

16 October 2018

Human Rights and Technology Inquiry
Australian Human Rights Commission
Level 3, 175 Pitt Street
Sydney NSW 2000

By email: tech@humanrights.gov.au

Re: The Impact of Technology on the enjoyment of Human Rights for social security recipients

I welcome the opportunity to make a submission to the Australian Human Rights Commission on the impact of technology on human rights. I make this submission as an academic with a disciplinary background in law whose research focuses on issues of public policy, social justice, human rights and Indigenous peoples.

Points made in this submission arise from my research and engagement undertaken as the Inaugural Braithwaite Research Fellow at the School of Regulation and Global Governance (RegNet) at the Australian National University, which I now continue as an ARC DECRA Fellow¹ at the Law Futures Centre and Griffith Law School at Griffith University for the project *Regulation and Governance for Indigenous Welfare: Poverty Surveillance and its Alternatives*.

I agree with the comments made by the Australian Human Rights Commissioner, Edward Santow, that 'Technology should exist to serve humanity' and that 'we must ... be alive to, and guard against, the threat that new technology could worsen inequality and disadvantage.'² This threat has been realised in the context of changes to Australia's social security system. This submission centres on ways in which technology is increasingly being used to hyper-regulate the lives of social security recipients, with adverse effects for numerous Indigenous peoples, particularly those living in remote regions.

This submission will address the following questions from the Human Rights and Technology Issues Paper:

1. What types of technology raise particular human rights concerns? Which human rights are particularly implicated?
2. Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people (such as ... Aboriginal and Torres Strait Islander peoples)?

¹ Australian Research Council Discovery Early Career Researcher Award (DECRA) (DE180100599).

² Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (July 2018) 4.

3. How should Australian law protect human rights in the development, use and application of new technologies? In particular:
 - (a) What gaps, if any, are there in this area of Australian law?
 - (c) What principles should guide regulation in this area?

This submission will address human rights compatibility problems with Compulsory Income Management (CIM) and the Community Development Program (CDP), both of which disproportionately impact on Indigenous peoples. Both CIM and CDP capture data about social security recipients, and that data can then be used for a range of purposes, including, as is evident with CDP, those that are punitive.

Although the federal government has portrayed both CIM and CDP programs as supportive measures for those subject to them, these programs have impinged upon the enjoyment of a range of human rights and further exacerbated inequality and disadvantage for many coerced program participants. Human rights infringed include rights to social security, privacy, equality, non-discrimination, an adequate standard of living, and genuine/meaningful consultation.

As Australia's law currently stands there are inadequate protections in place to protect social security recipients from technological experiments often dressed up in the language of 'innovation'.³ Instead the government⁴ has embarked upon *reckless innovation* – where the human rights of social security recipients are so restricted that they no longer deliver substantive 'rights' in any meaningful sense. Unfortunately subsequent harm caused by these developments has been treated dismissively by Ministers responsible for these programs.

Compulsory Income Management (CIM)

CIM with the BasicsCard

CIM originated as part of the Northern Territory Emergency Response, the 'Intervention'. Government discourse stressed that the measure was to address substance abuse, gambling and pornography issues, promote the care of children, and alleviate humbugging, amongst other objectives.⁵ Although initially rationalised as a temporary measure, income management is now firmly embedded in Australian social security law with no sunset clause: Part 3B of the *Social Security (Administration) Act 1999* (Cth). Part 3B deals with CIM where 50 to 70 per cent of fortnightly social security payments are typically quarantined to the BasicsCard.⁶ This card can only be used at government approved merchants, and the scheme has created significant consumer

³ See for example Andrew Forrest, *The Forrest review: creating parity* (2014) 102; Minderoo Foundation, *Cashless Debit Card Technology Report* (November 2017) 10, 23-24.

⁴ in partnership with particular non-government entities, for example, Indue Ltd.

⁵ Section 123TB of the *Social Security (Administration) Act 1999* (Cth).

⁶ for those outside of the Cape York Welfare Reform (CYWR), those subject to the CYWR can experience up to 90 per cent of their income quarantined to the BasicsCard.

problems for coerced program participants.⁷ Further details about the origins and many problematic features of CIM, including some human rights compatibility issues, are contained in Appendices A, B and C.

Numerous shortcomings of CIM via the BasicsCard have been highlighted to government, including those made by Bray and colleagues in their 2014 Northern Territory Income Management evaluation report.⁸ Bray and colleagues found that there was no evidence that the program was achieving the policy objectives outlined by government, nor was there any evidence of improvements in spending patterns, financial wellbeing, community wellbeing, or the wellbeing of children.⁹ Interestingly in light of the government's rationale for the scheme, Bray and colleagues also concluded 'the evidence is that income management has had no impact on alcohol consumption or alcohol-related harm.'¹⁰ Nevertheless the government continues to assert that compulsory cashless welfare transfers are useful to address all these issues.¹¹

In their 2016 Review of the *Stronger Futures* laws, the Parliamentary Joint Committee on Human Rights (PJCHR) noted with concern that CIM infringes upon the enjoyment of a range of human rights for social security recipients, including rights to social security, privacy and family, and equality and non-discrimination.¹² As the Parliamentary Joint Committee on Human Rights (PJCHR) has noted, limitations can be placed on human rights in some circumstances:

In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.¹³

The PJCHR concluded that there was no convincing evidence put forward by the federal government to prove that CIM was rationally connected to achieving legitimate objectives or a proportionate means of doing so. The PJCHR stated 'the committee is

⁷ For examples, see J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) 136-137.

⁸ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) xx-xxii.

⁹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) xx-xxii.

¹⁰ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) 305.

¹¹ For a critique of this position see Shelley Bielefeld, 'Government Mythology on Income Management, Alcohol, Addiction and Indigenous Communities' (2018) 38(4) *Critical Social Policy: A Journal of Theory and Practice in Social Welfare* 749-770.

¹² Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) x.

