
CONDITIONAL INCOME SUPPORT UNDER SEAM:

HUMAN RIGHTS COMPATIBILITY ISSUES

by Shelley Bielefeld

INTRODUCTION

This article explores the relationship between the School Enrolment and Attendance Measure ('SEAM') and human rights, in light of the recent assessment of this measure by the Parliamentary Joint Committee on Human Rights ('PJCHR').¹ The article considers the concerns raised by the PJCHR regarding the incompatibility of SEAM with Australia's international human rights obligations. It examines additional human rights concerns that were not addressed by the PJCHR in their June 2013 report; namely those that relate to the right of Indigenous peoples to participate in and enjoy their own culture. It is argued that rights to culture are significant for Indigenous peoples and should not be marginalised by the government in their efforts to promote the right to education. It is contended that SEAM is unlikely to deliver positive outcomes given that it involves the restriction of a range of human rights. Finally, the article also identifies several other criticisms of SEAM.

SEAM was introduced in 2008 in the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth), which inserted Part 3C on schooling requirements into the *Social Security (Administration) Act 1999* (Cth) ('SSA Act'). SEAM imposes conditions upon social welfare income and can result in the suspension of welfare payments for entire families if parents cannot ensure that their children meet the government's criteria for school attendance and enrolment.² It can therefore have a drastic impact upon families, and a particularly significant impact upon the wellbeing of children.³

In June 2012, as part of the *Stronger Futures* legislative package, SEAM was expanded pursuant to Schedule 2 of the *Social Security Legislation Amendment Act 2012* (Cth) ('SSLA Act').⁴ The *SSLA Act* also amended the *SSA Act*.⁵ The government states that these changes were enacted with the intention of supporting school enrolment and attendance. Thus the Explanatory Memorandum to the *SSLA* states that Schedule 2:⁶

[A]mends the provisions in the social security law that underpin ... SEAM ... to support greater improvement of

school attendance. Under the amended arrangements, a parent may be required to attend a compulsory conference to discuss their child's school attendance, to enter into a school attendance plan, and to comply with the plan. Failure to meet the compliance arrangements provided by this Schedule would lead to suspension of a parent's income support payment, unless certain circumstances apply.

Under the *Stronger Futures* laws, SEAM has been considerably expanded from six trial sites in the Northern Territory ('NT') and six trial sites in Queensland to a further 16 areas in the NT.⁷ The government maintains that SEAM is working effectively and has a beneficial impact. Thus, in their 2011 *Stronger Futures Discussion Paper*, the government stated that SEAM 'is having a positive impact on parents ensuring their children are enrolled and regularly attending school.'⁸ However, these claims are contentious, resting as they do on an equivocal evidence base.

THE FINDINGS OF THE PJCHR

The PJCHR originally examined SEAM, along with the income management and alcohol measures contained in the *Stronger Futures* laws, in response to a request by the National Congress of Australia's First Peoples.⁹ The Committee considered the government's position, that SEAM was implemented to promote the right of children to education under international human rights law. However, the PJCHR stated:

In addition to seeking to promote the right to education, SEAM also gives rise to a number of human rights compatibility concerns. The measure gives rise to concern about whether it constitutes racial discrimination insofar as its major impact is on Indigenous communities. The measures also potentially limit the right to social security and to an adequate standard of living guaranteed by articles 9 and 11 of the ICESCR respectively, and the right to privacy which is guaranteed by article 17 of the ICCPR.¹⁰

Under Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* the purpose or effect of a law is relevant in ascertaining whether or

not it discriminates on the basis of race.¹¹ It is possible for ostensibly race neutral laws to be discriminatory in terms of their impact. In relation to the issue of racial discrimination, as the PJCHR stated:

Even though the measures are not expressly based on race, they still appear to apply overwhelmingly to ... Aboriginal communities. Accordingly ... this means that they will potentially fall within the definition of racial discrimination in article 1 of the ICERD ... As such, in order to be non-discriminatory they will need to be shown to be based on objective and reasonable grounds and be a proportionate measure in pursuit of a legitimate objective.¹²

In regards to the other human rights compatibility issues under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') and the *International Covenant on Civil and Political Rights* ('ICCPR'), the PJCHR emphasised that the burden lay with the government to prove that the limitations placed upon these human rights were 'rational, reasonable and proportionate means of pursuing a legitimate objective.'¹³ Several stakeholders, including the Australian Human Rights Commission, have pointed out that there is a lack of evidence proving that SEAM is effective in terms of meeting the educational goals identified by the government.¹⁴ This may have relevance in terms of determining the reasonableness of the measure.

