

SCHOOL ENROLMENT AND ATTENDANCE MEASURES: MORE TRIALS FOR ABORIGINAL FAMILIES?

SOCIAL SECURITY AND VETERANS' ENTITLEMENTS LEGISLATION AMENDMENT (SCHOOLING REQUIREMENTS) ACT 2008 (CTH)

by Peter Billings

SEAM [School enrolment and attendance measure] has been designed as a trial to help build the currently limited evidence base on the impact of a welfare conditionality approach to improving school enrolment and attendance amongst the children of welfare recipients.¹

The race-based scheme of income management in prescribed parts of the Northern Territory is synonymous with the Federal Government's emergency response to date,² attracting sustained attention from within academe, the media and various bodies such as the Social Justice Commissioner, the Northern Territory Emergency Response Review Board, and UN human rights monitors. The more nuanced Cape York Welfare Reform trial³ is also on the public radar, of late via conflicting reports on the operation and impact of the Family Responsibilities Commission.⁴ Relative to these 'local' initiatives, a 'national' income management measure linked to child protection, currently being trialled across Western Australia⁵ has courted less publicity, though it too warrants close inspection and evaluation. Far less attention has been directed toward allied reforms introduced by the Rudd Government, designed to improve educational outcomes through the conditioning of social welfare.⁶ These changes to social security legislation supersede a school enrolment and attendance measure introduced as a part of the emergency response, which was never applied due to complex legal and administrative issues relating to the flow of data between the Northern Territory and Federal Governments.⁷ Critically, the new legislation facilitates more than income *management* insofar as the provisions permit the *suspension* and *cancellation* of welfare benefits for parents who fail to ensure their children attend school regularly.

THE SCHOOLING REQUIREMENTS PROVISIONS

The Commonwealth has openly exploited people's poverty and dependence on the state as additional leverage to encourage behavioural change.⁸ The *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth) ('SRA')⁹ outlines

requirements for parents in receipt of income support in relation to the enrolment and attendance of their children at school. It aims 'to engender behavioural change in those parents who are reluctant to encourage their children to participate in school'¹⁰ by conditioning income support. It complements existing (albeit underemployed) state and territory legislative powers to prosecute parents for failing to ensure their children attend school.¹¹ While not aimed solely at Aboriginal communities, many of the trial areas are largely populated by Aboriginal peoples and several overlap with prescribed areas under income management in the Northern Territory, raising the possibility of dual welfare controls operating simultaneously.¹² Similarly, the metropolitan district of Cannington (Perth) was flagged as a testing site for the new schooling measures so that the Commonwealth could examine the advantages of an overlap with the child protection-related welfare regime.¹³ While the Perth-based experiment is yet to commence, trials have commenced in Queensland (Logan, Doomadgee and Mornington Island).¹⁴

The schooling requirements extend to those persons claiming or receiving specified support payments who have a 'schooling requirement child' (as defined), and that child is legally required to be enrolled at school and attending at relevant times.¹⁵ Unlike the other regimes conditioning welfare, income support payments are not managed on the recipient's behalf. Distinctively, the regime steps beyond the management of welfare rights and permits the removal of entitlements. The Act enables the suspension or cancellation of income support payments to a person who, after 14 days' notice, has failed to provide evidence that a child is enrolled at a school.¹⁶ Additionally, where 28 days have passed and the person has not taken 'reasonable steps' to ensure satisfactory attendance, payments may be stopped.¹⁷ The operation of this section is dependent upon written notice from the school principal to the Secretary (Centrelink), setting out that a child is not attending satisfactorily *and* that he or she is not satisfied that reasonable steps are being taken to ensure attendance. Evidence from the Northern Territory suggests that

schools do not have the resources to properly monitor the system and that this is compromising its implementation.¹⁸ State/Territory privacy protection laws are overridden to meet concerns that the transfer of schooling information to Government departments and Centrelink would be unlawful.¹⁹

Suspension of payments is to be used a measure of last resort after repeated and sustained attempts to engage a parent.²⁰ The careful use of specific case management, in situations where children are not being supported to attend school, has been emphasised as part of the delivery of the trial, although it is not legislated for.²¹ In extreme cases of parental non-compliance with enrolment/attendance notices, cancellation of payments may occur after at least 13 weeks' suspension, a period which need not be continuous. Suspension and cancellation will arise in the absence of a 'reasonable excuse' or 'special circumstances' that, purportedly, Centrelink social workers will help parents identify. The meaning and application of these discretionary terms is determined via legislative instrument.²² Unlike the other schemes conditioning welfare payments, the SRA does not extend to supplemental payments for family assistance, such as childcare benefits. Centrelink is accountable for the administration of the scheme via standard review mechanisms, including the Social Security Appeals Tribunal, with an onward appeal right to the Administrative Appeals Tribunal.