¹³ Parliamentary Joint Committee on Human Rights (PJCHR), *Review of Stronger Futures Measures* (Canberra: Commonwealth Parliament, 2016) v.

concerned that the income management regime is not rationally connected to achieving its objectives'¹⁴ and 'that compulsory income management is a disproportionate measure.'¹⁵ They found that:

evidence before the committee indicates that compulsory income management is not effective in achieving its stated objective of supporting vulnerable individuals and families. ... A human rights compliant approach requires that any measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community. The current approach to income management falls short of this standard.¹⁶

Further, the PJCHR noted that:

The imposition of significant conditions on the provision of income support payments, including what goods or services may be purchased and where, is an intrusive measure that robs individuals of their autonomy and dignity and involves a significant interference into a person's private and family life.

The compulsory income management provisions operate inflexibly raising the risk that people who do not need assistance managing their budget will be caught up in the regime. This concern is heightened by the exemptions process which appears to discriminate in effect against Indigenous Australians.

Indeed, given the disparate impact on Indigenous people, the committee considers that the measures may be viewed as racially based differential treatment within the meaning of article 1 of the ICERD. Further, in light of the fact that there is some evidence to suggest that the majority of persons subject to income management are women, concerns also arise as to the consistency of the measure with guarantees against non-discrimination on the basis of sex.

The committee considers that a host of less rights restrictive measures may be developed and implemented in place of compulsory income management. Chief among these is removing the compulsory categories of income management and trialling a voluntary program across all current sites.¹⁷

Despite lack of compliance with Australia's human rights obligations, CIM continues across numerous locations, including the Northern Territory, the original site of the Intervention. The government captures a range of data about CIM. These data sets reveal that Indigenous social security recipients have consistently been grossly overrepresented in all compulsory income management categories (see Appendix A).

¹⁴ Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61.

¹⁵ Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61.

¹⁶ Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61-62.

¹⁷ Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61.

As of 30 March 2018 the number of people Australia wide on income management was 25,270 of which 78% identified as Indigenous.¹⁸ Of the 25,270 income managed people only 4,037 are on voluntary income management (and some of those on voluntary income management have not actually ‘voluntarily’ entered the scheme – see Appendix C). The program is therefore principally coercive in character in terms of the vast majority of people subject to it.

Sales data connected with the BasicsCard can also be captured and scrutinized by researchers and others.¹⁹ This is concerning because of what generalised conclusions might be drawn about social security recipient’s expenditure patterns from this data – with the possibility of further punitive prohibitions being added to existing income management prohibited expenditure categories, for example, foods high in sugar or fat. The pathway of prohibition can be a slippery slope. This is seen in the development of income management, initially trialled as an ‘emergency’ measure for Indigenous welfare recipients, it has now become a ‘business as usual’ feature of governance – with flow on effects for other intrusive surveillance and control measures like the Cashless Debit Card.

CIM with the Cashless Debit Card (CDC)

More recently there has been a new form of CIM in some trial areas, where 80 per cent of fortnightly social security payments are quarantined to a Cashless Debit Card issued by Indue Ltd (see Appendix A for the three waves of CIM development). CDC holders cannot spend their restricted funds on alcohol or gambling.²⁰ The legislative scheme for this type of CIM is set out in Part 3D of the *Social Security (Administration) Act 1999* (Cth). This type of CIM was triggered by the 2014 Forrest Review:

In 2014, Andrew Forrest recommended that the federal government trial a ‘Healthy Welfare Card’ with 100 per cent cashless welfare for recipients of government income support except for ‘age and veterans’ pensions (Forrest 2014: 100–8). Forrest (2014: 102–3) claimed that Australia had ‘increased the risk to its most vulnerable by paying all welfare benefits in cash’, which enabled an ‘incoming tide of drugs and alcohol’, particularly in remote Indigenous communities, and that there was a need to ‘find a technologically possible, sensible mass solution to end this unnecessary suffering’. Forrest (2014: 105) maintained that the Welfare Card would swiftly move individuals into employment and reduce ‘emergency relief payments and crisis services ... through a longer-term reduction in welfare reliance’. Neoliberal notions of increased efficiency and reduced government expenditure on income support

¹⁸ Department of Social Services, Cashless Debit Card (CDC) and Income Management (IM) Summary, 5 <<https://data.gov.au/dataset/income-management-summary-data/resource/986ef7fe-1ba8-460e-b1c4-2cf00145a948>>.

¹⁹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) ii.

²⁰ *Social Security (Administration) Act 1999* (Cth) s 124PM(a).

were therefore an important aspect of his advocacy for overhauling the Australian welfare system.²¹

As I wrote in Appendix A:

According to advocates of the BasicsCard and the Cashless Debit Card, welfare recipients have poor purchasing patterns and are incapable of self-regulation (Forrest 2014, 103). Technological intervention is presumed to be capable of taming their allegedly deviant dispositions. Technologising the poor will also supposedly bring them up to date with neoliberal expectations and make them fit for the future. However, as Russell West-Pavlov (2013, 3) notes, “‘Time’ is a term ...riddled with issues of power and hegemony”. Less acknowledged is the reality that data mining would provide plentiful profits for those tasked with trawling through personal data of welfare recipients searching for some peccadillo to penalise. Part of the Forrest Review (2014, 107) vision was to “use existing data mining technology to monitor use of the card to detect any unusual sales or purchases” and then impose penalties for rule infractions.

As Australia embarks upon this techno trend of increased panoptic oversight of the poor through compulsory forms of income management, those subject to it experience pilloried ‘in kind’ support. They can compare their current experience with one of less stigmatised social security payments in the very recent past; a time when they were not singled out as welfare recipients during consumer transactions by having to use a restrictive card peddled by paternalists as necessary to deal with substance abuse.²²

There have been numerous Senate Inquiries about the CDC, to which I have made a range of submissions addressing human rights compatibility problems and other concerns.²³ The CDC limits the enjoyment of the same range of human rights as CIM via the BasicsCard – rights to social security, privacy and family, and equality and non-discrimination.²⁴ Like other forms of income management that preceded it, the CDC has a grossly disproportionate impact on Indigenous peoples. In 2016 Indigenous peoples reportedly comprised 565 of the 752 people subject to the CDC in Ceduna and

²¹ Shelley Bielefeld, ‘Indigenous Peoples, Neoliberalism and the State: A Retreat from Rights to “Responsibilisation” via the Cashless Welfare Card’, in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamarino-Jiminez (eds), *The Neoliberal State, Recognition and Indigenous rights: New paternalism to new imaginings* (Australian National University Press) 147, 148.