The PJCHR concluded that although the promotion of the right to education was a 'legitimate objective', SEAM imposed limitations upon 'the right to social security, the right to privacy and family, the right to an adequate standard of living, and the rights of the child in relation to each of those rights.'¹⁵ They found the government had not 'clearly demonstrated that ... SEAM has had a significant impact on reducing low school attendance' or 'shown that the interference with rights that ... SEAM represents is justified.'¹⁶ Consequently, they recommend further monitoring of SEAM and consultation with communities affected by this measure. However, given the inadequacy of government consultations with Aboriginal peoples since 2007 when the NT Emergency Response (or 'Intervention') commenced,¹⁷ this finding may be of little comfort to those currently affected by SEAM.

HUMAN RIGHTS CONCERNS NOT ADDRESSED BY THE PJCHR – RIGHTS TO CULTURE

Cultural obligations can explain a significant amount of school absences for Aboriginal children in the NT. As one Aboriginal community member put it:

[T]he government has to understand that we have two seasons, the dry season and the wet season. In the dry season we have ceremonies where we send our children with their families

out in the bush for six months ... and the government should understand that that is part of our culture to attend. It is a kind of education too.¹⁸

Another stated that: 'They gotta put it in their education policy ... when we have sorry business on, when we have funerals on ... We are trying to follow both laws so we shouldn't get in trouble and have our money cut off when we take our children for sorry business'.¹⁹

Interestingly, one of the human rights the PJCHR did not consider in the context of SEAM's compliance with Australia's human rights obligations is the right of Aboriginal people to participate in and enjoy their culture. This right is enshrined in several international instruments to which Australia is a party. For example, under Article 27 of the ICCPR Indigenous peoples have the right to 'enjoy their own culture'.²⁰ Under Article 15(1) (a) of the ICESCR Indigenous peoples have the right to 'take part in cultural life'.²¹

Further rights to culture are contained in Article 30 of the *Convention on the Rights of the Child*, which provides that: 'In those States in which ... persons of indigenous origin exist, a child ... who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture'.²² Additional rights of Indigenous peoples to their culture are contained within the *United Nations Declaration on the Rights of Indigenous Peoples* pursuant to Articles 8(1), 11(1), 14(3), and 15(1).²³ These rights are of continuing significance to Indigenous peoples, who, to quote Rosalie Kunoth-Monks, 'do not want to become carbon copies of somebody else's culture'.²⁴

The conditions placed upon Aboriginal people through SEAM are likely to inhibit Aboriginal children from participating fully in cultural activities that are their inherent right under international human rights law. The government's imposed conditionality inherent in SEAM confronts Aboriginal families with a difficult choice, where they must choose between fulfilling their own cultural obligations and obeying the government's rigid SEAM requirements. Such an approach reveals an ongoing lack of political will on the part of the government to honour particular human rights obligations owed to Aboriginal peoples. The government should not impose a punitive measure which threatens the financial livelihood of entire families because those families choose to adhere to their cultural obligations. To do so is tantamount to enforcing assimilation. However, the government's unfortunate tendency to promote assimilation via SEAM is consistent

with the assimilation inherent in other aspects of the NT Intervention such as the land reforms,²⁵ and income management.²⁶

