5 February 2016

Senate Finance and Public Administration Committee
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Canberra ACT 2600
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Re: the Social Security Legislation Amendment (Community Development Program) Bill 2015

I welcome the opportunity to make a submission to the Committee on this 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.

My submission will draw attention to several problems with the proposed Bill:

1. The welfare discourse underpinning this Bill perpetuates destructive mythology about the poor.
2. Workfare regimes are inherently problematic and should be abandoned.
3. There are issues with the exercise of review rights.
4. There are issues with working for income managed/quarantined welfare income.
5. There are human rights incompatibility issues with the Bill which make it fundamentally unsuited to a society aspiring to uphold human dignity.

Welfare Discourse

The Explanatory Memorandum for the Bill is heavily imbued with the concept of welfare reliance/welfare dependency, which is arguably inappropriate in circumstances where the real issue is market failure in these remote areas. These phrases are an obfuscating linguistic device. Such language is a thinly veiled attempt to avert attention from market failure and shift blame on to individual welfare recipients living in remote areas. Through such discourse welfare recipients have been forced to function as cultural repositories for all that is wrong in society. However, no amount of blame shifting will magically conjure jobs into existence in an area where the market will not provide them.

Benedict Sheehy and Donald Feaver have recently stated that for effective regulatory systems there is a ‘need to ensure that the characterisation of the

organising problem and the framing of the policy response bear a coherent relationship.'[1] They explain that 'if the problem is characterised as a social coordination problem such as job market failure and the target becomes unemployed individuals who are encouraged to "take personal responsibility", a level of unnecessary incoherence is introduced.'[2] Such incoherence can result in regulation 'doomed to fail from the outset.'[3] I submit that the CDP framework proposed in this Bill suffers from such deficiencies.

There is another important issue to consider in the disparaging discourse of welfare dependency, one related to the nature of the paid work that exists in areas to which the CDP framework applies. Are Indigenous job seekers expected to take up employment positions in the mining industry for example? If so some may well see this as conflicting with their cultural obligations to care for country. Are Indigenous job seekers expected to take up employment as enforcers of the government's coercive paternalistic regulatory surveillance systems, such as CDP? If so this may also conflict with Indigenous peoples' cultural obligations, as revealed in Submission 4 to this Committee from the Tiwi Islands Training and Employment Board, and place people at personal risk of violent retribution. It is unreasonable to expect Aboriginal people to take up employment prospects that would lead to conflict with their cultural obligations, as Paulo Freire notes, 'one cannot expect positive results from … a program [that] constitutes cultural invasion, good intentions notwithstanding.'[4]

Another important consideration with the dominant welfare discourse is that Eurocentric definitions of employment can exclude types of work valued by Indigenous job seekers and Indigenous communities. Instead narrow neoliberal conceptions of work can readily come to dominate workfare regimes. With the transference of substantial powers to the Minister under sections 1061ZAAZ and 1061ZAAZA of this Bill this is a real risk for Indigenous job seekers. Section 1061ZAAZ(1) provides: 'The Minister may, by legislative instrument, determine a specified region in Australia to be a *remote income support region*.' Section 1061ZAAZA(1) stipulates that:

> (1) The Minister may, by legislative instrument, determine a scheme relating to:
> (a) the imposition of obligations on remote income support recipients; and
> (b) ensuring compliance with those obligations by remote income support recipients.

* I wish to thank Professor Jon Altman for his helpful comments on an earlier draft of this submission.
[1] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales Law Journal* 392, 410.
[2] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales Law Journal* 392, 411.
[3] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales Law Journal* 392, 411.
[4] Paulo Freire, *Pedagogy of the Oppressed* (Bloomsbury, 2012) 95.

Under section 1061ZAAZA(2) the factors within the power of Ministerial determination include (but are not limited to):

(a) obligations that must be complied with by remote income support recipients (including any obligations that apply instead of participation requirements, activity tests or employment pathway plans);
(b) circumstances in which persons are exempt from the requirement to comply with obligations;
(c) the consequences for remote income support recipients who fail to comply with obligations, including the following:
  (i) the reduction of amounts of remote income support payments;
  (ii) remote income support payments not being payable;
  (iii) the imposition of further obligations on recipients;
(d) the determination of reasonable excuses for failing to comply with obligations;
(e) the treatment of voluntary acts and misconduct;

Such expansion of Ministerial power is inappropriate and will not ensure that the wishes, aspirations and cultural obligations of Indigenous peoples are given due respect even if comprehended. The broad nature of these provisions would give the Minister absolute control over many aspects of their lives, including reducing the amount of social security they receive in a manner contrary to the principle of equality. The Minister would have control over what would be deemed a reasonable excuse for non-compliance, and this could readily open up the door for neoliberal cultural invasion of Indigenous communities, notwithstanding the fact that the Explanatory Memorandum mentions that consultation with communities will take place. The Federal government's previous consultation practices with Aboriginal communities have been strongly criticised,[5] which understandably gives cause for concern about what future consultations might involve and what significant factors might be missing from consultations. Issues of concern with previous consultations include rushed timeframes, lack of interpreters, and a lack of Indigenous influence over policy outcomes. Linguist Murray Garde has suggested that the complexity of government consultation and negotiation processes requires the presence of a highly proficient translator, because without this there can be no way of ensuring that government proposals are understood let alone agreed with.[6]

