

18 September 2015

Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Re: the Social Security Legislation Amendment (Debit Card Trial) Bill 2015

I welcome the opportunity to make a submission to the Senate Standing Committee on Community Affairs on the proposed Bill. 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.

As noted in the Explanatory Memorandum, this Bill is to 'amend the social security law to enable a trial phase of new cashless welfare arrangements in response to a key recommendation from Mr Andrew Forrest's Review of Indigenous Jobs and Training.'¹ Recommendation 5 of the Forrest Review stipulated that Australia's social security system should be transitioned to cashless welfare with 100 per cent income management for all Australian welfare recipients except for 'age and veterans' pensions.'²

The Forrest Review of Indigenous Jobs and Training wildly exceeded its mandate by recommending a substantial overhaul of Australia's welfare system. This has led to merited criticism about the policy process and the ideologically driven choice to proceed with the Healthy Welfare Card. There are also other serious concerns with the proposed legislation, each of which will be addressed below.

Evidence and Income Management

The Explanatory Memorandum states that:

The purpose of the trial is to test the concept of cashless welfare arrangements by disbursing particular welfare payments to a restricted bank account, accessed by a debit card which does not allow cash withdrawals. The trial will test whether significantly reducing access to discretionary cash,

* The author wishes to acknowledge the helpful comments of Professor Jon Altman on an earlier draft of this submission.

¹ Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) Outline.

² Commonwealth of Australia, *The Forrest Review* (2014) 100-108.

by placing a significant proportion of a person's welfare payments into a restricted bank account, can reduce the habitual abuse and associated harm resulting from alcohol, gambling and illegal drugs.³

However, the concept of cashless welfare arrangements has been well tried in Australia since it was introduced in 2007 as part of the Northern Territory Emergency Response (NTER),⁴ and continued under subsequent legislation.⁵ As introduced in 2007, the government's rationale for income management was that it would reduce the amount of cash available for 'substance abuse and gambling and ensure that funds meant to be for children's welfare are used for that purpose'.⁶ There have been numerous reports in recent years on the concept of cashless welfare transfers. The evidence on income management to date suggests that this is a concept that has been tried and found wanting.

On 18 December 2014, the Department of Social Services released the Final Evaluation Report on the operation of income management in the Northern Territory. Some key findings of this government-commissioned university-based research on income management were that:

- The evaluation could not find any substantive evidence of the program having significant changes relative to its key policy objectives, including changing people's behaviours.
- There was no evidence of changes in spending patterns, including food and alcohol sales ...
- There was no evidence of any overall improvement in financial wellbeing, including reductions in financial harassment or improved financial management skills. ...
- More general measures of wellbeing at the community level show no evidence of improvement, including for children.⁷

This extremely thorough research made clear that income management does not achieve what the government intended, does not benefit large numbers of welfare recipients, and is perceived to be unfair and discriminatory by many of those subject to it.⁸ Significantly, Bray and others concluded **'the evidence is that income management has had no impact on alcohol consumption or alcohol-related**

³ Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) Outline.

⁴ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

⁵ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) and *Social Security Legislation Amendment Act 2012* (Cth).

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 6 (Malcolm Brough).

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

⁸ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) 301; J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre University of New South Wales, 2012) 261.

harm.⁹ Other reports have likewise shown that cashless welfare transfers in the form of income management have not proven to be the panacea to social problems espoused by government.

The 2014 government-commissioned university-based research detailed mixed outcomes regarding the voluntary income management scheme operating in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands. Communities in the APY Lands had requested voluntary income management as a means of addressing a range of concerns, including humbugging.¹⁰ The 2014 APY Lands report noted that '[t]he majority of community members and other stakeholders who participated in this study were positive about income management being introduced into the APY Lands.'¹¹ However, the report states that '[w]ith less cash available, some of the 'humbugging' has reportedly been transferred from humbugging for money to humbugging for food.'¹² Although the data in this report is presented as tentative,¹³ with further research required, it noted that **'people on income management appear to be more likely to run out of money than those not on income management.'**¹⁴ This issue of those on voluntary income management being more likely to 'run out of money' than those not subject to income management was also raised in the government-commissioned Deloitte May 2014 report on place based income management.¹⁵ This raises questions about the efficacy of voluntary income management, even for those who do wish to choose it.

