consultations and in an open and transparent manner. Since late 2007, the government has supported three successive comprehensive consultations with Indigenous people in remote Northern Territory communities. It would be misguided to judge the government’s record only on the consultations completed from June to August last year. It is also not true to claim that these consultations were the start of the process. Each of these consultations has involved an unprecedented number of communities and individuals participating in meetings to have their say and to influence the policy proposals. Taken together, they provide an extraordinarily strong basis for the government’s Stronger Futures legislation. We note that the National Congress of Australia’s First People’s and the Australian Human Rights Commission have acknowledged the government’s efforts to ‘better engage and consult with Aboriginal people.’

Finally, as noted in the above account of the RDA’s provisions, a special measure must not be continued after the objectives for which it was taken have been achieved.

**Does race-neutral income management avoid racial discrimination?**

This section briefly examines the various income management measures in relation to the ACHR guidelines. This is done in order to highlight some of the matters that may be considered in the event that a complaint was made to the AHRC or the courts in relation to income management. The focus of this section is on whether the legal framework for income management discriminates against Indigenous people, rather than whether discretionary actions done under those laws are discriminatory. The paper looks particularly at the issue of indirect discrimination because, as the AHRC has commented:

Due to its general application the income management measure is not expressed to be intended to operate as a special measure under the RDA and does not raise issues of direct discrimination. In order to be consistent with the RDA, it only remains to identify whether it raises concerns of indirect discrimination.

**Impact on people of a particular race**

The AHRC guidelines state that if, in practice, income management has a greater impact upon people of a particular race it may be discriminatory. As can be seen from the table below, as at 24 June 2011, Indigenous people made up the overwhelming number of people subject to compulsory

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income management under the largest scheme—the Participation/Parenting measure in the Northern Territory (around 87 per cent). Around 97 per cent of those under the Child Protection measure in the Kimberley region of Western Australia were Indigenous. Given that the Cape York Welfare Reform Trial is specifically aimed at Indigenous communities, it is reasonable to assume that Indigenous people make up the overwhelming majority (possibly all) of welfare recipients subject to compulsory income management in that region (though no disaggregation is available). Similarly, no breakdown into Indigenous/Non-Indigenous status is available for the Vulnerable Welfare Recipient or Child Protection measures in the Northern Territory. Only around 37 per cent of those on compulsory Child Protection Income Management in the Perth metropolitan area identified themselves as Indigenous.60

Table 1: Payment recipients subject to compulsory income management in the Northern Territory, various schemes, 24 June 2011

<table>
<thead>
<tr>
<th>Scheme</th>
<th>Indigenous*</th>
<th>Non-Indigenous**</th>
<th>Total</th>
<th>% Indigenous</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation/Parenting measure (Disengaged youth/Long-term welfare recipient) (NT)</td>
<td>11 106</td>
<td>1660</td>
<td>12 766</td>
<td>87</td>
</tr>
<tr>
<td>Vulnerable welfare recipient (NT)</td>
<td></td>
<td></td>
<td>229</td>
<td></td>
</tr>
<tr>
<td>Child Protection (NT)</td>
<td></td>
<td></td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>Child Protection, Perth metro (WA)</td>
<td>44</td>
<td>76</td>
<td>120</td>
<td>37</td>
</tr>
<tr>
<td>Child Protection, Kimberley (WA)</td>
<td>92</td>
<td>3</td>
<td>95</td>
<td>97</td>
</tr>
<tr>
<td>Cape York (Qld)</td>
<td></td>
<td></td>
<td>152</td>
<td></td>
</tr>
</tbody>
</table>

*Disaggregation into Indigenous/Non-Indigenous status not available for some schemes. In the case of Cape York, it is reasonable to expect that most if not all are Indigenous. Cape York figure may include a small number of people on voluntary income management.