²² Shelley Bielefeld, ‘Cashless Welfare Transfers for “Vulnerable” Welfare Recipients – Law, Ethics and Vulnerability’ (2018) 26(1) *Feminist Legal Studies* 1, 18.

²³ Shelley Bielefeld, Submission to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*, 18 September, 1-15; Shelley Bielefeld, Submission No 55 to the Senate Standing Committee on Community Affairs, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, 29 September, 1-20; Shelley Bielefeld, Submission to the Australian National Audit Office, *The implementation and performance of the Cashless Debit Card trial*, 15 January, 1-9; Shelley Bielefeld, Submission No 68 to the Senate Standing Committee on Community Affairs, *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018*, 20 July, 1-13.

²⁴ Parliamentary Joint Committee on Human Rights (PJCHR), *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 39; Parliamentary Joint Committee on Human Rights (PJCHR), *Report Number 6 of 2018* (Canberra: Commonwealth Parliament, 2018) 33.

984 of the 1,199 people on the card in Kununurra and Wyndham.²⁵ Consequently, indirect racial discrimination is an issue as per Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), which takes into consideration the actual effect of laws and policies rather than simply relying on government statements of intent embedded in legislative objectives. The PJCHR has found that threshold requirements for permissible limitations on human rights, including rational connection and proportionality, have not been satisfied by the government's assertions in Human Rights Compatibility Statements accompanying extensions of the CDC scheme.²⁶

The PJCHR has stated that although 'the cashless welfare trial measures may pursue a legitimate objective', the Committee has 'concerns as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to their objective.'²⁷ They noted that evaluation findings suggest that the CDC 'trials have not been definitively positive.'²⁸ The PJCHR stated that when assessing the proportionality of limitations they consider whether there are 'adequate and effective safeguards' that can 'ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure'.²⁹ The Committee continued:

the cashless debit card would be imposed without an assessment of individual participants' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

As the cashless debit card trial applies to anyone residing in locations where the trial operates who is receiving a social security payment specified under the scheme, there are serious doubts as to whether the measures are the least rights restrictive way to achieve the stated objectives.³⁰

The Committee also noted that:

The compulsory nature of the cashless debit card trial ... raises questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'. Application of the scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial,

²⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission) 91-92.

²⁶ Parliamentary Joint Committee on Human Rights (PJCHR), *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 34-40; Parliamentary Joint Committee on Human Rights (PJCHR), *Report Number 6 of 2018* (Canberra: Commonwealth Parliament, 2018) 36-37.

²⁷ PJCHR, *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 36.

²⁸ PJCHR, *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 37.

²⁹ PJCHR, *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 37.

³⁰ PJCHR, *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 38.

would appear to be a less right[s] restrictive way to achieve the trial's objectives.³¹

There have also been serious problems with the government's CDC consultations – with a lack of genuine, meaningful, human rights compliant consultation, in contravention of Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). As I stated in a recent article:

The government emphasises that the CDC has been co-designed with Indigenous leaders in the trial areas via a consultation process, however the nature of what was agreed and the extent to which there was co-design of the CDC has been contested. Some Indigenous elders and community members indicate that the broadly applied mandatory CDC was not the targeted scheme they had supported in consultations, and assert that they do not want the card in their community because it fosters shame and causes suffering. For instance, Mimi Smart, an elder of the Yalata community, argues that the trial should be cancelled. She states:

when it was first talked about ... I thought it was going to be for ... people that hang out in Ceduna drinking and causing trouble, and not ... people living in Ceduna who don't drink and get into trouble. I didn't think it would be for ... people who do look after their kids. I thought the cashless card would be targeted.

Problems have also been raised by some stakeholders and community members who maintain that the government had already decided to go ahead with the CDC at the time the consultation occurred.³²

Some Indigenous community members who had initially signed up to the CDC have gone on the public record stating that there were important details meant to be part of co-design omitted from the governments' policy formation and implementation.³³ For example, Lawford Benning, one of the Indigenous leaders who had originally supported the CDC in Kununurra has withdrawn support for the cashless card. Benning states that Minister Tudge made several important commitments to the Indigenous leadership in Kununurra, none of which were honoured as part of the actual policy implemented. Benning states:

The commitments included the local Aboriginal community being:

³¹ PJCHR, *Report Number 9 of 2017* (Canberra: Commonwealth Parliament, 2017) 39.

³² Shelley Bielefeld, 'Cashless welfare cards: controlling spending patterns to what end?' (2017) 8(29) *Indigenous Law Bulletin* 28, 28.

³³ Mimi Smart in Melissa Davey, 'Cashless welfare card made life worse, half of trial participants say', *The Guardian*, 14 March 2017 <<https://www.theguardian.com/australia-news/2017/mar/14/cashless-welfare-card-made-life-worse-say-half-of-trial-participants>>; Lawford Benning, 'Media Statement: "My People Have Spoken"', MG Corporation, 22 August 2017, <<http://www.mgcorp.com.au/wp-content/uploads/2016/11/170822-MY-PEOPLE-HAVE-SPOKEN-Cashless-Debit-Card.pdf>>.

1. Provided with sufficient support for wrap around support services for alcohol, drugs and employment issues prior to the introduction of the CDC;
2. Given delegated authority to assess and review local service providers of the wrap around services and if necessary shift the funding and support services to a more effective provider; and
3. Given delegated authority to easily assess and remove CDC recipients from the trial without the process being intrusive.³⁴

This suggests that the policy process was not one of actual co-design – as claimed by government. It was merely an opportunity for certain people within the community to be conversational participants in CDC policy discussions. An opportunity to be a conversational participant in policy discussions does not equate to co-design—especially when important matters regarding policy shape, implementation and outcomes are ignored by government.