In Cape York the income management system can operate upon request or as a sanction imposed by the Family Responsibilities Commission. The 2012 Cape York Evaluation Report called into question the government's claim that income management operates as an effective sanction to bring about behavioural change. The data was found to be 'consistent with the hypothesis that people who have more recently been subject to income management are resistant to change and less likely to respond to the sanction of income management.'¹⁶ The Report concluded that **'[t]here were no substantial differences in the characteristics of clients who had ceased being income managed and clients who were currently being income managed.'**¹⁷

⁹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, 2014) 305. (emphasis added)

¹⁰ Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Social Policy Research Centre UNSW, September 2014) 1.

¹¹ Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Social Policy Research Centre UNSW, September 2014) 1.

¹² Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Social Policy Research Centre UNSW, September 2014) 19.

¹³ Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Social Policy Research Centre UNSW, September 2014) 2.

¹⁴ Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Social Policy Research Centre UNSW, September 2014) 22. (emphasis added)

¹⁵ Deloitte Access Economics, *Place Based Income Management – Baseline Evaluation Report* (May 2014) 68.

¹⁶ Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation* (2012) 207.

¹⁷ Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation* (2012) 207. (emphasis added)

A government that ignores evidence will create poor law and policy. The point of evaluation is to inform the policy process. However, this has not been happening in the context of income management. If the government persists in ignoring evidence on the ineffectiveness and problematic nature of income management then it will rightly be criticised for using the evaluation phase as 'a mere tick and flick exercise',¹⁸ at great public expense.

A Violation of the Rule of Law

Arguably, the rule of law is violated by the proposed Bill. In his widely accepted exposition of the rule of law, AV Dicey stated that it includes the notion of 'equality before the law, or the equal subjection of all classes to the ordinary law of the land'.¹⁹ The Healthy Welfare Card in the proposed Bill will apply exceptionally and unequally to those in receipt of government income support, so that in the areas selected for the trial 80 per cent of welfare income will be restricted,²⁰ whereas in areas not subject to this Bill or other forms of income management welfare recipients experience unrestricted access to cash welfare payments. This Bill and other forms of income management currently in place create different rights to access social security payments in cash depending arbitrarily upon the geographical location where one resides. That this exceptionalism is perceived to be inappropriate was flagged earlier this year by the Mayor of Moree, initially one of the areas where the government considered implementation of the Healthy Welfare Card. Mayor Katrina Humphries stated:

I started to get very frustrated with it, I had a NIMBY moment, not in my back yard, why single us out again, do we really need another divisive thing in our community? I don't think so, we are trying to move forward. I have no issue with the card, but don't single us out as a community to use it, and what if it doesn't work out? It could set us back ten years, I am not prepared for that.²¹

In the proposed Bill, welfare recipients are to be discriminated against based upon where they reside rather than because of any problematic spending patterns or any irresponsible behavior on their part. To impose substantial restrictions on the spending patterns of welfare recipients and significantly reduce their consumer rights because of an unproven belief that reduction in cash will lead to superior outcomes is misguided.

¹⁸ Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 5th ed, 2013) 204.

¹⁹ AV Dicey, 'Introduction to the Study of the Law of the Constitution' in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 18.

²⁰ Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) s 124PJ.

²¹ Mayor Katrina Humphries quoted in Kelly Fuller, 'Moree says no to welfare card', ABC, 21 July 2015, <<http://www.abc.net.au/local/stories/2015/07/21/4277826.htm>>.

The rule of law is an ancient legal concept, a hallmark of civilized society, and a concept deeply embedded in the Westminster system from which Australia derives its legal pedigree. As such, it is not a concept to be lightly brushed aside in the throes of paternalistic fervor.