OTHER CRITICISMS OF SEAM

Whilst the aim of facilitating greater school attendance and higher educational outcomes for Aboriginal peoples is an admirable goal, the problem lies with the government's method in attempting to address these matters. Their method reflects the tragically typical ineptitude characteristic of recent government interventions in the lives of Aboriginal peoples. The inadequacies of the government's method in attempting to address the multifaceted aspects of the Intervention are now well documented. There are several other issues that the government could have addressed in order to achieve educational goals rather than adopting SEAM. The government could have chosen to address the lack of public transport which makes it difficult for Aboriginal children living in remote areas to attend school.²⁷ They could have chosen to address the culturally inappropriate education curriculum²⁸ and made more effort to involve parents and community members in the education process so that Aboriginal children would find it more engaging.²⁹ They could have sealed the roads that become impassable during the wet season so that access to school is physically possible rather than impossible.³⁰ They also could have implemented strategies to deal with the bullying and discrimination issues that arise in some schools which can negatively affect attendance rates.³¹ The means by which the government has chosen to facilitate these educational goals are 'punitive'³² and leave many legitimate concerns unaddressed. The government may well find that a system of rewards and incentives developed collaboratively with Aboriginal communities are more effective in addressing educational goals than the threat of income suspension.³³

Although the government claims that SEAM was requested by Aboriginal communities to deal with educational goals, they have not provided evidence to support this claim.³⁴ Concerned Australians examined several transcripts of government consultations and meetings that took place in June to August of 2011 in the NT where the issue of education was raised. They concluded that although education was routinely seen as a 'high priority', 'there was not a single request for welfare cuts or fines [for] those parents with children who were not attending school.'³⁵ SEAM appears to be yet another means by which the government has implemented a system of routine paternalistic surveillance over Aboriginal families. As such, it runs counter to the recommendations of the Australian Human Rights Commission specifying that

effective engagement with Aboriginal peoples requires: 'Recognition and regard for Indigenous peoples rights', 'Respect for Indigenous culture and difference' and ensuring that the government receives the 'free, prior and informed consent' of Indigenous peoples.³⁶

There has been considerable and warranted opposition to SEAM.³⁷ The government is unlikely to achieve positive outcomes by suspending, ignoring or excluding specific human rights of Indigenous peoples in the quest to promote their right to education. Yet the government repeatedly insists that they are promoting human rights by overriding other human rights. The human right the government shows a frequent and consistent willingness to displace is the right of Indigenous peoples to their own culture. This marginalisation of Aboriginal culture has the effect of furthering the assimilation objectives of the colonial state.³⁸ The idea that the achievement of some human rights requires the suspension of others shows a lack of understanding of the interconnectedness of rights, a paucity of imagination, and a lack of commitment to honouring the international human rights that Australia has agreed to undertake in the international arena.

In evaluating the compatibility of SEAM with Australia's human rights obligations it is worthwhile reflecting upon the words of Louis Henkin:

Human rights are *rights*; they are not merely aspirations, or assertions of the good. To call them rights is not to assert, merely, that the benefits indicated are desirable or necessary ... To call them "rights" implies that they are claims "as of right", not by appeal to grace or charity ... they need not be earned or deserved.³⁹

Yet SEAM imposes a level of conditionality upon parents who are welfare recipients, dictating steps they must take in order to earn and deserve their human right to social security.⁴⁰ SEAM changes the nature of welfare in Australia away from 'a citizenship rights-based approach' and instead implements an approach that is punitive and degrading for welfare recipients.⁴¹ This treatment reveals the government's reluctance to provide social security for those they characterise as the 'undeserving poor'.⁴² Parents who do not ensure that their children meet the government's enrolment and attendance stipulations are thus characterised as undeserving of welfare support. However, the losers in this arrangement are likely to be the children the government claims to want to benefit.⁴³ As the Australian Human Rights Commission states:

[I]n situations where welfare payments are suspended or cancelled, there is likely to be no income available for the period of the suspension, or in the case of the cancellation, for the

period until a new application is completed. This will likely have a severe impact on the well-being of children.⁴⁴

CONCLUSION

Whilst the government remain committed to the extension of SEAM, claiming that it has led to positive outcomes for those subject to it, the PJCHR were evidently less convinced about the merits of the scheme and the government's claims about its efficacy. It seems unlikely that the new Liberal government will be willing to address the problems with human rights compatibility in SEAM, given their poor track record on human rights and Indigenous peoples. Prime Minister Tony Abbott has indicated that he has a favourable view of conditional welfare support;⁴⁵ therefore the human rights violations of those subject to the scheme may continue to be unaddressed in the domestic sphere. This may make resort to international human rights complaints mechanisms, such as the First Optional Protocol to the ICCPR, worthy of consideration. This would draw additional international attention to this issue and may result in international political pressure being placed upon the government to amend or repeal SEAM.

