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**Submission to the United Nations Special Rapporteur on extreme poverty and human rights, for the thematic report to the UN General Assembly on digital technology, social protection and human rights.**

The National Social Security Rights Network (NSSRN) is a peak community organisation in the area of income support law, policy and administration in Australia. Our members are community legal centres across Australia that provide free and independent legal assistance to people experiencing issues with social security and family assistance payments. The NSSRN draws on this front line experience in developing its submissions and policy positions.

The NSSRN welcomes this opportunity to provide input for the United Nations Special Rapporteur's thematic report to the UN General Assembly on the human rights impacts of the introduction of digital technologies in the implementation of national social protection systems.

We discuss the issues below, having regard to our members' expertise in the area of social security.

**1 Specific case studies involving the introduction of digital technologies in national social protection systems**

**Online Compliance Intervention (OCI) system**

In Australia, the Department of Human Services (DHS) deliver a range of government payments and services for retirees, the unemployed, families, carers, parents, people with disabilities, Indigenous Australia, students, apprentices and people from diverse cultural and linguistic backgrounds through its master program, commonly known as Centrelink.

The best recent example involving the introduction of digital technologies in the Australian social security system is DHS' automated, data-driven debt recovery program, the Online Compliance Intervention (OCI) system, colloquially known as "Robodebt".

**(a) Background and specific legal basis**

Data matching between government agencies and the Australian Taxation Office (ATO) for the purposes of identifying social security overpayments has been used in the social security space since 1990.<sup>1</sup> Since that time, technological developments have enhanced the ability for government to cross-check a recipient's declared income with their ATO records. In 2001, the *Social Security (Administration) Act 1999* (Cth) was amended to allow computer programs to make decisions under social security law<sup>2</sup> and this provision primarily related to debt recovery.<sup>3</sup>

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<sup>1</sup> This was as a result of the Data-matching Program (Assistance and Tax) Act 1990 (Cth). For more commentary on debt identification, please see Peter Sutherland, 'Social Security and Debt Recovery, Presentation to the AIAL National Administrative Law Conference, Hotel Realm, Canberra: Thursday 20 July 2017, [http://communitylegalqld.org.au/sites/default/files/downloads/webinars/peter\\_sutherland\\_draft\\_paper\\_july\\_2017.pdf](http://communitylegalqld.org.au/sites/default/files/downloads/webinars/peter_sutherland_draft_paper_july_2017.pdf).

<sup>2</sup> See 6A Secretary may arrange for use of computer programs to make decisions, *Social Security (Administration) Act 1999*.

<sup>3</sup> Simon Elvery, 'How algorithms make important government decisions — and how that affects you', ABC News (online), 21 July 2017, <http://www.abc.net.au/news/2017-07-21/algorithms-can-make-decisions-on-behalf-of-federal-ministers/8704858>.

However historically, DHS would oversee these calculations and approve the decision to raise the debt.

**(b) Introduction of the OCI system**

With the introduction of the OCI system, in July 2016, key changes were made by the DHS to the way in which they compared income declaration data from the ATO and income reported by people in receipt of social security payments. This process became entirely automated, removing the role of any human intervention. The process also involved averaging out the ATO reported income across the relevant financial year – a practice that unsurprisingly caused significant numbers of debts to be inaccurately raised.<sup>4</sup> Between November 2016 and March 2017, approximately 200,000 people were affected by the OCI program.<sup>5</sup> During this period, DHS sent approximately 20,000 letters per week.<sup>6</sup>

The OCI process also reversed the onus of proof – DHS identified a possible overpayment but would require the person to obtain evidence of payslips or bank statements to prove that the debt calculation was inaccurate.