The government’s claim that the CDC trial was ‘community led’ also warrants closer examination. In Kununurra ‘only four local leaders were consulted, all of whom expressed personal views in support of social welfare reform.’³⁵ Although these people:

took a public stance on a highly contentious issue, it does not follow that these four leaders speak on behalf of the entire community. The CDC trial was implemented without widespread consultation and the government now proposes to expand and extend the CDC without effective consultation.³⁶

Lawford Benning, one of these original four leaders, states that ‘the overwhelming majority’ of people in his community are opposed to the Cashless Debit Card.³⁷ He indicates that while ‘some recipients do support the trial as it currently operates and others would support a modified version, they make up a small minority.’³⁸

Benning also states that some people ‘would rather not be part of the CDC trial and have removed themselves off all Centrelink benefits.’³⁹ People removing themselves from the system in order to avoid the card are not receiving the social security payments to which they are entitled. It is tragic that such decisions are being made due to the onerous conditions the government chooses to place on access to social security payments for these people.

³⁴ Lawford Benning, ‘Media Statement: “My People Have Spoken”’, MG Corporation, 22 August 2017.

³⁵ MG Corporation, Submission No 6 to the Senate Standing Committee on Community Affairs, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*.

³⁶ MG Corporation, Submission No 6 to the Senate Standing Committee on Community Affairs, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*.

³⁷ Lawford Benning, ‘Media Statement: “My People Have Spoken”’, MG Corporation, 22 August 2017.

³⁸ Lawford Benning, ‘Media Statement: “My People Have Spoken”’, MG Corporation, 22 August 2017.

³⁹ Lawford Benning, ‘Media Statement: “My People Have Spoken”’, MG Corporation, 22 August 2017.

Other practical problems with the CDC include those encountered by participants in navigating the technology required to access the restricted portion of their social security payment. A 2018 CDC Senate Inquiry stated that:

Submitters have observed that participants in existing trial sites who were unable to use technology to set up their own direct debits and bills payments have been subject to late fees after setting up their payments through Indue Ltd, the provider of the cashless debit card. No Cashless Card Kalgoorlie & Surrounds described a situation where one participant was issued a breach notice for her rental property due to a mistake made in processing her rent. Participants also detailed frustrations in not being able to use their cashless debit card for online transactions to purchase medical devices, gifts, or other items which are not restricted.⁴⁰

The items mentioned in the preceding sentence were not restricted in theory but they were in practice. The CDC is far more restrictive than politicians responsible for inflicting the card acknowledge. To impose restrictions on social security income that lead to increased costs for CDC holders is grossly unjust. The CDC places additional cost burdens on those who are least equipped to deal with them due to social security payments being made below the poverty line.

Other problems with CDC technology based delivery of social security payments were made by Uniting Communities in their submission to the same 2018 Senate Inquiry:

The imposition of the CDC and its associated automated technology and datafication, removes people's rights regarding freedom of choice in relation to their private banking arrangements – the CDC has prescribed that all income recipients are placed on a card managed by an outsourced private company, Indue. People have not been given the choice as to which banking institution they would prefer and the fundamental architecture of income management and the Cashless Card serves to preclude this. The DSS has been prescriptive and has removed freedom of choice, thereby eroding people's rights.

While there are a number of concerns about the lack of responsiveness on the part of Centrelink and the long waiting times, the automation of welfare services has removed the face to face interaction between case workers and income support recipients. A reduction in human contact can result in an increased likelihood of miscommunication and confusion- not everyone is literate or numerate, and technology can be confusing, overwhelming and alienating. It is critical that the cutbacks in Centrelink funding and staffing levels are reversed in order to provide easier access to Centrelink, improve the institution's cultural competence, and support those on income support who are not familiar with technological systems or have limited computer skills.

⁴⁰ Senate Community Affairs Legislation Committee, Social Security Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 19.

The introduction of mobile phone apps for checking one's CDC account balance, hailed by DSS as 'digital inclusion', has left many people on the Card feeling inept and overwhelmed because they either do not own smart phones, are not familiar with such technology, do not have the literacy or numeracy skills, and/or do not have sufficient funds to pay for the cost of mobile data and downloads. The so-called technologies of 'digital inclusion' are in fact serving to exclude and alienate a number of people on the Card who have previously been comfortable with managing their own cash in hand.

Being on the Card invariably means that, when using your Indue card for transactions, you are conspicuous and can easily be identified as being 'on welfare'. This makes Cardholders visible to others in public spaces and reduces their privacy and dignity when paying for goods. Such exposure increases people's sense of stigma, shame and embarrassment, more so when the Card doesn't work.

The expansion of the Card to additional locations will see increased encroachment of the automation and privatisation of the welfare system and its payment modalities on the lives of private citizens.⁴¹

A perverse effect of the technologisation of social security payment processes is that those who are most marginalised must spend a significant proportion of their very limited income on technology required to access their payment and Indue account information, including their account balance. The injustice of this arrangement has not been given adequate consideration by Ministers responsible for inflicting this scheme on financially disadvantaged people.

Problems with IT literacy and IT system reliability were also raised in the Final Orima CDC Evaluation report, which states that 'in some Trial areas' there is 'limited or "patchy" signal coverage for mobile phones and the internet'.⁴² In terms of CDC implementation flaws, the Orima Final Evaluation report noted that there were 'Technology issues (e.g. infrastructure for technology not being in place in time for commencement, overestimation of technology skills in remote communities and the requirement for email accounts).'⁴³ This report also makes clear that CDC participants encountered numerous adverse effects from the CDC program, including:

- Being unable to transfer money to children that are away at boarding schools.
- Being unable to participate in the 'second hand' market for used goods.

⁴¹ Uniting Communities, Submission No 51 Senate Community Affairs Legislation Committee, Social Security Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 7-8.

⁴² Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 38.

⁴³ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 100.