The concept of the rule of law has garnered support from many notable commentators over the years.²² Traces of this idea are apparent in the 'Paternalism Test Principle' formulated by Guy Standing. According to this principle 'A policy or institutional change is socially just only if it does not impose controls on some groups that are not imposed on the most free groups in society.'²³ If the government is truly concerned about harm arising from alcohol and substance abuse then it must be acknowledged that such problems are present amongst members of all classes in Australian society, not simply those in receipt of government income support. Yet there has been no like proposal to target members of other social classes in the same stigmatizing manner.

Consumer issues

The Explanatory Memorandum for the proposed Bill states that:

In trial locations, the debit card will work as similarly as possible to any other bank card. The trial will seek to ensure the card works at all existing terminals and shops, except those exclusively selling restricted products, as well as online where possible. The only difference will be that the debit card will not allow the purchase of alcohol and gambling products or cash withdrawals.²⁴

However, the proposed debit card will clearly not be the same as other banking products currently available to welfare recipients in the areas selected for the trial.²⁵ They currently are not compelled to maintain an account with a mandated banking institution, as will be the case with the Healthy Welfare Card.²⁶ That in itself eliminates consumer choice; however there are other serious consumer related concerns.

The Explanatory Memorandum for the proposed Bill states that:

Recognising that we do not live in a cashless society and that people need cash for minor expenses such as children's lunch money or bus fares, the

²² George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 16-25.

²³ Guy Standing, *A Precariat Charter: From Denizens to Citizens* (Bloomsbury, 2014) 123.

²⁴ Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) Outline.

²⁵ As is clear from the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) 124PM.

²⁶ Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) s 124PP.

remaining 20 per cent of payments will be available for use at the person's discretion.²⁷

This amount of cash is highly unlikely to meet the needs of affected welfare recipients. Some of the implications of welfare recipients not having sufficient cash to pay for goods and services are as follows:

- They would be unable to purchase many second-hand and other goods through private sellers, which would unjustly force those with the lowest income to purchase at higher prices where the Healthy Welfare Card was accepted. For example, the capacity of welfare recipients to purchase:
 - second-hand clothing at markets for cash,
 - second-hand motor vehicles from private sellers for cash,
 - fresh fruit and vegetables from private sellers, and
 - second-hand textbooks for students for cash from private sellers

would all be extremely reduced under the proposed Bill.

- It would also mean that affected welfare recipients would be unable to take advantage of superior consumer options where goods are offered at a reduced price if the amount is paid in cash, as occurs with some sellers of whitegoods.²⁸
- Some online purchases, which often allow goods to be purchased at more competitive prices, would be curtailed and in some instances prohibited altogether – which would arguably foster unlawful anti-competitive conduct. Restrictions on online purchases could also preclude welfare recipients from obtaining necessary health or other treatment, for example, Endovan for treating endometriosis, which can only be purchased from the United States. It is not clear from the information thus far provided by the government which online providers will be approved and which will not; and indeed whether online providers will be limited to national providers or international providers. The significance of the latter should not be underestimated, as we are now living in a global economy.
- Some service providers, such as gardening services for example, are often paid in cash, and welfare recipients (especially those with physical disability issues) could be affected by more limited service provision in this area if there was virtually a cashless welfare system with 80 per cent of welfare recipient's income quarantined.
- Welfare recipients who are parents would be unlikely to be able to pay a babysitter in cash to have a few hours respite on occasion, which is arguably something that all parents need.

²⁷ Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) Outline.

²⁸ Sophie Elsworth, 'How to save by getting a better deal on everything in 2015', News.com.au, 30 January 2015, <<http://www.news.com.au/finance/money/how-to-save-by-getting-a-better-deal-on-everything-in-2015/story-e6frfmcr-1227200836030>>.