Our members report that the OCI process unfairly shifts the onus of proof to people who are already experiencing financial hardship and are in vulnerable circumstances. One of our members provided assistance to Phil\* who had a \$2400 income support payment debt from 2010 – 2011. Phil was unable to provide bank statements or payslips from 2010 – 2011, and as a result, DHS raised a debt by means of the OCI process. Our member told us, that Phil had been working for a labour hire company that had gone into administration and was currently receiving an income support payment. Our member assisted Phil to contact the administrator who confirmed that the company had not provided information about the wages of particular employees. Our member also told us that Phil had to obtain bank statements. Phil had to pay \$45 to obtain the bank statements but he was unable to afford this. Our member assisted Phil to seek a waiver of these fees from the bank. Phil is now waiting for DHS to correctly calculate the debt amount.

**(c) Stated objectives**

The Australian government implemented the OCI system as part of a 2015-16 Budget measure, 'Strengthening the Integrity of Welfare Payments' to achieve savings and fund policy priorities,<sup>7</sup> and a December 2015 Mid-Year Economic Fiscal Outlook announcement. The OCI system also fulfils a Coalition election commitment called *Better Management of the Social Welfare System*.<sup>8</sup>

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<sup>4</sup> It was reported that between July 2016 and September 2017, one in six debts were wrongly calculated. It is possible that this is an understatement of wrongly calculated debts, given that the onus is on the alleged debtor to prove that the estimated overpayment is incorrect. Inaction may result in the debt being raised. See Christopher Knaus, 'Centrelink forced to wipe or change one in six robo-debts', *The Guardian* (online), 14 February 2018, <https://www.theguardian.com/australia-news/2018/feb/14/centrelink-forced-to-wipe-or-reduce-one-in-six-robo-debts>.

<sup>5</sup> Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Service, Committee Hansard, 8 March 2017, p. 1.

<sup>6</sup> Dr Goldie, Committee Hansard, 8 March 2017, p. 1.

<sup>7</sup> Commonwealth of Australia, Portfolio Budget Statements 2015-16, Budget Related Paper No. 1.15B: Social Services Portfolio (Department of Human Services), p. 29; Commonwealth of Australia, Annual Report 2016-17 (Department of Human Services), p. 257.

<sup>8</sup> Liberal Party of Australia and The Nationals, *The Coalition's policy for better management of the social welfare system*, June 2016, <https://cdn.liberal.org.au/pdf/policy/2016%20Coalition%20Election%20Policy%20-%20Better%20Management%20of%20the%20Social%20Welfare%20System.pdf> (accessed 17 May 2017).

**(d) Analysis of implications**

A number of government, legislative branch and other state institutions such as the Commonwealth Ombudsman and the Senate Community Affairs Reference Committee have undertaken analyses of the implications of the introduction of the OCI system.<sup>9</sup>

With respect to existing legal frameworks, the implementation of the OCI system represented a change in the decision-making process used to assess and calculate debts and penalties following identification of a discrepancy through data-matching.

The NSSRN's concerns about whether the OCI system is compatible with administrative law principles were covered in our submission to the Senate Community Affairs Reference Committee inquiry into the *Better Management of the Social Welfare System* initiative.<sup>10</sup> Our main concerns with the application of digital technology in the OCI system involves the legality of the use of the averaging tool and whether it meets the minimum requirements of procedural fairness by giving people the opportunity to confirm or correct the ATO information through the online portal.

**(e) Costs involved and cost-savings (expected and actual)**

The Australian government forecast in the 2015-16 Budget that it would save \$1.7 billion over five years by identifying overpayments using income data for the 2010-11 to 2012-13 financial years. The government subsequently expanded the scheme to include non-employment income and a greater span of years. The 2016-17 Mid-Year Economic and Fiscal Outlook forecast that the government would achieve \$3.7 billion worth of savings (or \$2.1 billion in underlying cash terms) over four years from 2016-17.

According to information provided by DHS in its response to Questions on Notice asked during Senate Estimates in October 2018,<sup>11</sup> the costs of administering income compliance measures have been approximately:

- \$72 million in 2015-16;
- \$110 million in 2016-17; and
- \$193 million in 2017-18.

