17 May 2019

United Nations Special Rapporteur on Extreme Poverty and Human Rights

By email: [srextremepoverty@ohchr.org](mailto:srextremepoverty@ohchr.org)

**Re: Thematic report to the UN General Assembly on digital technology, social protection and human rights**

I welcome the opportunity to make this submission as an academic with a disciplinary background in law whose research focuses on issues of welfare law and policy, social justice, human rights and Indigenous peoples. The points raised in this submission arise from my current ARC research projects.[[1]](#footnote-1)

The Australian Federal Government has implemented numerous technological changes to the social security system in recent years. As this submission and Appendices make clear, these changes have resulted in additional burdens of poverty surveillance, control and punishment falling heavily on welfare recipients. These technological developments have been framed by government as ‘innovations’, mechanisms of modernization to bring the social security system up to date. However, these changes are also linked to imposing onerous neoliberal expectations on the poor and the creation of new poverty profiteer industries (see further Appendices B and D).

This submission centres on ways in which technology is increasingly being used to hyper-regulate the lives of social security recipients in Australia, with adverse effects for numerous people, including Indigenous peoples and people with disabilities. This submission will briefly address several welfare programs that infringe upon human rights of social security recipients—with further detailed information in the Appendices. These programs capture data about social security recipients, and that data can then be used for a range of purposes, including those that are punitive. As Australia’s law currently stands there are inadequate protections in place to protect social security recipients from harmful technological experiments.

**Compulsory Income Management (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.[[2]](#footnote-2) 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.[[3]](#footnote-3) This card can only be used at government approved merchants, and the scheme has created significant consumer problems for coerced program participants.[[4]](#footnote-4) Further details about the origins and many problematic features of CIM, including some human rights compatibility issues, are contained in Appendices A, B, C and D.

The Parliamentary Joint Committee on Human Rights (PJCHR) has noted 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.[[5]](#footnote-5) 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.[[6]](#footnote-6) They found that CIM ‘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.’[[7]](#footnote-7)

Despite lack of compliance with Australia’s human rights obligations, CIM continues, with data sets revealing that Indigenous social security recipients have consistently been grossly overrepresented in all compulsory income management categories (see Appendix B).

Sales data connected with the BasicsCard can also be captured and scrutinized by researchers and others.[[8]](#footnote-8) 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 policy development.

**CIM with the Cashless Debit Card (CDC)**

CIM with a CDC has been introduced in some trial areas, where 80 per cent of fortnightly social security payments are quarantined to this card issued by Indue Ltd. CDC holders cannot spend their restricted funds on alcohol or gambling.[[9]](#footnote-9) 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*, with people in receipt of social security income portrayed as more likely to have substance abuse issues and be unsuited to managing cash responsibly (see Appendix B). This Review advocated that data mining be deployed in conjunction with a cashless welfare card to scrutinize and penalise any ‘improper’ purchases.

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.[[10]](#footnote-10) 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.[[11]](#footnote-11)

Like other forms of income management that preceded it, the CDC has a grossly disproportionate impact on Indigenous peoples.[[12]](#footnote-12) Consequently, indirect racial discrimination with the CDC is a problem, infringing Article 1 of the *International Convention on the Elimination of All Forms of Racial Discriminatio*n (ICERD). 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.[[13]](#footnote-13)

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) (see Appendices A and D).

Some people find the CDC so burdensome that they have withdrawn from accessing social security payments.[[14]](#footnote-14) People removing themselves from the system in order to avoid the card are not receiving the social security payments to which they are entitled.

Some CDC holders have difficulty navigating the technology required to access the restricted portion of their social security payment, leading to a host of problems, including problems paying rent and paying for other essentials such as medical devices.[[15]](#footnote-15) The CDC also leads to increased costs for cardholders who are subject to merchant fees, minimum spend requirements in some shops, and Indue fees. This means their social security income does not go as far as it did before the CDC was introduced. 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.

Uniting Communities point out that the CDC is not appropriate because ‘not everyone is literate or numerate, and technology can be confusing, overwhelming and alienating.’[[16]](#footnote-16) They elaborate that many CDC holders have been ‘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.’[[17]](#footnote-17)

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’.[[18]](#footnote-18) Power outages in some trial areas have also caused problems for people on the CDC who cannot then use their quarantined funds during this time to purchase essentials.

The CDC also raises problems for people with disabilities, and violates the *Convention on the Rights of Persons with Disabilities* (CRPD) (see further detail in Appendix C). 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.

**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. With the abolition of CDEP many Indigenous people 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’,[[19]](#footnote-19) 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.[[20]](#footnote-20) 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,[[21]](#footnote-21) therefore issues of indirect racial discrimination arise under Article 1 of ICERD. CDP allows financial penalties to be imposed where welfare recipients do not comply with the regulatory framework, and Indigenous people have been heavily overrepresented in penalties administered thus far.[[22]](#footnote-22) My previous submissions to Inquiries on CDP outline many problems with its design, operation, ideological underpinnings, and human rights violations.[[23]](#footnote-23)

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

* rights to ‘social security’,[[24]](#footnote-24)
* rights to ‘an adequate standard of living’,[[25]](#footnote-25)
* ‘just and favourable conditions of work’ including ‘Fair wages and equal remuneration for work of equal value without distinction of any kind’,[[26]](#footnote-26) and
* ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’.[[27]](#footnote-27)

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 workfare schemes in non-remote locations. ‘Free choice’ implies a lack of coercion – yet coercion is at the heart of the workfare regime imposed by CDP.

Given that CDP can result in children going hungry and going without essentials due to penalties imposed on parents, the scheme also violates children’s rights to benefit from social security under Article 26(1) of the *Convention on the Rights of the Child*. Children should have access to the benefits of social security provision irrespective of the conduct of their parents.