60. There is no current information available from which to determine what proportion of people on compulsory Child Protection Income Management in the Perth region are from Non English Speaking Backgrounds. However, the 2010 evaluation of Child protection income management in Western Australia found that ‘as of 30 April 2010, no parents/guardians presently on [Child Protection Income Management] (or their children) had self-identified as coming from a culturally and linguistically diverse background’. *Evaluation of the Child Protection Scheme of Income Management and Voluntary Income Management Measures in Western Australia*, ORIMA Research and FAHCSIA, September 2010, p. 62, viewed 20 March 2012, [http://www.fahcsia.gov.au/sa/families/pubs/cpsim_vim_wa/Pages/default.aspx](http://www.fahcsia.gov.au/sa/families/pubs/cpsim_vim_wa/Pages/default.aspx)
**Includes those who chose not to disclose whether or not they were from an Aboriginal or Torres Strait Islander background.

From this it is clear that overall (the Perth metropolitan area aside), compulsory income management has a substantially greater impact on Indigenous people than non-Indigenous people. This impact is particularly significant in the case of the Parenting/Participation scheme in the Northern Territory, where 11,106 people are compulsorily subject to the scheme. The AHRC itself has noted the ‘disproportionate effect [of income management] on Aboriginal people in the Northern Territory’, highlighting the fact that Indigenous people make up only 30 per cent of the Northern Territory population. 61

In relation to Place-Based Income Management, the AHRC also ‘notes with concern’ that:

... the five disadvantaged communities, which will be subject to the income management scheme from 1 July 2012, have high culturally and linguistically diverse communities. According to 2006 Census data, people born overseas accounted for 23.8% of the total population of Playford (South Australia). In Bankstown (NSW), 38.7% of the total population were born overseas and 53.7% of the population spoke a language other than English at home. The Commission further understands that the communities of Shepparton and Logan have experienced very high migrant settlement in recent years, particularly humanitarian settlement. 62

The AHRC adds that:

The overrepresentation of Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities in the trialling of income management is of significant concern to the Commission. Measures that disproportionately impact upon the ability of a particular racial group to enjoy their rights (such as the right to social security) may raise issues of indirect discrimination, particularly where the scheme is applied too broadly. 63

However, as noted above, the 2009 AHRC draft guidelines indicate that it may be permissible to limit rights in pursuit of a legitimate, non-discriminatory goal. The guidelines specify five criteria that should be met by an income management plan. The following section examines the extent to which these criteria are met by each of the various compulsory income management measures.

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62. Ibid.
63. Ibid.
Legitimate limitation of rights according to AHCR guidelines

Subject to anti-discrimination legislation

AHRC criterion: the income management measure should be subject to the application of the RDA and state/territory anti-discrimination legislation

This criterion was met for each income management measure with the removal of the clauses excluding the RDA and Northern Territory and Queensland anti-discrimination legislation (achieved through the Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2009). This means that the RDA will apply, and therefore measures such as income management can be tested for possible direct and indirect discrimination.

Voluntary/opt in approach or last-resort suspension approach

AHRC criterion: the income management measure should not apply automatic quarantining — different options that should be considered may include allowing for a voluntary/opt in approach or a last-resort suspension approach for income management

The AHRC guidelines state that the Cape York and Child Protection measures (Western Australia and Northern Territory) are ‘based on an opt-in or last resort suspension model’. The guidelines use the example of the Cape York model to explain:

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

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64. Australian Human Rights Commission, Draft guidelines for insuring income management measures are compliant with the Racial Discrimination Act, op. cit, p. 13.
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.\textsuperscript{65}

This would suggest that the AHRC is likely to look more favourably at compulsory income management measures that are:

- targeted at particular groups of people who may benefit from income management
- based on referrals from agencies or qualified officials (such as Centrelink social workers) and
- part of a process in which income management is applied as a last resort.

This would presumably include the new Supporting People at Risk and Place Based Income Management measures as each would meet the above criteria.