- It would make the process of paying rent for those currently in share house arrangements far more cumbersome, without necessarily adding any compensating benefit. Current arrangements frequently involve subtenants paying a proportion of the rent in cash to the head tenant who then has responsibility for paying rent to the landlord/real estate agent. Share house accommodation is necessary in Australia due to the lack of affordable housing for those on low incomes, and if such arrangements were impeded by the 'Healthy Welfare Card' one unintended consequence could be a significant increase in homelessness. The Explanatory Memorandum noted that:

If a person requests it, the Secretary may make deductions from instalments of a payment payable to a person and pay the amounts deducted to a business or organisation nominated by the person. Such deductions may be in respect of rent, other bills or to businesses in periodic payment for purchases.²⁹

However, this unnecessarily increases bureaucracy. Evidence to date suggests that significant problems can arise for welfare recipients who make such arrangements. Those who administer income management do not have the same vested interest as individual welfare recipients in ensuring that rent is paid in a timely and accurate manner. Examples of rent related administrative errors associated with income management are disturbingly numerous.³⁰ This has created unnecessary stress for welfare recipients affected by such bureaucratic blunders. It has been time consuming for those affected by such errors to unravel the mess their financial affairs have fallen into as a direct consequence of the government's well-intentioned but inappropriate paternalism. Such errors have the potential to adversely affect credit ratings of welfare recipients, and consequently make it more difficult for welfare recipients to secure appropriate rental accommodation in future.

The recommendation for a 'Healthy Welfare Card' is based upon the same flawed philosophical foundation of new paternalism as the current income management system and would lead to the same problems of stigmatisation and reduction of autonomy for welfare recipients. Cashless welfare transfers lead to increased social stratification, and can have a significant impact on the social interactions of welfare recipients in society. As Zoe Williams states, '[w]hen you relegate people to a world without money, you create a true underclass: a group whose privacy and autonomy are worth less than everyone else's, who are stateless in a world made of shops.'³¹

²⁹ Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) 9.

³⁰ Commonwealth Ombudsman, *Ombudsman 2012–2013 Annual Report* (October 2013) 43-45; Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory* (2011), 19 <<http://www.equalityrightsalliance.org.au/projects/womens-experience-incomemanagement-northern-territory>>; Kirstyn Jones interviewed by Natasha Mitchell, 'Should governments control how you spend your welfare payments?', *Australian Broadcasting Corporation Radio National*, 2 June 2015 <<http://www.abc.net.au/radionational/programs/lifematters/income-management/3113294>>.

³¹ Zoe Williams, 'Tories want to relegate those on benefits to a world outside money', *The Guardian*, 28 March 2013 <<http://www.theguardian.com/commentisfree/2013/mar/28/tories-benefits-money-vouchers-underclass>>.

That cashless welfare transfers have this stigmatising impact is apparent in the following example given by a Centrelink Officer:

When it came out ... we had incidences in the supermarkets where the [sales assistant] would tell the customer, no, oh well you are on that card, you can't have that steak. You go and get that other steak, that cheaper one. You are wasting your money.³²

This demonstrates that government rhetoric about the budgetary incompetence of welfare recipients has accomplished powerful status hierarchy work – with some people feeling free to proffer unsolicited advice at the point of sale. The long term effect of this type of conduct on social relations is likely to be damaging.

The reason why restrictions on the contractual freedom of welfare recipients are likely to be stigmatising for those affected by them lies in the consumer context that has long operated in Australia. Generally, freedom of contract has been presumed to be a right to which all should have access. The doctrine of freedom of contract holds that:

(1) contracting parties should be free to agree to whatever agreement they wish; and (2) people should be free to decide to enter into contracts with whoever they please and should not be compelled to enter contractual relationships.³³

By restricting the consumer relationships that welfare recipients can enter into, as outlined above, the proposed Bill violates this contractual principle. It also violates contractual freedom by virtue of requiring a mandated bank account with a mandated bank provider for the proposed debit card. Such unnecessary interference with laissez-faire capitalism seems an ill-fitting choice for a Liberal government with traditional roots in liberalism.

Prior to the income management scheme recently introduced as part of the NTER, there were limited circumstances under which the government interfered in the contractual freedom of consumers, who were by and large assumed to be capable of making rational decisions. The context in which the government has previously interfered with contractual freedom has been limited to circumstances: a) where there has been an abuse of power,³⁴ or b) where there has been an issue with capacity for minors or those deemed mentally incompetent.³⁵ Welfare recipients should not be treated as the legal equivalent of minors or as though they are

³² Centrelink Customer Service Adviser quoted in J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre University of New South Wales, 2012) 94.