- Being unable to pool funds for larger purchases (e.g. cars).
- Being unable to make small transactions at fundamentally cash-based settings (e.g. fairs, swimming pools and canteens).
- Being unable to make purchases from merchants or services where EFT facilities were unavailable.
- Being told by a merchant out of the area that they cannot accept this card.
- Having difficulty using the card online (including some online merchants not accepting the card).
- Being unable to set up automatic payments and other transactions on their cards at the beginning of the Trial.
- Difficulties keeping track of automatic payments/understanding deductions from account balance.
- Being embarrassed when the card does not work/cannot be used/have insufficient funds.
- Payment system problems – e.g. chip not recognised, EFT machine not working, and card damaged.
- Losing the card.
- Difficulties with checking the card account balance.
- Difficulties remembering their PIN/online login details.⁴⁴

The Final Orima Evaluation Report noted that 33% of CDC holders ‘had experienced at least one of’ these challenges as a consequence of the program.⁴⁵ At Wave 2 of the Orima Evaluation 32% of CDC holders reported that the program ‘had made their lives worse’.⁴⁶ This is unsurprising given that the CDC has resulted in people running out of money to pay bills such as housing costs, food, and essential items for children.⁴⁷

In communications with CDC holders from trial sites since the commencement of the program I have heard of numerous instances of the card not working, even when people had money in their Indue accounts to pay for purchases that were not alcohol or gambling products and should have been permissible expenditure under the scheme. Contrary to the government’s assertions that the card works ‘as similarly as possible to any other bank card’,⁴⁸ feedback from CDC holders indicates that this is a fallacy.

Janet Hunt, upon analysing the early Orima Evaluation report states that:

⁴⁴ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 89.

⁴⁵ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 89.

⁴⁶ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 6.

⁴⁷ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 72.

⁴⁸ Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 August 2015, 3 (Alan Tudge, Parliamentary Secretary to the Prime Minister).

data is provided which shows that 55% of transactions on the cards failed due to insufficient funds (Orima 2017: pA6). That is nearly 21,000 transactions, where people were unable to purchase what they wanted. However, only 1% of failed transactions related to trying to use the card for prohibited purchases. This indicates some hardships and poverty and/or the problem that people did not know what their card balance was, indicating the challenge of money management using this card.⁴⁹

It is concerning that the CDC also has the capacity to enhance the financial vulnerability of particular people who have limited IT literacy. The Final Orima Report stated that:

A few stakeholders ... reported that there had been a few instances in which Trial participants with limited IT and financial literacy had been “taken advantage of” when seeking technical assistance from family/friends and lost money in the process (i.e. funds had been transferred into another person’s account without consent).⁵⁰

Some final points on the CDC, the scheme includes people in receipt of a Disability Support Pension, they are included within the definition of a ‘trigger’ payment under the legislation.⁵¹ I note the AHRC is particularly interested in how technology can impact on the human rights of persons experiencing disability challenges. Although government data available on the CDC does not give precise figures of current DSP recipients who are subject to the program,⁵² government documentation indicates that the CDC applies to numerous people with disabilities.⁵³

I have a forthcoming article that addresses human rights compatibility problems with the CDC⁵⁴ in light of Australia’s obligations under the *Convention on the Rights of Persons with Disabilities* (CRPD).⁵⁵ The subsequent points on disability issues and the CDC are drawn from this piece. Although disability discrimination is a relevant concern with the CDC – it has not been considered or addressed by the PJCHR or government Human Rights Compatibility Statements accompanying CDC legislation.

People with disabilities who are forced on to the CDC can encounter particular challenges. Some relate to not being able to access necessary and/or affordable

⁴⁹ Janet Hunt, ‘The Cashless Debit Card Trial Evaluation: A Short Review’ (Centre for Aboriginal Economic Policy Research Topical Issue, 1/2017, ANU) 5.

⁵⁰ Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 90.

⁵¹ The *Social Security (Administration) Act 1999* (Cth) s 124PD.

⁵² Department of Social Services, ‘Cashless Debit Card (CDC) and Income Management (IM) Summary’, <<https://data.gov.au/dataset/income-management-summary-data/resource/986ef7fe-1ba8-460e-b1c4-2cf00145a948>>.

⁵³ Statement of Compatibility with Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (Cth) 9.

⁵⁴ Shelley Bielefeld and Fleur Beaupert, ‘The Cashless Debit Card and Rights of Persons with Disabilities’ (forthcoming).

⁵⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).

goods, due to limitations on where the card is accepted.⁵⁶ Quarantining income to the CDC puts people with physical disabilities who have significant support needs in a position where they are more likely to need to hand over a payment card to a third party to make purchases for them and disclose their personal identification number (PIN). The CDC has the potential to expose people with disabilities to new types of financial exploitation if the people to whom cards are lent for one purpose decide to use them for another, particularly people who need carers/support to undertake essential weekly tasks such as shopping and bill payment in person if they cannot pay online.

The CRPD has been ratified by Australia and is monitored by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee). The CRPD Committee notes that legal agency 'is frequently denied or diminished for persons with disabilities,'⁵⁷ a concern addressed in Articles 3 and 12 of the CRPD, among others. Article 3 of the CRPD incorporates general principles of equality, non-discrimination, '[f]ull and effective participation and inclusion in society', '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'. The exercise of individual autonomy and freedom to make independent choices is removed by the compulsory application of the CDC.

In its impact on numerous people with disabilities, the CDC scheme runs counter to Article 12 of the CRPD, which provides that:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit,

⁵⁶ People with Disability Australia, Submission 58 to the Senate Standing Committee on Community Affairs, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 6.

⁵⁷ CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 3-4.

and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Australia's CDC laws contravene Article 12. The coercive nature of the CDC overrides the will and preferences of program participants. Their involvement in the scheme is not subject to regular review by a competent and independent review body. Rather, as the National Social Security Rights Network points out, 'In the small trial communities, there is a strong likelihood that an applicant will know members of the Community Panels', raising 'issues of bias, conflicts of interest, and discrimination.'⁵⁸ CDC measures have been imposed regardless of a person's capacity to responsibly manage their own financial affairs and therefore cannot legitimately be described as a 'support' they 'require'. Neither can the scheme be considered as tailored to the individual circumstances of people with disabilities, as it is imposed as a blanket measure on all who receive trigger payments in trial locations. Quarantining 80 per cent of income to the CDC also makes it arduous for coerced program participants to gain access to other forms of financial credit, because they only have a small amount of cash remaining for repayment of credit cards and other personal loans. The CDC can therefore create financial exclusion.