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<sup>9</sup> On 10 April 2017, the Commonwealth Ombudsman released a report examining its concerns with the DHS' implementation of the OCI system, using complaints the Ombudsman investigated as case study examples, [http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf). The growing public evidence of the disruption and impact to individual's lives caused by the OCI system, among other things, also lead to the Senate Community Affairs Reference Committee completing an inquiry on the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative. The Senate Committee's report was released in June 2017 and addresses many of the elements requested by the Special Rapporteur, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/SocialWelfareSystem/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report).

<sup>10</sup> National Social Security Rights Network, Submission 107, 22 March 2017, <http://www.nssrn.org.au/wp/wp-content/uploads/2017/04/NSSRN-submission-Better-Management-of-the-Social-Welfare-System-Initiative-inquiry-FINAL.pdf>.

<sup>11</sup> Senate Community Affairs Legislation Committee, Additional Estimates 2018-19, Answer to Question on Notice reference number HS 9 (SQ19-000022), 26 March 2019, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeed2-EstimatesRoundId5-Portfoliold25-QuestionNumber9>.

The income compliance measures have achieved approximately \$1.5 billion in savings, comprising of:

- \$401 million in 2015-16;
- \$324 million in 2016-17;
- \$405 million in 2017-18; and
- \$405 million in 2018-19 (as at 31 December 2018).

From these figures, it is clear that the Australian Government is continuing to invest in the OCI system which in our view is fundamentally flawed and unfair.

### **3 What human rights concerns might arise in connection with the introduction of digital technologies in social protection systems?**

#### **Algorithmic code imperilling legal code**

While we support and embrace new digital technologies that make the social security system more accessible, transparent, and inclusive, secure for people and claimants, we also caution against the danger posed by digital technologies to further entrench existing social disadvantage and breach fundamental principles of rule of law and human rights.

In this regard, we observe the rise of the use of data and artificial intelligence for predictive modelling and wholly or partially automated decision-making in social protection systems. These technologies, coupled with the lack of transparency and/or intelligibility of their algorithms, have the potential to lead to discriminatory outcomes and human rights violations, especially for those in vulnerable social groups who are already at the complex intersections of disadvantage and risks of abuse.

In her book *Automating Inequality*, Virginia Eubanks describes how minorities, including the poor and people of colour, “bear a much heavier burden of monitoring, tracking, and social sorting than advantaged groups”.<sup>12</sup> Her work discusses the level of surveillance and “digital social sorting experienced by people who rely on social security payments.

She writes:

*“Across the country, poor and working-class people are targeted by new tools of digital poverty management and face life-threatening consequences as a result. Automated eligibility systems discourage them from claiming public resources that they need to survive and thrive. Complex integrated databases collect their most personal information, with few safeguards for privacy or data security, while offering almost nothing in return. Predictive models and algorithms tag them as risky investments and problematic parents. Vast complexes of social service, law enforcement, and neighbourhood surveillance make their every move visible and offer up their behaviour for government, commercial, and public scrutiny.”*

We add here that algorithmic decision-making causing adverse impacts on vulnerable social groups can occur by choice (for example, certain groups of people in receipt of social security payments being subjected to greater scrutiny in respect of their social security payments or

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<sup>12</sup> Virginia Eubanks, ‘The Digital Poorhouse’, Harper’s Magazine (online), January 2018 <https://harpers.org/archive/2018/01/the-digitalpoorhouse>.

mutual obligation requirements), or by inadvertence or poor application (for example, “use of bad algorithms that are the output of poor statistical methods, particularly where derived from thin data at the edges of the societal Bell Curve”).<sup>13</sup> Both types of potential misuse of digital technology need to be taken into account.

### **Digital technology as an additional barrier to access**

It is likely that the digital transformation will result in many improvements to the social protection system. However, we should not lose sight of people in receipt of social security payments or claimants who will not benefit from these changes by virtue of being digitally excluded or invisible.