³³ J W Carter, *Cases and Materials on Contract Law in Australia* (LexisNexis Butterworths, 6th ed, 2012) 6-7; also see *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

³⁴ Such as misrepresentation: *Derry v Peek* (1889) 14 App Cas 337; unconscionability: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; undue influence: *Johnson v Buttress* (1936) 56 CLR 113; or duress: *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.

³⁵ At common law, the concept of necessities has been significant in determining cases of this type: *Nash v Inman* [1908] 2 KB 1; *Gibbons v Wright* (1954) 91 CLR 423. Legislation regarding minors varies by jurisdiction, under s 19 of the *Minors (Property and Contracts) Act 1970* (NSW) the court considers whether the contract was for the benefit of the minor.

mentally defective. Yet this stigmatisation currently occurs under the compulsory income management scheme, and will likewise occur through the proposed Bill. Such attitudes reflect an outdated social Darwinian view of the poor which has no place in a modern democracy.

It is arguable that the government has created a new class of incapacity in contractual relations by limitations placed upon welfare recipients through compulsory forms of income management. However, such developments have not been based upon rigorous analysis or evidence that such curtailment of contractual freedom is reasonable, proportionate, or necessary. It should not be presumed by the government, without evidence, that welfare recipients are poor planners who are incapable of spending their limited income sensibly.

Encroachment upon freedom of contract through income management has significant autonomy costs for welfare recipients. The Australian Psychological Society has observed that '[a]utonomy is a core human need.'³⁶ Autonomy theorists maintain that 'liberal societies should be especially concerned to address vulnerabilities of individuals regarding the development and maintenance of their autonomy.'³⁷ Denial of autonomy can create or exacerbate other problems. For some time now the government has had access to evidence that compulsory income management has created serious stress related health issues and depression for some welfare recipients,³⁸ yet they have not addressed this.

Under the proposed sections 124PG, 124PH and 124PJ income management via the Healthy Welfare Card can be voluntary or coerced. Yet evidence to date suggests that compulsory forms of income management are particularly ineffective and often poorly received by those subject to them. Bray and others note in their 2012 report, 'Compulsory Income Management has given rise to considerable feelings of disempowerment and unfairness.'³⁹ Similarly, in their 2014 report they state 'A substantial group of people subject to income management felt that income management is unfair, embarrassing and discriminatory.'⁴⁰

The policy logic behind income management appears to assume that the poverty of welfare recipients can be effectively addressed if their spending patterns are government restricted. However, evidence suggests that the reason for financial

³⁶ Australian Psychological Society, Submission to the Human Rights Policy Branch of the Attorney-General's Department, *Proposal to Amend the Racial Discrimination Act 1975*, April 2014, 6.

³⁷ Joel Anderson and Axel Honneth, 'Autonomy, Vulnerability, Recognition, and Justice' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges of Liberalism: New Essays* (Cambridge University Press, 2005) 127, 127.

³⁸ Australian Indigenous Doctors' Association (AIDA) and Centre for Health Equity Training, Research and Evaluation, University of New South Wales, Health Impact Assessment of the Northern Territory Emergency Response (2010) 25; Equality Rights Alliance, Women's Experience of Income Management in the Northern Territory (2011), 19 <<http://www.equalityrightsalliance.org.au/projects/womens-experience-incomemanagement-northern-territory>>; J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre UNSW, July 2012) 94; J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, September 2014) 113, 199.

³⁹ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre UNSW, July 2012) xix.

⁴⁰ J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, September 2014) xxi.

stress experienced by many welfare recipients is inadequate income. 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'.⁴¹ ACOSS noted that 'many social security payments fall below the poverty line, even with Rent Assistance and other supplementary payments added to household income'.⁴² If the government is keen to engage in further experimental policymaking they could consider raising the amount of welfare payments and see whether any problems paying bills are then eradicated. I submit that this would be preferable to the current expensive income management scheme and the changes outlined in the proposed Bill. Another matter that could be considered is regulating the suppliers of goods and services rather than intensively and inappropriately regulating the consumer purchases of welfare recipients.