On the other hand, the criterion that income management measures should not apply automatic quarantining would most likely not be met by the Participation/Parenting forms of income management, given that these apply automatically to whole categories of welfare recipients in the Northern Territory. While exemptions under these measures are possible, the initial application of the measure is automatic and compulsory, not voluntary or a last resort.

It might also be considered relevant that the Participation/Parenting forms of income management have yet to be applied outside of the Northern Territory, despite initially being described as (along with the other Northern Territory measures) part of a model that would be rolled out nationally to disadvantaged areas. To date, all subsequent introductions of income management have been targeted, rather than automatic schemes (for example, Supporting People at Risk and Place Based Income Management).

**Applied for a defined period**

*AHRC criterion: the income management measure 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*

This criterion is satisfied in the case of the following income management measures (with the period in which income management determinations remain in force in brackets):

- Vulnerable Welfare Recipients (12 months)
- Cape York (3 to 12 months) and

\textsuperscript{65} Ibid.
• Child Protection (3 to 12 months).

It will also most likely be satisfied by the new Place Based measure, given that this is based on the Vulnerable Welfare Recipients and Child Protection schemes. It is not known whether the Supporting People at Risk measure will specify a period in which income management determinations will remain in force as this is not specified in legislation (it may be specified later in a Ministerial Determination).

The criterion is not met by the Participation/Parenting measure as there is no defined income management period specified in legislation for the Long-Term Welfare Recipient or Disengaged Youth sub-measures.

**Allow for review and appeal**

*AHRC criterion: the income management measure must allow for review and appeal processes*

The fourth criterion could be said to be met by each of the current income management measures. There are various forms of review and appeal available to those who do not agree with a decision made under the Social Security (Administration) Act about income management arrangements for them. These are outlined in the Australian Government’s *Guide to social security law* (‘11.1.13 Reviews & Appeals under Income Management’ at http://www.fahcsia.gov.au/guides acts/sg/sgguide-11/sgguide-11.1/sgguide-11.1.13.html).

As an example, a person who is unhappy with a decision made under the SSA Act about income management arrangements for them under the Participation/Parenting measure may seek review of that decision. Such a person would have access to the full range of review and appeal rights, including review by Authorised Review Officers and the Social Security Appeals Tribunal. Further, where income support recipients wish to apply for exemption from the new arrangements, evidence must be provided to justify this exemption—in effect, this is a form of reversal of the onus of proof (SSA Act sections 123UGC and 123UGD) (exemptions are not available to people subject to any of the other income management schemes).

The Place Based measure will include review and appeal rights because it is to be based on the existing Vulnerable Welfare Recipient and Child Protection schemes.

In its submission to the Senate inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills, the AHRC expressed the following concerns in relation to the Supporting People at Risk measure:

... The Commission submits that the decision-making powers of the external referring agency are too broad. Once the agency makes a ‘referral’, Centrelink does not have the discretion or the authority to consider its merits. Individuals are therefore not afforded the established review and appeal process built into the administration of the social security law.

... Further, the normal avenues of review and appeal of Centrelink decisions will not be available in externally referred cases. Consequently, any externally referred individual would need to seek
review through the agency from which the external referral has been made. This may place the individual at a disadvantage as they are required to operate within the internal review mechanisms that exist at the external referring agency.

... The Commission is concerned that some external referral agencies may not have review processes, and that individuals placed on income management through external referral will be denied access to the well-established and accessible Centrelink review and appeal processes.