[5] Northern Territory Elders and Community Representatives, 'Press Conference Statement Melbourne 4th November, 2011' in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (Concerned Australians, 2015) 139-142; Michele Harris (ed), *A Decision to Discriminate – Aboriginal Disempowerment in the Northern Territory* (Concerned Australians, 2012) 13-20; Nicholson, Alastair et al, 'Listening but not Hearing: A response to the NTER Stronger Futures Consultations June to August 2011' (2012) <http://www.jumbunna.uts.edu.au/researchareas/ListeningButNotHearing8March2012.pdf> 5-11; Australian Human Rights Commission, *Social Justice Report 2011* (2011) 27-28.
[6] Murray Garde, 'Lost without translation: what the Bininj missed' (2014) *Land Rights News* 4-5.

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The Australian Human Rights Commission has set out guidelines for effective and culturally appropriate engagement with Aboriginal and Torres Strait Islander peoples that the government would do well to follow. These include '[r]ecognition and regard for Indigenous peoples' rights', '[r]espect for Indigenous culture and difference, particularly decision making processes' and ensuring 'Indigenous peoples' free, prior and informed consent.'[7] When compared to these ethical guidelines, the approach adopted in the Bill's is inadequate, as consent is rendered irrelevant.

The Bill provides that there will be 'provision for reasonable excuses for being absent' from workfare obligations, 'factoring in appropriate reasons such as illness and cultural business',[8] however the CDP scheme involves private and for-profit providers who may well be ill equipped to determine what amounts to 'cultural business'. How are non-Indigenous for profit providers going to determine what is and is not 'cultural business'? The drafters of this Bill seem to be unaware that it is inappropriate for for-profit providers to be in a position to make such determinations. Moreover, it is an invasion of the privacy of Indigenous job seekers to require them to disclose aspects of their cultural business in order to access their right to social security. Requiring such disclosure reflects a perception that receipt of public money means welfare recipients are to have a shrunken space in which to experience a private life. For Indigenous job seekers this may resonate with other experiences of colonialism and lead to negative outcomes.

Problems with Workfare

There has been much scholarly critique over a very long time of workfare regimes. The basis for such critiques is varied; however all have some bearing on the CDP Bill, which involves forced labour for job seekers with their right to social security denied unless they labour for well below award rates. William Morris stated in the 19th century that 'there is some labour which is so far from being a blessing that it is a curse'.[9] Workfare is of this latter genre. Morris stated that 'the semi-theological dogma that all labour under any circumstances, is a blessing to the labourer, is hypocritical and false'.[10] Such dogma is a ruse to keep the poor poorer still by labouring for next nothing instead of appropriately valuing their efforts, time and talents.

For the poor workfare shrinks their sense of the possible. Instead of being treated as though they possess valuable potential and/or capacities they are instead treated as though they are only worthy of pseudo-employment opportunities. For those in

[7] Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Peoples Engagement Toolkit 2012* (2012) 19. The last factor mentioned mirrors Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*.
[8] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, p 3 of the General Outline.
[9] William Morris, *Useful Work Versus Useless Toil* (Penguin Books, 2008) 2.
[10] William Morris, *Useful Work Versus Useless Toil* (Penguin Books, 2008) 28.

remote communities where there are no or few genuine job opportunities workfare ensures their labour is appropriated by the state in an unending exploitative cycle. Workfare regimes are underpinned by what Paulo Freire refers to as 'the false generosity of paternalism', an approach that 'maintains and embodies oppression'.[11] However repressive paternalism is no antidote to the ravages of poverty.

Undermining the autonomy of the poor, as occurs with workfare regimes, is unlikely to produce positive outcomes. That is because 'genuine empowerment can only come from freely exercised choice'.[12] As Freire observes,

> People are fulfilled only to the extent that they create their world … and create it with their transforming labour … If for the person to be in the world of work is to be totally dependent, insecure and permanently threatened—if their work does not belong to them—the person cannot be fulfilled. Work that is not free ceases to be a fulfilling pursuit and becomes an effective means of dehumanization.

The penalty regimes that seem to be an integral accompaniment to all workfare schemes nationally and internationally[13] lead to job seekers being 'permanently threatened'; and frequently lead to dehumanising outcomes as people on already small incomes have those incomes still further reduced by the imposition of unjust penalties, a theme to which I will later return.