Victims of Domestic Violence

The proposed Bill appears to offer no exemptions from income management under the Healthy Welfare Card, which is problematic in many respects, but which is likely to be particularly detrimental for welfare recipients experiencing circumstances of domestic violence. Women experiencing domestic violence require easily accessible funds for crisis accommodation and travel to get away from perpetrators of violence.⁴³ Having to engage in complicated and time consuming bureaucratic procedures to spend income managed funds can have the unintended consequence of impeding the achievement of these safety preserving objectives.

When considering income management in their 2011 Report on Family Violence, the Australian Law Reform Commission (ALRC) pointed out that '[t]he vulnerable position of people experiencing family violence, and the complex needs for their safety and protection, suggest that a different response is required'.⁴⁴ They noted that for Indigenous women who experience domestic violence 'a mandatory income management regime may discourage reporting'.⁴⁵ As such the ALRC made pertinent recommendations that are relevant to the proposed Bill. Recommendation 10—1 of the ALRC report on Family Violence advocates that:

The Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) to ensure that a person or persons experiencing family violence are not subject to Compulsory Income

⁴¹ Based upon 50% of the medium income with housing costs deducted beforehand, Australian Council of Social Services, *Poverty in Australia 2014* (2014) 8 <http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf>.

⁴² Australian Council of Social Services, *Poverty in Australia 2014* (2014) 10 <http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf>.

⁴³ This issue was addressed in Recommendation 10—3, Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 18.

⁴⁴ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (Report No 117, 2011) 267-268.

⁴⁵ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (Report No 117, 2011) 271.

Management. The *Guide to Social Security Law* should reflect this amendment.⁴⁶

Recommendation 10—2 proposes that:

The Australian Government should amend the Social Security (Administration) Act 1999 (Cth) to create an ‘opt-in and opt-out’ income management model that is voluntary and flexible to meet the needs of people experiencing family violence. The Guide to Social Security Law should reflect this amendment.⁴⁷

These important recommendations should be adopted rather than ignored by government policymakers responsible for income management. To exacerbate the already precarious circumstances of women experiencing domestic violence by limiting their access to cash is unacceptable.

Human rights compatibility issues

The Explanatory Memorandum claims that the ‘Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.’⁴⁸ This seems doubtful based upon the report undertaken by the Parliamentary Joint Committee on Human Rights in 2013,⁴⁹ which concerned human rights incompatibility issues with the income management system continued under the 2012 legislation.⁵⁰ The Parliamentary Joint Committee on Human Rights (PJCHR) is a Federal Committee that examines bills, legislation and legislative instruments for human rights compatibility pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In their 2013 report examining the Stronger Futures legislative package the Committee raised concerns about racial discrimination in the current income management scheme, stating that:

It is clear that while the measures have been extended to communities that are not predominantly Aboriginal, the measures still apply overwhelmingly to such Aboriginal communities. Accordingly, this means that they will fall within the definition of racial discrimination in article 1 of the ICERD, which refers to measures as racially discriminatory if they have ‘the purpose or effect’ of restricting the enjoyment of human rights. As such, in order to be non-discriminatory they will need to be shown to be based on objective and

⁴⁶ Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 18.

⁴⁷ Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 18.

⁴⁸ Statement of Compatibility with Human Rights extracted in Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) 1.

⁴⁹ Parliamentary Joint Committee on Human Rights (PJCHR), *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013).