Below, we set out how certain vulnerable groups are likely to face barriers that prevent them from participating in the digital world and fully reaping the benefits of technological improvements to the social protection system:

#### **People experiencing family violence.**

As established in our research report, *How well does Australia’s social security system support victims of family and domestic violence?*, the increasing shift of service provision to the online space has unintended consequences for people experiencing family and domestic violence.<sup>14</sup> In Australia, many people seeking social protection systems are initially referred to the computer to access the government agency website or to the telephone to access the government agency call centre. However, for many people experiencing family violence this is not appropriate. Many people require urgent access to social workers who can assist with access to other support agencies, such as emergency housing, and facilitate access to crisis payments that will provide financial security to support a person to leave a violent environment. Further, face-to-face services increase the likelihood that people can comfortably share their story, and also increase a person’s confidence that a social worker understood and acknowledged the gravity of their circumstance.

Requiring people to use online tools to access their social security payments may also increase the risk that violent partners may interfere with a person’s entitlement, or monitor their income reporting to government agencies. This is particularly pertinent given the rise of technology-facilitated domestic violence: domestic violence now “almost always involves some form of digital

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<sup>13</sup> Peter Leonard (2018), “Social licence and digital trust in data-driven applications and AI: a problem statement and possible solutions”, <https://www.business.unsw.edu.au/research-site/Documents/Peter-Leonard-Social-Licence-and-digital-trust-the-problem-statement.pdf>. See also Cathy O’Neill (2016), *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*; Tene, O. & Polonetsky, J. (2017) “Taming the Golem: Challenges of Ethical Algorithmic Decision Making” *N.C.J.L.&Tech* 19,125; Crawford, K. & Schultz, J. (2014) “Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harm”, 55 *BCL Rev* 93; Sloan, R.H. & Warner, R., “When Is an Algorithm Transparent? Predictive Analytics, Privacy, and Public Policy”, *IEEE Security & Privacy* (16, 3, pp18-25, May/June 2018); Peter Leonard (2017), “Emerging Concerns for Responsible Data Analytics: Trust, Fairness, Transparency and Discrimination”, [https://www.commsalliance.com.au/\\_data/assets/pdf\\_file/0018/58104/Peter-Leonard-Emerging-Concerns-for-ResponsibleData-Analytics-Trust-Fairness-Transparency-and-Discrimination-Paper-for-the-NSW-Data-Analytics-Centre-Showcase-12-Jul.pdf](https://www.commsalliance.com.au/_data/assets/pdf_file/0018/58104/Peter-Leonard-Emerging-Concerns-for-ResponsibleData-Analytics-Trust-Fairness-Transparency-and-Discrimination-Paper-for-the-NSW-Data-Analytics-Centre-Showcase-12-Jul.pdf).

<sup>14</sup> National Social Security Rights Network, ‘How well does Australia’s social security system support victims of family and domestic violence?’ (Report, August 2018) [http://www.nssrn.org.au/wp/wpcontent/uploads/2018/08/NSSRN\\_Report2018\\_FamilyViolence\\_SocialSecurity\\_s m.pdf](http://www.nssrn.org.au/wp/wpcontent/uploads/2018/08/NSSRN_Report2018_FamilyViolence_SocialSecurity_s m.pdf), 48-49.

technology,” with the most common forms being “monitoring someone's habits via social media, harassing via text messages, or using GPS tracking technology to stalk.”<sup>15</sup>

#### **People who are less digitally literate.**

Concerns associated with financial control and abuse also extend to those people who are not competent or unable to use digital tools to access government services. We have found that some of our clients have shared their online authentication credentials with other people because they require assistance to digitally interact with government agencies. The sharing of logins and passwords with payday lenders and other companies has also been reported.<sup>16</sup> In our view, encouraging people to use digital tools (and limiting the ability for people to interact with the social security system in more traditional ways) may have significant and adverse consequences in exposing people to financial abuse, as people seek the help of others to communicate online with government.