THE RIGHT TO SOCIAL SECURITY

The universal right to social security is enshrined in several declarations and treaties and is accepted as a basic

human right in international law.²³ The content of this right emerges from the Economic Social and Cultural Rights ('ESCR') Committee's General Comment No.19.²⁴ Article 9 of the *International Covenant on Economic Social and Cultural Rights* ('the Covenant'), provides for the preservation of human dignity and economic security and requires that states realise the right, within their available resources, and without discrimination.²⁵ This includes the right not to be subject to arbitrary and unreasonable restrictions upon existing social security.²⁶ States Parties are required to take particular care that Indigenous peoples are not 'excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.'²⁷

Welfare quarantining in prescribed parts of the Northern Territory has proven to be inconsistent with the right to social security because welfare benefits have not always been available and accessible to people *and* because less invasive (more proportionate) means could have been employed to secure the desired outcomes. In contrast, it is the potential *loss* of welfare entitlements that constitutes the denial of social security rights under the terms of the SRA. The operation of the *Racial Discrimination Act 1975* (Cth) (and corresponding jurisdiction-specific legislation) is not suspended in relation to the schooling measures which are, ostensibly, universal. The Government has stressed that it is not targeting Aboriginal children and that the trial sites were not selected because of the number of Aboriginal students in the locations.²⁸ While the application of the measures clearly has a racial dimension, the extension of the trial to Logan (and potentially Cannington) is probably sufficient to sustain the view that, in law, the trials are racially neutral, although both areas have a higher than average Indigenous and ethnic minority population.²⁹

The SRA compromises social security rights expressly, providing for benefit suspension or cancellation as a 'last resort'. This appears to conflict with the strong presumption that 'retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.'³⁰ In examining whether States Parties have violated this legal obligation the ESCR Committee will look at whether: (a) there was a reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or

Storm Dancers 2006
Ros Langford

Acrylic on canvas,
1010mm x 760mm



whether an individual or group is deprived of access to the minimum level of social security; and (f) whether there was an independent review of the measures at the national level. This analytical framework is used to examine the schooling requirements measures below.

The justification advanced for the schooling measures is the need to address lower than average school attendance rates across Australia, although tackling poor attendance rates among Aboriginal children in the Northern Territory appears to be a primary purpose.³¹ As the measures purport to be universal, there needs to be an evidence base that sustains the policy beyond non-attendance levels in socio-economically deprived Aboriginal communities. But there is

no evidence to suggest that Australia has significantly higher than average rates of non-enrolment or attendance, which raises questions about the justifications for severe sanctions to address the issues and for proposals to roll these measures out nationally if the trials are successful.³²

The Government hypothesises that financial levers can work to get children to school is based on the success of a scheme linking an allowance for maternity immunisation and childcare benefits to the completion of a vaccination program.³³ It is a stretch to see how this example supports the notion that conditional welfare in the educational context will be effective. The lack of domestic or overseas evidence demonstrating that coercive measures improve educational outcomes has been acknowledged by the Government, although this is said to be a reason for proceeding with the trial rather than a reason not to.³⁴

Simply compelling children to attend school, without more, does not mean that they will engage with the educational process or improve their educational outcomes. Given the lack of supporting evidence, it is incongruous that alternative strategies that are *known* to have motivated disengaged children to attend school have not also benefited from substantial Commonwealth funding.³⁵ It is also misconceived to impose a sanctions-based policy without first addressing the malfunctioning Northern Territory education system: specifically, the quality of educational infrastructure and teaching services, and culturally insensitive curricula.³⁶ The lack of consultation with communities prior to the decision to implement the schooling enrolment and attendance measures also compromises its legitimacy and potential effectiveness. Moreover, the potential loss of acquired social security entitlements will heap pressure on vulnerable families and may deprive individuals of access to the minimum level of social security resulting in destitution. This is not in

the best interests of the child and undermines children's rights to benefit from social security.³⁷ Through its terms and operation, the SRA appears to be inconsistent with the prohibition on the adoption of deliberately retrogressive measures.³⁸