... The Commission contends that all decisions affecting individuals should be subject to merits review to ensure natural justice, due process, and effective administrative decision-making.\textsuperscript{66}

As a result of these concerns, the AHRC recommended that:

\begin{itemize}
\item the power of an agency to make external referrals, and the factors that can be considered when making the decision to refer, should be clearly stated and defined in the primary legislation \textbf{[Recommendation no. 9]} and
\item Schedule 1 of the Social Security Legislation Amendment Bill 2011 be amended so that the proposed external referral mechanism allows Centrelink to make its own determination of whether to place a referred individual onto an income management program after considering the merits of a particular referral \textbf{[Recommendation no. 10].} \textsuperscript{67}
\end{itemize}

\textbf{Additional support programs}

\textit{AHRC criterion: the income management measure should include additional support programs that address the rights to food, education, housing, and provide support for welfare recipients, safe houses for women and men, alcohol and substance abuse programs}

The fifth criterion in the model suggested by the Commission is consistent with evidence about the kinds of assistance necessary to bring about sustainable change in disadvantaged communities. Each of the current income management measures includes assistance for welfare recipients in the form of financial counselling and money management services. All except the Cape York measure provide access to a matched savings scheme, under which each dollar that a person eligible for the scheme saves in their personal bank account is matched by the Government up to a limit of $500.

Further, Commonwealth and relevant state and territory governments have all provided assistance across most of the areas suggested by the Commission above since the introduction of income management. The difficult question is whether such assistance can be said to have been sufficient to have ‘addressed’ the rights to such things as food, education, housing, safety and health care. The AHRC guidelines provide no guidance as to how to determine whether access to these social rights has been adequately addressed.


\textsuperscript{67.} Ibid, p. 32.
One possible method for evaluating this could be to examine social outcomes (for example, in areas such as education, health and community safety) in the areas covered by income management. However, in the short term, such an exercise would be made difficult by methodological problems such as the absence of adequate baseline data.

**Conclusion**

Table 2 (below) summarises the comparisons made in the previous section of the various income management measures against the AHRC criteria. As can be seen from the table, the Participation/Parenting measure is the compulsory income management measure that would be viewed the least favourably by the Commission. This is because it only clearly meets two of the AHRC criteria (with a third, ‘additional support programs’, possibly met but unclear). The Parenting/Participation clearly does not meet the criteria that an income management measure should be a voluntary/opt in/last-resort or be applied for a defined period.

This can be contrasted with each of the other measures which target specific classes of individuals whom it is considered would benefit from income management and which are applied for defined periods of time. It is notable that each of the most recent expansions of income management to areas outside of the Northern Territory have been of this latter type, rather than the Northern Territory Participation/Parenting type.

While the Government has asserted that the Participation/Parenting measure is compliant with the RDA, one way of increasing the possibility that the AHRC and the courts would share this view would be to align the Participation/Parenting measure with the other targeted and time-bound income management measures.

**Table 2: AHRC criteria for income management measures compared against each compulsory income management scheme**

<table>
<thead>
<tr>
<th>Scheme</th>
<th>Subject to anti-discrimination legislation</th>
<th>Voluntary/opt in approach or last-resort suspension approach</th>
<th>Applied for a defined period</th>
<th>Allow for review and appeal</th>
<th>Additional support programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parenting/Participation (NT)</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td>Vulnerable welfare recipients (NT)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (12 months)</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td>Cape York</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (3 to 12 months)</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td>Child Protection (WA/NT)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (3 to 12 months)</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td>Supporting People at Risk (Agency Referral)</td>
<td>Yes</td>
<td>Yes</td>
<td>Unclear (AHRC has expressed concern)</td>
<td>Not known (not specified in legislation)</td>
<td>Unclear</td>
</tr>
</tbody>
</table>
### Income management and the Racial Discrimination Act

<table>
<thead>
<tr>
<th>Scheme</th>
<th>Subject to anti-discrimination legislation</th>
<th>Voluntary/opt in approach or last-resort suspension approach</th>
<th>Applied for a defined period</th>
<th>Allow for review and appeal</th>
<th>Additional support programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Place-based</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td>(Vulnerable Welfare Recipient 12 months, Child Protection: 3 to 12 months)</td>
<td>Yes</td>
<td>(Vulnerable Welfare Recipient and Child Protection: schemes have review and appeal rights)</td>
<td>Yes</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
</tbody>
</table>