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- 1 Parliamentary Joint Committee on Human Rights ('PJCHR'), Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013).
- 2 *SSA Act* s 124F(1) allows for enrolment notices to be given to parents who are welfare recipients, s 124G(1) makes school enrollment a condition for welfare payments once a compliance notice has been given under s 124F(1), s 124H(1) allows for welfare payments to be suspended once a parent has not complied with a notice under s 124G(1), s 124L(1) makes school attendance a condition for welfare payments once a compliance notice has been given under s 124K, and 124M(1) allows for suspension of welfare payments where parents have not complied with s 124L(1).
- 3 Australian Human Rights Commission ('AHRC'), *Information concerning Australia and the Convention on the Rights of the Child – Additional Information Submitted to the Committee on the Rights of the Child by the Australian Human Rights Commission* (4 May 2012) 9.
- 4 The Stronger Futures legislative package consists of three Acts – the *Stronger Futures in the Northern Territory Act 2012* (Cth); the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth); and the *Social*

Security Legislation Amendment Act 2012 (Cth).

- 5 *SSLA Act* s 11 of Schedule 2 inserted Division 3A on School attendance plans into the *SSA Act*, which includes s 124NE(1) which makes school attendance a condition for welfare payments once a compliance notice has been given under s 124ND and s 124NF(1) which allows for suspension or cancellation of welfare payments where parents have not complied with s 124NE(1).
- 6 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth), 12. Section 124NE(2) and (3) of the *SSLA Act* leaves it to the discretion of the Secretary as to what circumstances may be deemed 'special circumstances' in order to avoid the suspension of a welfare payment.
- 7 PJCHR, above n 1, 64.
- 8 Department of Families, Housing, Community Services and Indigenous Affairs, *Stronger Futures in the Northern Territory Discussion Paper* (June 2011) 10.
- 9 PJCHR, above n 1, 1.
- 10 *Ibid* 65; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('ICESCR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 171 (entered into force 23 March 1976) (ICCPR).
- 11 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD').
- 12 PJCHR, above n 1, 66.
- 13 *Ibid* 67.
- 14 *Ibid* 68-69; AHRC, above n 3, 9.
- 15 PJCHR, above n 1, 73-74.
- 16 *Ibid* 74.
- 17 Australian Human Rights Commission, *Social Justice Report 2011* (2011) 27-28; Alastair Nicholson et al, *Listening but not Hearing: A response to the NTER Stronger Futures Consultations June to August 2011* (March 2012) 5 <<http://www.jumbunna.uts.edu.au/researchareas/ListeningButNotHearing8March2012.pdf>>; Alastair Nicholson quoted in Michele Harris (ed), *A Decision to Discriminate – Aboriginal Disempowerment in the Northern Territory* (Concerned Australians, 2012) 5; Rollback the Intervention, *Submission No 40 to the Senate Standing Committee on Community Affairs, Parliament of Australia, Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills*, 2012, read by Rev Dr Djinyini Gondarra OAM and Rosalie Kunoth-Monks OAM <<http://www.respectandlisten.org/submission/stronger-futures.html>>; Emma Partridge, Sarah Maddison, and Alastair Nicholson, 'Human Rights Imperatives and the Failings of the Stronger Futures Consultation Process' (2012) 18(2) *Australian Journal of Human Rights* 21, 21 and 32-36.
- 18 Mrs Williams, from the Babbarra Women's Centre, quoted in Harris, above n 17, 69 and 76. See also Michele Harris and Rosa McKenna, 'Cuts to Welfare Payments for School Non-Attendance: Requested or Imposed?', *Concerned Australians*, October 2011, 9 and 12 <<http://www.concernedaustralians.com.au/media/Welfare-Cuts-Requested-or-Imposed.pdf>>.
- 19 Kintore community member quoted in Harris and McKenna, above n 18, 9.
- 20 ICCPR, above n 10.
- 21 ICESCR, above n 10.
- 22 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1588 UNTS 530 (entered into force 16 January 1991).
- 23 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('UNDRIP').