⁵⁰ *Social Security Legislation Amendment Act 2012* (Cth).

reasonable grounds and [be] a proportionate measure in pursuit of a legitimate objective.⁵¹

After examining the issue, the Committee concluded that the government had failed to prove that income management was non-discriminatory. They stated:

[T]he government has not yet clearly demonstrated that:

- the income management regime to the extent it may be viewed as having a differential impact based on race, is a reasonable and proportionate measure and therefore not discriminatory; or
- the income management regime is a justifiable limitation on the rights to social security and the right to privacy and family.⁵²

These criticisms of the Committee are equally applicable to the proposed Bill. The proposed Bill will also likely have a disproportionate impact on Indigenous welfare recipients. The information released by the Department of Social Services to date suggests that the trials will target communities with a high proportion of Indigenous welfare recipients. This much was made clear by Alan Tudge in a recent ABC interview on the Healthy Welfare Card where the following exchange took place:

MICHAEL BRISSENDEN: So trials are planned in other small communities, aren't they? Is it really your intention to make every Australian on welfare subject to these restrictions? Or is this, as some have suggested, targeting Indigenous people only?

ALAN TUDGE: No, this is not targeting Indigenous people. And even in the Ceduna region about two-thirds of people covered will be Indigenous. The other third will be non-Indigenous.⁵³

This is clearly a disproportionate application of the measure to Indigenous welfare recipients. This statement by Tudge reflects confusion between express racially discriminatory intent and racially discriminatory effects and consequences. As noted above, the ICERD prohibits racially discriminatory effects and consequences. Critical race theorist Howard Winant explains that 'racial differences often operate as they did in centuries past: as a way of restricting the political influence not just of racially subordinated groups but of all those at the bottom end of the system of social stratification.'⁵⁴ The fact that some non-Indigenous welfare recipients are likewise caught in the net of income management does not make the scheme non-racially

⁵¹ Parliamentary Joint Committee on Human Rights (PJCHR), *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013) 51-52. The ICERD is the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁵² Parliamentary Joint Committee on Human Rights (PJCHR), *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013) 61-62.

⁵³ Alan Tudge interviewed by Michael Brissenden, 'Trial of "almost cashless" welfare card program to start in Ceduna, SA, next year', *Australian Broadcasting Corporation News*, 5 August 2015 <<http://www.abc.net.au/am/content/2015/s4287108.htm>>.

⁵⁴ Howard Winant, *The New Politics of Race: Globalism, Difference, Justice* (University of Minnesota Press, 2004) 105.

discriminatory. Failure to abide by Australia's international human rights obligations will continue to damage Australia's reputation internationally, which is something the new leadership of the Liberal party should consider.

It is incontrovertible that Indigenous welfare recipients are heavily overrepresented in compulsory income management categories across the country.⁵⁵ Where welfare recipients genuinely want to participate in voluntary forms of income management they should be supported to do so. However as stated above, the proposed Bill contains coercive categories, through 'trigger payments'. If at some future point the government decided to transition everyone now subject to income management via the BasicsCard onto the new Healthy Welfare Card then the racially discriminatory character of the scheme would continue.

The government's statement of human rights compatibility accompanying the Explanatory Memorandum for the proposed Bill conveniently omits reference to the right to privacy, yet the right to privacy is clearly violated by sections 124PN and 124PO. These sections have serious privacy implications for affected welfare recipients who are to be targeted by the trial of the Healthy Welfare Card. It is unclear whether those who are to be targeted by the trial are fully aware of the nature of these privacy implications, or whether they have given their informed consent to such invasion of their privacy. These provisions allow:

- for disclosure of information about individual welfare recipients to be given to the Secretary (s 124PN),
- for the Secretary to give information about individual welfare recipients to an officer/employee of a financial institution (s 124PN),
- for a community body to disclose information about individual welfare recipients to the Secretary (s 124PO), and
- for the Secretary to disclose information about individual welfare recipients to an officer/employee of a community body (s 124PO).

Substantial and arbitrary surveillance of virtually all consumer transactions of affected welfare recipients would be possible through such a scheme. It is unclear to what purpose or purposes this information may be gathered, stored, monitored and shared. It is also unclear whether this information could be used in an adverse way against individual welfare recipients in a manner that is unforeseen at this point. The Bill contains no procedures to ensure that affected welfare recipients have access to the information about them that is to be gathered, stored, monitored and shared. Likewise it contains no procedures to ensure that any erroneous information could be corrected. This degree of monitoring of welfare recipients is inappropriate and unreasonable. Arguably these sorts of electronic cards provide the government and

⁵⁵ Senate Estimates, Parliament of Australia, House of Representatives, *Income Management Summary — 27 December 2013* (February 2014) 1; J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, September 2014) xx.

other entities such as financial institutions and community bodies with information that those parties should not have about individual citizens in a democratic society.