CONCLUSION

The different modalities of welfare reform currently being trialled in Australia share an emphasis on individual behaviour as the source of social problems, while downplaying complex underlying structural issues. The emergency response measures in the Northern Territory and the Cape York Welfare Reform trial are united by the rationale that moderating control over social welfare entitlements will lead to behaviour modification and the moral regeneration of dysfunctional communities, families and individuals, thereby yielding real improvements in the socio-economic status of children. The SRA takes this conviction a step further insofar as it provides for draconian benefit sanctions for welfare recipients who behave 'irresponsibly'. In principle, the school enrolment and attendance measure is incompatible with Australia's international law obligations, it remains to be seen whether the punitive elements of the scheme are applied in practice.

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- 1 Senate Standing Committee on Community Affairs, *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008* (Cth) [Provisions] (November 2008) 1 [Department of Education, Employment and Workplace Relations (DEEWR) and Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Submission 4*, 4].
- 2 *Social Security (Administration) Act 1999* (Cth) ('SSAA 1999 (Cth)') Part 3B, inserted by *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sch 1, item 17, established several schemes of income management, including the indiscriminate NT scheme.
- 3 See *Family Responsibilities Commission Act 2008* (Qld). The *Social Security (Administration) – Queensland Commission (Family Responsibilities Commission) Specification 2008* (Cth) provided that the FRC satisfied the definition of the 'Queensland Commission' for the purposes of SSAA 1999 (Cth) s 123TC(b).
- 4 See Natasha Robinson and Sarah Elks, 'Welfare tough love works as quarantining parent payments cuts indigenous truancy', *The Australian* (Sydney), 30 September 2009; and Terry Sweetman, 'Welfare brake applied through school attendance figures', *Sunday Mail*, 3 October 2009. Cf. Chris Sarra, 'Positive not punitive the best approach', *The Australian* (Sydney), 3 October 2009 and Peter Billings, 'Law academic warns Cape York school attendance report needs close scrutiny' (Press Release, 1 October 2009) <www.law.uq.edu.au/

index.html?page=118572&pid=26466>. These contributions offer differing evaluations of the Family Responsibilities Commission, *Quarterly Report No. 4* (April – June 2009) <www.atsip.qld.gov.au/government/families-responsibilities-commission/> at 30 October 2009.