- 24 Rollback the Intervention, above n 17.
- 25 Peter Billings, 'Still Paying the Price for Benign Intentions? Contextualising Contemporary Interventions in the Lives of Aboriginal Peoples' (2009) 33 *Melbourne University Law Review* 1, 36; Deirdre Howard-Wagner and Ben Kelly, 'Containing Aboriginal Mobility in the Northern Territory: From "Protectionism" to "Interventionism"' (2011) 15 *Law Text Culture* 102, 117.
- 26 Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46 *Australian Journal of Political Science* 519, 526; Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians – Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522, 536, 545, 557.
- 27 Barbara Shaw quoted in Harris, above n 17, 75; Harris and McKenna, above n 18, 4-5.
- 28 Peter Billings, 'School Enrolment and Attendance Measures: More Trials for Aboriginal Families?' (2009) 7(14) *Indigenous Law Bulletin* 3, 5; National Congress of Australia's First Peoples in PJCHR, above n 1, 69; Harris and McKenna, above n 18, 7-8.
- 29 National Congress of Australia's First Peoples in PJCHR, above n 1, 69; Harris and McKenna, above n 18, 6-7.
- 30 Concerned Australians, 'Opinion: NTER Evaluation 2011' (November 2011) 9 <<http://www.concernedaustralians.com.au>>.
- 31 Harris, above n 17, 69 and 75; Fiona Allison, Melanie Schwartz, and Chris Cunneen, "'That's discrimination!' Indigenous peoples' experiences of discrimination in the Northern Territory' (2013) 8(5) *Indigenous Law Bulletin* 8, 11.
- 32 Rollback the Intervention, above n 17.
- 33 Harris and McKenna, above n 18, 8.
- 34 Jon Altman, 'Arguing the Intervention' (2013) 14 *Journal of Indigenous Policy* 1, 118-119.
- 35 Harris and McKenna, above n 18, 2.
- 36 Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Peoples Engagement Toolkit 2012* (2012) 19. The latter mirrors part of Article 19 of the UNDRIP, above n 23.
- 37 Harris, above n 17, 78; Billings, above n 28, 5; Altman, above n 34, 117.
- 38 Altman, above n 34, 12, 37, 92, 133; Irene Watson, 'In the Northern Territory Intervention what is Saved or Rescued and at what Cost?' (2009) 15(2) *Cultural Studies Review* 45, 55.
- 39 Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 3 in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 1151.
- 40 Article 9 of the ICESCR, above n 10.
- 41 Jon Altman, *Centre for Aboriginal Economic Policy Research, Income Management and the Rights of Indigenous Australians to Equity* (2010) 1 and 6.
- 42 Belinda Carpenter and Matthew Bell, *Justice in Society* (Federation Press, 2012) 62; Philip Mendes, 'Key critics of the welfare state in Australia' (2012/2013) *Dissent* 58, 58; Philip Mendes, 'Compulsory Income Management: A Critical Examination of the Emergence of Conditional Welfare in Australia' (2012) *Australian Social Work* 1, 1.
- 43 Jon Altman, 'The intervention is dead, long live the intervention', *Crikey*, 1 November 2011, 2 <<http://www.crikey.com.au/2011/11/01/the-intervention-is-dead-long-live-the-intervention/>>; The Australian Human Rights Commission in PJCHR, above n 1, 73.
- 44 AHRC, above n 3, 9.
- 45 Malcom Farr, 'Tony Abbott calls for welfare crackdown', *News.com.au*, 31 March 2011, <<http://www.news.com.au/money/money-matters/quarantine-welfare-payments-to-essentials-says-opposition-leader-tony-abbott/story-e6frfmd9-1226031178877>>; Michelle Grattan, 'Abbott to get tough on welfare', *The Age*, 31 March 2011, <<http://www.theage.com.au/national/abbott-to-get-tough-on-welfare-20110330-1cgf9.html>>; Patricia Karvelas, 'Coalition bid to expand welfare quarantining', *The Australian*, 1 October 2013, <<http://www.theaustralian.com.au/national-affairs/coalition-bid-to-expand-welfare-quarantining/story-fn59niix-1226730353663>>.

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