In terms of privacy issues, the proposed Bill would arguably place Australia in violation of Article 17(1) of the *International Covenant on Civil and Political Rights*.⁵⁶ This article stipulates that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' As discussed above, the application of the Healthy Welfare Card is arbitrarily based upon geographical location rather than any specific behavioural problems of affected welfare recipients. The First Optional Protocol to the ICCPR has a complaints mechanism in Article 2 that allows an aggrieved party to appeal before the Human Rights Committee of the United Nations where the person has exhausted domestic remedies. Australia is a signatory to both the ICCPR and the First Optional Protocol to the ICCPR. As the Bill makes no provision for domestic remedies of the nature described in the previous paragraph, the government risks further international embarrassment by virtue of this Bill should an aggrieved welfare recipient chose to proceed with the First Optional Protocol procedure.

Conclusion

The purpose of the welfare system is to provide income support to those in need in order to ensure a dignified means of survival. Income management schemes that stigmatise the poor are inappropriate. These developments reveal a welfare system that has lost sight of its central purpose—the relief of human suffering. Those who have historically been most marginalised by society will be disproportionately affected by these punitive welfare reforms.⁵⁷ Such reforms show that Australia is currently governing poverty with impoverished governance.

These reforms will demonise the poor and reinforce populist prejudice. This is not an admirable outcome for the most marginalised in our society who deserve a socially just welfare system based upon need not prejudice and the targeting of public funds to productively improve their livelihoods rather than unproductively vilify their generally imagined unacceptable behaviours. For a humane and dignified society '[m]oralistic social policy must be displaced by rights-based policy.'⁵⁸ Only a rights-based approach will safeguard the position of those who are most disadvantaged.

The current income management scheme has been delivered at tremendous public expense, arguably without providing any redeeming benefits. Approximately '\$1 billion' has been allocated to income management between '2005-06 to 2014-15',⁵⁹

⁵⁶ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵⁷ Guy Standing, *Beyond the New Paternalism – Basic Security as Equality* (Verso, 2001) 137.

⁵⁸ Guy Standing, *A Precariat Charter – From Denizens to Citizens* (Bloomsbury, 2014) 384-385.

⁵⁹ Luke Buckmaster, Carol Ey, and Michael Klappdor, 'Income Management: an Overview' (Background Note, Parliamentary Library, Parliament of Australia, 2012) 34.

and a further \$133.3 million was dedicated to income management in the 2015 Budget for the financial years 2015-2016 and 2016-2017.⁶⁰ It is difficult to see how the implementation of the Healthy Welfare Card proposed by the Forrest Review will be a more cost effective alternative. Investment in such schemes fiscally limits other options the government could take to support welfare recipients that may well produce superior outcomes, such as appropriate support services and job creation for those who currently struggle with unemployment. A government genuinely committed to improving Australian society would choose the latter rather than the former pathway.

Finally, I have had the benefit of reading the submission of the National Welfare Rights Network to the Committee on this Bill, and note that they raise many similar concerns. I support their recommendation that 'the Bill should be rejected in its entirety, and a genuinely voluntary system of community-based, individual opt-in system of income management be implemented where there is community support.'⁶¹

Yours sincerely,

Dr Shelley Bielefeld
School of Law
Western Sydney University
Locked Bag 1797
Penrith South DC
NSW 2751 Australia

⁶⁰ Australian Government, 'Budget 2015: Budget Paper No. 2: Budget Measures: Part 2: Expense Measures', *Australian Government*, May 2015 <http://www.budget.gov.au/2015-16/content/bp2/html/bp2_expense-02.htm>.

⁶¹ National Welfare Rights Network, Submission to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*, 18 September 2015.