- 5 The trials commenced in Cannington and Kununura on 24 November 2008, and were extended across the Kimberley region and to Perth suburbs during 2009. See J. Macklin and R. McSweeney, 'Income Management in Cannington and Kimberley' (Press Release, 18 November 2008) <www.fahcsia.gov.au/internet/jennymacklin.nsf/content/income_management_18nov08.htm>; R. McSweeney, 'Expansion of Income Management Trials in Western Australia' (Press Release, 20 April 2009) <www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=131710> and, J. Macklin 'Income Management expanded across Perth' (Press Release, 2 October 2009) <[www.jennymacklin.nsf/content/income_management_2oct09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/income_management_2oct09.htm)> at 30 October 2009.
- 6 *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth) ('SRA').
- 7 Northern Territory Emergency Response (NTER) Review Board, *Report of the NTER Review Board* (2008) <www.nterreview.gov.au> at 29 October 2009) 29.
- 8 People receiving income support payments have been selected for the trials because the 'Australian government has direct policy leverage to encourage behavioural change' (Senate Standing Committee on Community Affairs, above n 1, 16).
- 9 Inserting Part 3C (schooling requirement provisions) into the SSAA 1999 (Cth).
- 10 Commonwealth, *Parliamentary Debates*, Senate, 15 September 2008, 4707-4708 (J. McLucas).
- 11 State education department's annual reports reveal little about prosecution levels. It has been claimed that in WA, SA, ACT and NT there have been no prosecutions for truancy since 2004 (Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2008, 7003 (T. Abbott)).
- 12 The six sites are Hermannsburg, Wallace Rockhole, Tiwi Islands, Katherine, Katherine town camps and Wadeye (Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7210 (J. Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs)).
- 13 Senate Standing Committee on Community Affairs, above n 1, 9.
- 14 J. Macklin and A. Bligh 'Increasing school attendance and enrolment in Queensland' (Press Release, 18 September 2009) <www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/jm_m_qldschoollattendance_18september2009.doc> at 29 October 2009; and, see Mark Flack, 'Anti-truancy plan defended', *Albert and Logan News*, 23 September 2009.
- 15 SSAA 1999 (Cth) Pt.3C div.1 (schooling requirements) inserted by SRA s 6.
- 16 SSAA 1999 (Cth) Pt.3C div.2 (school enrolment notices) inserted by SRA s 6.
- 17 SSAA 1999 (Cth) Pt.3C div.3 (school attendance notices) inserted by SRA s 6. 'Reasonable steps' are defined in Social Security (Administration) (Schooling Requirement) Determination 2009 (No 1.) sch 1.
- 18 Natasha Robinson, 'Truancy program at risk' *The Australian* (Sydney), 6 October 2009.
- 19 SSAA 1999 (Cth) Pt.3C div.4 (information about schooling) inserted by SRA 2008 (Cth) s 6.
- 20 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 2008, 6299 (J. Gillard, Deputy Prime Minister).
- 21 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7211 (J. Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs).
- 22 SSAA 1999 (Cth) s 124G and s 124L, inserted by SRA s 6; and Social Security (Administration) (Schooling Requirement) Determination 2009 (No 1.) sch 1.
- 23 *Universal Declaration of Human Rights* art 22 ('everyone, as a member of society, has the right to social security') supplemented by art 25 (the right to an adequate standard of living); *International Covenant on Economic Social and Cultural Rights* art 9 ('the right of everyone to social security') links with art 11 (right to an adequate standard of living); *Convention on the Elimination of Racial Discrimination* art 5(e) (iv) (non-discrimination in the enjoyment of social security); and *Convention on the Rights of the Child* art 26 (child's right to benefit from social security).
- 24 Committee on Economic Social and Cultural Rights', *General Comment No. 19*, 39th Session, E/C.12/GC/19 (4 February 2008). Australia has ratified the ICESCR.
- 25 Committee on Economic Social and Cultural Rights', above n 24, paras 1- 4, and para 59 (core obligations). The right to social security and social insurance may be properly construed as encompassing social assistance schemes, see, E.H. Riedel, 'The Human Right To Social Security: Some Challenges' in E.H. Riedel (Ed), *Social Security as a Human Right* (2007), 23-25.
- 26 Committee on Economic Social and Cultural Rights', above n 24, paras 2 (non-discrimination) and 9 (non-arbitrariness).
- 27 *Ibid* para 35.
- 28 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7210 (J. Macklin) and Standing Committee on Community Affairs, above n 1, 16.
- 29 For example, in Logan 5.1% of the population is Indigenous, compared to the 2.3% national demographic. ('2006 Census QuickStats: 4114 (Postal Area)' via <www.censusdata.abs.gov.au> at 2 November 2009). As the Logan Mayor noted, a large number of refugees are also resettled in the area (Christine Kellett, 'Lay off Logan, says Mayor', 18 September 2009 <www.brisbanetimes.com.au/queensland/lay-off-logan-says-mayor-20090918-fty0.html> at 2 November 2009).
- 30 Committee on Economic Social and Cultural Rights', above n 24, para 42.
- 31 J. Macklin and M. Scrymgour, 'NT Trials to Boost School Attendance' (Press Release, 20 June 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/boost_school_attendance_20june08.htm> at 30 October 2009.
- 32 ACOSS Submission to the Standing Committee on Community Affairs, above n 1, 10.
- 33 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 7210 (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs).
- 34 Standing Committee on Community Affairs, above n 1, 10-11.
- 35 \$17.6 million was allocated to the schooling measures, while \$36.4 million over three years was allocated to undertake and evaluate the child protection and schooling pilots. (Commonwealth, *Budget Paper No.2: Budget Measures 2008-09* (2008), 174 <www.ato.gov.au/budget/index.htm> at 30 October 2009). For alternatives see L. Behrendt and R. McCausland, *Welfare Payments and School Attendance: An Analysis of Experimental Policy in Indigenous Education* (August 2008) <www.aeufederal.org.au/Publications/2008/LBehrendtpaper.pdf>; and, generally, the *Stronger Smarter Institute* <www.strongersmarter.qut.edu.au/aboutus/> at 30 October 2009.
- 36 The *Report of the NTER Review Board* referred to 'an education system failure in Northern Territory remote communities', see NTER Review Board, above n 7, 30.
- 37 *Convention on the Rights of the Child* arts 3 and 26.
- 38 Committee on Economic Social and Cultural Rights, above n 24, para 64.