The push to make people in receipt of income support payments “self-manage” their interaction with the system through online platforms also extends to participation in employment services programs that are required for many people to receive unemployment payments. Such programs typically require that people agree to a job plan which involves looking for work and attending mutual obligation activities. Recent changes in Australia emphasise the jobseekers’ “personal responsibility”, and they are required to report their attendance and participation, increasingly with online tools (including a mobile phone application). However, if someone is not capable of using the tools, the provider bears the onus of reporting on behalf of that person. Given this additional burden on the already under resourced provider, we are concerned that many people will be pressured to use the online systems even if they are not digitally competent or have other barriers to using digital tools.

#### **People living in remote areas without access to reliable digital services.**

For those living in remote Australia, there are significant infrastructure barriers to accessing digital spaces.<sup>17</sup> For example, many people living remotely access the internet through their mobile phone service, however mobile data is more expensive than fixed lined internet connections. Although we acknowledge that there are social security payments available, namely the “Telephone Allowance”, typically these allowances cannot sufficiently cover the expense of remaining connected, particularly for people living remotely.

The geographical isolation also raises a number of issues when access to social security benefits are heavily reliant on functioning technology, particularly for areas with widespread income management and restricted access to cash. For example, the wet season in early 2018 brought monsoonal storms to the Tiwi Islands, north of Darwin, causing damage to a Telstra tower and

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<sup>15</sup> Antony Funnell, ‘How technology can be used to safeguard against domestic violence’, ABC News (online), 26 September 2017, <http://www.abc.net.au/news/2017-09-26/how-technology-can-be-used-to-stop-domestic-violence/8981478>.

<sup>16</sup> Arial Bogle, ‘Payday lenders ask customers to share MyGov and banking passwords, putting them at risk’, ABC News (online), 8 January 2018, <http://www.abc.net.au/news/science/2018-01-08/payday-lenders-ask-for-mygov-banking-passwords-security/9249086>.

<sup>17</sup> See Fairfield Multicultural Agency and Refugee Council of Australia, ‘Not Working: Experiences of refugees and migrants with Jobactive’, (August 2017), 12, <https://www.refugeecouncil.org.au/wp-content/uploads/2017/08/Jobactive.pdf>.

interfering with residents' access to fuel, internet and phones over a 3-day period.<sup>18</sup> During this time EFTPOS machines were down and many residents struggled to buy essential items due to their lack of access to cash. Only one of the two shops in Wurrumiyanga, on Bathurst Island could process non-cash sales. When questioned about the options available to people with no access to cash, the Australian Minister for Indigenous Affairs argued that people could telephone DHS Income Management line – however, the phone lines were also down during this period.<sup>19</sup>

**5 Would you have specific recommendations about addressing both the human rights risks involved in the introduction of digital technologies in social protection systems as well as maximizing positive human rights outcomes?**

Based on our discussions above, and the experience of our member centres assisting people who have been negatively impacted by new digital services and automation, we have a number of specific propositions:

- In-person and telephone-based services must be made widely available as an alternative to online service provision in order to prevent exclusion and abuse, and there must be an adequate level of oversight of digital service provision.
- The collection of data must be accompanied by appropriate disclosure of purpose and at least some recipient control over data use.
- The introduction of any new technology to the social security system must be accompanied by a continuation of a range of services to people with barriers to participating in the digital world.
- With respect to the implementation of new automation to social security systems:
  - (a) properly invest in fully developing the automated system, rather than only seeing it as a cost-saving measure;
  - (b) rigorously test the automated system to ensure that it works reliably to generate data to support accurate decision-making;
  - (c) ensure there is a fair and accessible mechanism for challenging the accuracy of any decisions made in reliance on the automated system; and
  - (d) effectively consult with people receiving income support payments and community organisations working to fully understand how the automated system will impact on disadvantaged and vulnerable people, and the stress that interacting with the system may cause.

**To discuss this submission further please contact:**

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<sup>18</sup> Stephanie Zillman, 'Wet season storms highlight communications weakness on Tiwi Islands', ABC News (online), 7 February 2018, <http://www.abc.net.au/news/2018-02-02/storms-highlight-welfare-card-vulnerabilities-on-tiwis/9387250>.

<sup>19</sup> Ibid.