The CRPD Committee has released General Comment No 1 addressing Article 12 of the CRPD.⁵⁹ This document explains that substitute decision making is incompatible with 'the human rights-based model of disability'.⁶⁰ Compulsory income management via the CDC involves substitute decision making – because the decision of parliamentarians about the budgetary capabilities of social security recipients is substituted for that of any person who has their income quarantined to the CDC. The CRPD Committee makes it clear that substitute decision-making occurs in systems where:

(i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.⁶¹

The CDC is a contemporary instance where this occurs. Along with other types of compulsory income management, the CDC takes away the freedom of government income support recipients to enter into contracts for goods and services of their choice

⁵⁸ National Social Security Rights Network, Submission 45 to the Senate Standing Committee on Community Affairs, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 7.

⁵⁹ CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014).

⁶⁰ CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 1.

⁶¹ CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 6.

with merchants and service providers of their choice.⁶² In doing so, the CDC arguably involves a denial of the legal capacity of social security recipients in receipt of a DSP. General Comment No 1 says that 'States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.'⁶³ Article 5 of the CRPD also prohibits discrimination against people with disabilities.

The CDC also arguably imposes substitute decision making on Indigenous peoples subject to the scheme, which is deeply problematic given Australia's lengthy history of discriminatory denial of legal capacity for First Peoples (see Appendix B).

The Community Development Program (CDP)

CDP has been designed to absorb previous Community Development Employment Program (CDEP) and Remote Jobs and Communities Program (RJCP) participants. Under CDEP Indigenous job seekers could earn wages by voluntarily undertaking work in remote Indigenous communities. Work was broadly defined to include 'culturally-appropriate activities', and CDEP 'developed local social and commercial enterprise under local control'.⁶⁴ With the abolition of CDEP many Indigenous people who had been wage earners under this scheme were transformed into welfare recipients and placed under RJCP. Under CDP, welfare recipients living in remote communities aged between 18 and 49 years are required to undertake work or work-like activity or training for up to 25 hours a week in order to access a social security payment. CDP is purportedly part of the government's strategy for 'breaking the cycle of welfare dependency',⁶⁵ and has required welfare recipients in remote areas to engage in up to 10 hours of activity per week in addition to that which is required for welfare recipients residing elsewhere who are also subject to work for the dole obligations.⁶⁶ At the time of writing, CDP's legislative framework is contained in Division 3A of the *Social Security (Administration) Act 1999* (Cth). A range of penalty provisions are set out in Division 3A 'Compliance with obligations in relation to participation payments'.

Although CDP is not expressly a race-based measure 'over 80% of CDP participants' identify as Indigenous,⁶⁷ therefore issues of indirect racial discrimination arise under Article 1 of ICERD, which takes into account not just the stated purpose of legislation but its consequences. CDP allows financial penalties to be imposed where welfare recipients do not comply with the regulatory compliance oriented framework, and

⁶² Shelley Bielefeld, 'Compulsory Income Management under the Stronger Futures Laws – Providing "Flexibility" or Overturning Freedom of Contract?' (2013) 8(5) *Indigenous Law Bulletin* 18-21; Shelley Bielefeld, 'Income Management and Indigenous Peoples – Nudged into a Stronger Future?' (2014) 23(2) *Griffith Law Review* 285-317.

⁶³ CRPD Committee, General Comment No. 1: Article 12: Equal Recognition before the Law, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 6.

⁶⁴ Shelley Bielefeld and Jon Altman, 'Australia's First Peoples – still struggling for protection against racial discrimination' in *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975* (Cth) Conference, August, 202 <<https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years>>.

⁶⁵ Australian Government, 'The Community Development Programme (CDP)' 2017 <<https://www.dpmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>>.

⁶⁶ Note there is currently a proposal to reduce the hours to 20 per week.

⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission) 97.

Indigenous people have been heavily overrepresented in penalties administered thus far.⁶⁸ My previous submissions to other Inquiries on the CDP program outline many of my concerns about its design, operation, ideological underpinnings, and human rights violations.⁶⁹

I have had the opportunity to read the submission by Lisa Fowkes to the Australian Human Rights Commission, and endorse her well informed comments about the deficiencies of CDP, including the problems associated with automated recording of mutual obligations requirements. I shall therefore keep my comments about this program brief. The CDP scheme involves the use of technology to track and administer penalties for people in breach of program requirements. Indigenous peoples have been grossly overrepresented in CDP penalties administered thus far. If the government applies its proposed Targeted Compliance Framework (TCF) under the Social Security Legislation Amendment (Community Development Program) Bill 2018 this is likely to continue – only the effects will be exacerbated. As Aboriginal Peak Organisations Northern Territory (APONT) explains, ‘The TCF is designed to increase the level of punishment of those who have multiple compliance ‘failures’. Because CDP participants, unlike any other group of income support recipients, have daily obligations from their first entry into income support, they accumulate more ‘failures’ more quickly.’⁷⁰

Penalties administered under the CDP scheme raise compatibility problems with a range of human rights, such as:

- rights to ‘social security’ (Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); Article 5(e)(iv) of the ICERD),
- rights to ‘an adequate standard of living’ (Article 11 ICESCR),
- ‘just and favourable conditions of work’ including ‘Fair wages and equal remuneration for work of equal value without distinction of any kind’ (Article 7 ICESCR); and
- ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ (Article 6 ICESCR).

Coercive workfare arrangements effectively place welfare recipients in a position where they have to earn their social security payment. A social security system that penalises payments out of existence compromises the right to an adequate standard of living. Just and favourable conditions of work require non-discriminatory treatment – but CDP places additional obligations upon program participants that make it more onerous than

⁶⁸ Lisa Fowkes, *Impact on Social Security Penalties of Increased Work for the Dole Requirements* (Centre for Aboriginal Economic Policy Research Working Paper No. 112/2016) 1-6.

⁶⁹ Submission No 18 to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Community Development Program) Bill 2018*, 21 September, 1-9; Submission No 11 to the Senate Finance and Public Administration Committee, The appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP), 8 June 2017, 1-5; Submission to the Department of the Prime Minister and Cabinet, *Consultation Paper: Changes to the Community Development Programme*, 15 April 2016, 1-3; Submission No 19 to the Senate Finance and Public Administration Committee, *Social Security Legislation Amendment (Community Development Program) Bill 2015*, 5 February 2016, 1-18.