Financial penalties imposed as part of CDP can 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.[[28]](#footnote-28) CDP arguably lacks rational connection to a legitimate objective and is not a proportionate response. There are less rights-restrictive alternatives.[[29]](#footnote-29)

There are also ongoing problems with lack of genuine and meaningful consultation about CDP reforms, in contravention of Article 19 of UNDRIP.[[30]](#footnote-30)

**Robo-debt**

The government has developed an automated Online Compliance Intervention (‘OCI’) debt recovery system, where technology is used to generate debt notices for people who have received government income support, known colloquially as ‘robo-debt’.[[31]](#footnote-31) This system has created horrific and unnecessary stress for many people – and in numerous instances the debt notices were false because of the method by which debts were calculated.[[32]](#footnote-32) 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.

**Data Over Multiple Individual Occurrences (DOMINO)**

I am also concerned about the development of the Data Over Multiple Individual Occurrences (DOMINO) system, explained by government thus:

DOMINO contains modular event-based data on individuals providing a longitudinal picture of the interaction of individual welfare recipients throughout their interactions with DSS payments.  These de-identified 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.[[33]](#footnote-33)

The Data Strategy and Development Branch of the Department of Social Services informed me that: ‘The datasets are used for research and policy development.’[[34]](#footnote-34) Although the system will use de-identified data so that individuals are not (theoretically) identifiable, ‘some communities may be identifiable due to post codes’.[[35]](#footnote-35) 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.

DOMINO allows researchers to be able to access this data for a fee.[[36]](#footnote-36) 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 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).

I set out a range of recommendations in Appendix A about these issues that may also be of interest for this report.

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

Yours sincerely,

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**Appendices**

**Appendix A**

Shelley Bielefeld, Submission No 90 to the Australian Human Rights Commission, *Human Rights and Technology Issues Paper*, 16 October 2018, 1-23.

**Appendix B**

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

**Appendix C**

Shelley Bielefeld and Fleur Beaupert, ‘The Cashless Debit Card and Rights of Persons with Disabilities’ (2019) *Alternative Law Journal* <[https://doi.org/10.1177/1037969X19831768](https://protect-au.mimecast.com/s/wQZeCE8krZHRPvYVTwcWQS?domain=doi.org)> (accepted 29/1/2019).

**Appendix D**

Shelley Bielefeld, ‘Cashless welfare cards: controlling spending patterns to what end?’ (2018) 8(29) *Indigenous Law Bulletin* 28-32.

1. Australian Research Council Discovery Early Career Researcher Award (DECRA): Regulation and Governance for Indigenous Welfare: Poverty Surveillance and its Alternatives (DE180100599) and Australian Research Council Discovery Project (DP): Conditional Welfare: A Comparative Case Study of Income Management Policies (DP180101252). [↑](#footnote-ref-1)
2. Section 123TB of the *Social Security (Administration) Act 1999* (Cth). [↑](#footnote-ref-2)
3. 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. [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)
5. Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) x. [↑](#footnote-ref-5)
6. Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61. [↑](#footnote-ref-6)
7. Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (March 2016) 61-62. [↑](#footnote-ref-7)
8. J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) ii. [↑](#footnote-ref-8)
9. So*cial Security (Administration) Act 1999* (Cth) s 124PM(a). [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. 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. [↑](#footnote-ref-11)
12. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission) 91-92. [↑](#footnote-ref-12)
13. 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. [↑](#footnote-ref-13)
14. Lawford Benning, ‘Media Statement: “My People Have Spoken”’, MG Corporation, 22 August 2017. [↑](#footnote-ref-14)
15. Senate Community Affairs Legislation Committee, Social Security Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 19. [↑](#footnote-ref-15)
16. Uniting Communities, Submission No 51 Senate Community Affairs Legislation Committee, Social Security Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 7-8. [↑](#footnote-ref-16)
17. Uniting Communities, Submission No 51 Senate Community Affairs Legislation Committee, Social Security Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, 7-8. [↑](#footnote-ref-17)
18. Department of Social Services, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (Canberra: Orima Research, 2017) 38. [↑](#footnote-ref-18)
19. Australian Government, ‘The Community Development Programme (CDP)’ 2017 <https://www.dpmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>. [↑](#footnote-ref-19)
20. Note there is currently a proposal to reduce the hours to 20 per week. [↑](#footnote-ref-20)
21. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission) 97. [↑](#footnote-ref-21)
22. 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. [↑](#footnote-ref-22)
23. 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. [↑](#footnote-ref-23)
24. Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 5(e)(iv) of the ICERD. [↑](#footnote-ref-24)
25. Article 11 ICESCR. [↑](#footnote-ref-25)
26. Article 7 ICESCR. [↑](#footnote-ref-26)
27. Article 6 ICESCR. [↑](#footnote-ref-27)
28. Grant Huscroft, Bradley Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 2. [↑](#footnote-ref-28)
29. 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. [↑](#footnote-ref-29)
30. 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. [↑](#footnote-ref-30)
31. 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. [↑](#footnote-ref-31)
32. 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. [↑](#footnote-ref-32)
33. Department of Social Services <https://www.aihw.gov.au/our-services/data-on-request/dss-data> [↑](#footnote-ref-33)
34. Email to my ANU email address from the Director of Data Policy and Governance at the Department of Social Services, 20 February2018. [↑](#footnote-ref-34)
35. Email to my ANU email address from the Director of Data Policy and Governance at the Department of Social Services, 20 February2018. [↑](#footnote-ref-35)
36. if they go through an ethics process. [↑](#footnote-ref-36)