⁷⁰ Aboriginal Peak Organisations Northern Territory, Submission No 4 to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Community Development Program) Bill 2018*, 3.

workfare schemes in non-remote locations. Free choice, in terms of Article 6, implies a lack of coercion – yet coercion is at the heart of the workfare regime imposed by CDP. To the extent to which job seekers are said to ‘accept’ conditions imposed by workfare, the issue of economic duress warrants consideration. The high penalty rate for Indigenous workers under workfare raises questions about whether Article 6 is really complied with in the CDP scheme. Reluctant compliance and creative non-compliance regarding workfare should not be seen as acceptance for the purposes of Article 6.

Given that the CDP scheme can result in children going hungry and going without essentials due to penalties imposed on parents the scheme also violates children’s rights. Article 26(1) of the *Convention on the Rights of the Child* stipulates that: ‘States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.’ The full realisation of this right is not ensured by a system of penalties that reduces finances for children’s needs. Children should have access to the benefits of social security provision irrespective of the conduct of their parents. However, CDP focuses on the requirements of the government’s penalty heavy compliance regime at the expense of the needs of remote living Indigenous social security recipients and their dependent family members.

As previously stated, the PJCHR indicates that: ‘A human rights compliant approach requires that any measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community.’⁷¹ In light of the extremely high rate of penalties administered under CDP thus far⁷² it cannot reasonably be argued that the scheme is effective. If penalising people in this manner had the capacity to effect behavioural change then would the number of penalties be so high? One would expect the penalties to be reduced over time if this approach was indeed effective.

Given that many of those in receipt of welfare payments are currently living well below the poverty line,⁷³ financial penalties imposed as part of CDP have the capacity to plunge people further into poverty. This is not a measure which could be said to have benefits that outweigh the disadvantages – which is one relevant factor in determining whether a measure is proportionate.⁷⁴ Indeed CDP runs into similar problems as CIM in terms of limitations on human rights, with a lack of rational connection to a legitimate objective and a lack of proportionality. There are a range of less rights restrictive

⁷¹ Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61-62.

⁷² Lisa Fowkes, ‘Impact on Social Security Penalties of Increased Work for the Dole Requirements’ (Canberra: Centre for Aboriginal Economic Policy Research Working Paper No. 112/2016, Australian National University, 2016) 1-7.

⁷³ In their 2014 report on poverty, the Australian Council of Social Services observed that ‘61% of people below the poverty line relied upon social security as their main income’ and that ‘many social security payments fall below the poverty line, even with Rent Assistance and other supplementary payments added to household income.’ Australian Council of Social Services, *Poverty in Australia 2014* (Sydney: 2014) at 8, 10, online: <http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf>.

⁷⁴ Grant Huscroft, Bradley Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 2.

alternatives. For example, the Senate Finance and Public Administration Committee concluded that:

[T]here should be a move away from the compliance and penalty model towards the provision of a basic income with a wage-like structure to incentivise participation. Furthermore, the program should be driven and owned by the local community ensuring appropriate community development consistent with the unique requirements of each community, whilst remaining culturally appropriate and flexible.⁷⁵

I endorse this alternative to CDP.

There are also ongoing problems with lack of genuine and meaningful consultation about CDP reforms, in contravention of Article 19 of UNDRIP. Although the government claims consultation has occurred to inform its latest iteration of proposed CDP reform, I note that Aboriginal Peak Organisations Northern Territory (APONT) indicates otherwise:

APO NT has been working with a broad alliance of around 30 Indigenous organisations and peak bodies to raise concerns about the CDP and to develop a detailed alternative scheme. We have repeatedly requested negotiations over the CDP reform process in order to ensure that affected communities are included in decisions that have such an important impact on their lives. ...

Despite this we find ourselves, once again, responding to a Bill and a set of reforms that have not been the subject of prior consultation. Again, there is very little detail about key aspects of the overall reform package and it is proposed that much be left to delegated legislation. Again, we have very little time to respond to the submission deadline.

The Government repeatedly says that it wishes to do things with, not to First Nations people. Yet the story of the CDP has been one of top down decision making – from the decision to impose daily Work for the Dole on participants, to the failed 2015 CDP2 Bill, to this current proposal.

No measure that affects First Nations people to the extent that this Bill does should come before Parliament without first having been negotiated with affected First Nations people and their organisations. No Bill of this type should be adopted until and unless the Government provides evidence that it has consulted fully and openly with affected communities and they have given their free, prior and informed consent. As an alliance of peak Indigenous organisations in the NT, and as part of a wider alliance of Indigenous

⁷⁵ Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 105.

organisations, we are telling you that we have not been asked for our view in relation to this proposal and we do not consent to its passage.⁷⁶

Cumulative impact of multiple technologically enhanced surveillance and control programs

For numerous Indigenous social security recipients compulsory income management has also been combined with workfare under CDP, requiring coerced labour as condition to access income managed funds.⁷⁷ As stated in a recent publication of mine:

This is disturbingly reminiscent of Indigenous peoples being forced to work for rations during Australia's earlier colonial period. This practice of requiring Indigenous welfare recipients to labour for social security payments appears to violate Article 5(e)(i) of the ICERD, which stipulates that there is to be "just and favourable conditions of work" and "just and favourable remuneration" for work. The income managed social security payments for which Indigenous welfare recipients have laboured are paid well below award rates.⁷⁸

Compulsory Income Management and the Community Development Program are both surveillance and control mechanisms. Both foster social insecurity in the name of welfare conditionality. Both do not adequately meet the material needs of Australia's First Peoples in a culturally appropriate and respectful way – with their 'free, prior and informed consent' (Art 19 UNDRIP). This is evident by the significant amount of Indigenous opposition to these programs outlined in numerous submissions to recent CIM and CDP Senate Inquiries.⁷⁹

Other social security related issues

Robo-debt

In addition to the previous matters, I am deeply concerned about the capacity for technology to be used to generate debt notices for people who have received government income support, as has occurred with Australia's robo-debt debacle.⁸⁰ This system has created horrific and unnecessary stress for so many people – and in numerous instances the debt notices were false because of the method by which debts

⁷⁶ Aboriginal Peak Organisations Northern Territory, Submission No 4 to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Community Development Program) Bill 2018*, 2.

⁷⁷ Gurindji, 'Media Release from the Gurindji, 28 July 2011' in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (Concerned Australians and Griffin Press, 2015) 103–105.

⁷⁸ Shelley Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination: Placing the Australian Government under Scrutiny' in Elisabeth Baehr and Barbara Schmidt-Haberkamp (eds), *And there'll be NO dancing'. Perspectives on Policies Impacting Indigenous Australia since 2007* (Newcastle upon Tyne, Cambridge Scholars Publishing) 145, 156.

⁷⁹ To give two examples out of many – see MG Corporation, Submission No 6 to the Senate Standing Committee on Community Affairs, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, which outlines lack of consultation with the vast majority of Indigenous people in the East Kimberley who were to be subject to the CDC and clearly states the majority do not want the card; and on CDP see Aboriginal Peak Organisations Northern Territory, Submission No 4 to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Community Development Program) Bill 2018*.

⁸⁰ Caused by the online compliance intervention ('OCI') debt recovery system. Terry Carney, 'The new digital future for welfare: debts without legal proofs or moral authority?' (2018) *University of New South Wales Law Journal Forum* 1-16.

were calculated.⁸¹ As Terry Carney has concluded, ‘Robo-debt ... wreaks legal and moral injustice. It flouts key design principles laid down by the Administrative Review Council and surely needs to be corrected.’⁸² People deserve to have a competent human check a social security debt notice before it is sent to them. They also should not have to bear the onus of proof about the non-existence of a debt many years after the year in which the alleged debt was accrued. To do otherwise sets up a system designed to fail people for the sake of promoting an algorithm. Technology should not be implemented simply for its own sake – but only where it genuinely improves the lives of people in a clearly verifiable way. This is particularly important for those who have experienced or are experiencing financial disadvantage.

Data Over Multiple Individual Occurrences (DOMINO)

I am also concerned about the development of the Data Over Multiple Individual Occurrences (DOMINO) system, about which I attended a seminar in November 2017 at ANU. This system was described by government officials in the following terms:

The data resource is known as Data Over Multiple Individual Occurrences (DOMINO). DOMINO contains modular events based data on individuals providing a longitudinal picture of the interaction of individual welfare recipients throughout their interactions with DSS payments. These data have been designed with a focus on enduring data integration and as an asset for future research. DOMINO contains information on recipients’ demographics, benefits history, concessions, education (where available) and housing.

In correspondence with the Data Strategy and Development Branch of the Department of Social Services, I was informed that: ‘The datasets are used for research and policy development.’⁸³ Although the system will use de-identified data so that individuals are not (theoretically) identifiable, ‘some communities may be identifiable due to post codes’.⁸⁴ This is concerning because where the post code refers to a small remote community it may be easier to identify the individual to whom specific data refers. In such circumstances this would involve an invasion of privacy of the individual. It is also troubling in that it is possible for geographical location to potentially operate as a proxy for racial discrimination for remote living Indigenous people. The Intervention is a classic case in point.

Further on DOMINO, the seminar outlined a plan for researchers to be able to access this data for a fee. This raises the issue of data sovereignty – should data given by individual social security recipients for one purpose (to obtain needed income) be used for another purpose – such as policy development and government profit from data

⁸¹ Terry Carney, ‘The new digital future for welfare: debts without legal proofs or moral authority?’ (2018) *University of New South Wales Law Journal Forum* 1, 3.

⁸² Terry Carney, ‘The new digital future for welfare: debts without legal proofs or moral authority?’ (2018) *University of New South Wales Law Journal Forum* 1, 16.

⁸³ Email to my ANU email address from the Director of Data Policy and Governance at the Department of Social Services, 20 February 2018.

⁸⁴ Email to my ANU email address from the Director of Data Policy and Governance at the Department of Social Services, 20 February 2018.

sales? This issue is important given the capacity for data to be (mis)used to promulgate punitive programs for Indigenous peoples in Australia and for information to be collected about them without their 'free, prior and informed consent' about future uses of the data (contrary to Art 19 UNDRIP).

Conclusion

I recommend that:

- a) The government cease all technological experiments on people in need of social security payments.***
- b) The government adopt a mandatory risk assessment process for all proposed technological innovations before they are implemented. If risks of harm or program error are identified the government should then re-evaluate their law/policy/reform proposals, paying due attention to ethical issues and human rights concerns.***
- c) The government meaningfully consult in a human rights compliant manner with the communities likely to be directly affected by proposed technological innovations.***
- d) No mandatory technological processes be implemented without adequate and reliable infrastructure.***
- e) No mandatory technological processes be implemented without ensuring additional financial resources are supplied to those who need such financial assistance to use new systems.***
- f) Technology not be implemented simply for its own sake – but only where it genuinely improves the lives of people in a clearly verifiable way.***
- g) The government not sell any data about Australian citizens in DOMINO or any like database.***

If I can be of any further assistance I would be happy to oblige.

Yours sincerely,



Dr Shelley Bielefeld
ARC DECRA Fellow/Senior Lecturer
Griffith Law School
Arts, Education and Law Group
Building N61, Nathan campus, Griffith University
170 Kessels Road, Nathan, QLD, 4111, Australia

And

Visiting Scholar
School of Regulation and Global Governance (RegNet)
College of Asia and the Pacific
8 Fellows Road
The Australian National University
Acton ACT 2601 Australia

Email addresses: s.bielefeld@griffith.edu.au and shelley.bielefeld@anu.edu.au

Appendices

Appendix A

Shelley Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients – Law, Ethics and Vulnerability' (2018) 26(1) *Feminist Legal Studies* 1-23.

Appendix B

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* 522-562

Appendix C

Shelley Bielefeld, 'Compulsory Income Management – Exploring Counter Narratives amidst Colonial Constructions of Vulnerability' (2014) 36(4) *Sydney Law Review* 695-726.