Rather than provide productive outcomes for the poor, coercive workfare arrangements have a history of funnelling public money to poverty profiteers.[14] The incentive payments to be made to Providers under the CDP scheme proceeds down the same pathway. I submit that it is inappropriate to channel public money towards such ends and the $31 million[15] allocated to fund the coercive arrangements in this Bill would be better spent on providing real work opportunities for the unemployed in remote areas. As Katherine Curchin astutely puts it, 'Greater investment in regional economic opportunities makes more sense than punitive treatment of individual welfare recipients.'[16]

Standing convincingly outlines multiple reasons why workfare should be abolished. 'Workfare threatens' the 'principle of justice, compromising choice and freedom.'[17] Workfare can feed into poverty traps, increase precarity for the poor, and be

[11] Paulo Freire, *Pedagogy of the Oppressed* (Bloomsbury, 2012) 54.
[12] Mick Carpenter, Stuart Speeden and Belinda Freda (eds), *Beyond the Workfare State: Labor markets, equalities and human rights* (The Policy Press, 2007) 6.
[13] Joe Soss, Richard Fording, and Sanford Schram, *Disciplining the Poor – Neoliberal Paternalism and the Persistent Power of Race* (University of Chicago Press, 2011) 46.
[14] Joe Soss, Richard Fording, and Sanford Schram, *Disciplining the Poor – Neoliberal Paternalism and the Persistent Power of Race* (University of Chicago Press, 2011) 185, 263.
[15] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, p 3 of the General Outline.
[16] Katherine Curchin, 'From the Moral Limits of Markets to the Moral Limits of Welfare' (2016) 45(1) *Journal of Social Policy* 101, 115.
[17] Guy Standing, *Beyond the New Paternalism – Basic Security as Equality* (Verso, 2001) 178.

humiliating for job seekers. It can also lead to job seekers being coerced into accepting any labour foisted upon them by regulatory bureaucracies, rather than finding the most fitting work for job seekers to enhance their career prospects. The volume and extent of the talent currently crushed beneath the weight of workfare regimes is yet to be measured.

Legalising forced labour through workfare will likely have long term detrimental effects for the poor and also for society. As Standing points out, 'Once labour for a profit making company is accepted as the duty of the unemployed citizen, it leads to the conclusion that if you are a failure in the job market, you have a duty to labour for nothing.'[18] Workfare is therefore an excellent recipe to further entrench inequality in society, which creates other threats as understandable anger from those oppressed by such schemes and economic injustice more generally mounts.[19]

The Explanatory Memorandum states that the Bill will 'strengthen incentives for job seekers in remote Australia to actively engage with their income support activity requirements and provide greater opportunities to participate and remain in paid work.'[20] However, employers who have the benefit of free labour under workfare have zero incentive to later pay for it in the form of providing a 'real job' for currently coerced workers. The very premise upon which politicians promote workfare, that it is somehow a pathway to 'real jobs', lacks both a logical foundation and evidential support.

The Explanatory Memorandum accompanying the Bill proposes immediate penalties for non-compliance with CDP, and claims that currently:

> The consequences of not attending activities (No Show No Pay penalties) are not immediately felt, with long periods of up to five weeks or more before penalties are applied. For many remote job seekers the penalty feels arbitrary and not connected to their behaviour. As a result, behaviour is not changing.

However the possibility that there are other reasons for non-compliance need to be considered. How do Aboriginal communities see the imposition of penalties for non-compliance? Could non-compliance signal resistance to the regulatory framework rather than a lack of comprehension of what the framework demands? Are Aboriginal job seekers being asked to undertake work-like activities that conflict with their family and cultural obligations? These are issues that need to be explored.

The current framework provides less autonomy for Aboriginal communities and Aboriginal job seekers than was the case under the Community Development

[18] Guy Standing, *A Precariat Charter: From Denizens to Citizens* (Bloomsbury, 2014) 268.
[19] Danny Darling, *Inequality and the 1%* (Verso, 2015) 3, 83.
[20] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, p 1 of the General Outline.

Employment Program (CDEP),[21] and the change in compliance could be linked to the lack of autonomy under the current scheme being perceived as unfair or undesirable. There is a vast deal of difference between the CDEP measure and the CDP outlined in the Bill. In addition to promoting far greater autonomy for Aboriginal communities, CDEP was voluntary.[22] Instead of having a substantial number of for-profit providers eager to access financial bonuses attached to the government's coercive regulatory regime, CDEP provided fairer remuneration for Indigenous job seekers and better accommodated Indigenous cultural diversity.

The penalty structure authorised under the CDP Bill is concerning, as such structures have funnelled much needed financial resources away from Indigenous job seekers and their dependent family members. As Submission 1 to this Committee by Lisa Fowkes shows, penalties have been ineffective in promoting the kind of compliance the government claims to want to see from Indigenous welfare recipients:

> The fact that so many penalties have already been applied to CDP clients (47,000 penalties across a caseload of 37,000), with no apparent impact on levels of compliance, suggests that many people are continuing to fall foul of the rules despite having direct experience of having been penalised.[23]

If penalising people in this manner had the capacity to effect behavioural change then would the number of penalties be this high? Given that many of those in receipt of welfare payments are currently living well below the poverty line,[24] financial penalties imposed as part of CDP have the capacity to plunge people further into poverty. This is not a measure which could be said to have benefits that outweigh the disadvantages. Should the children of non-compliant parents go hungry or suffer any other form of deprivation created by this punitive policy? Surely children should have the benefits of social security provision irrespective of the conduct of their parents. After all, Article 26(1) of the *Convention on the Rights of the Child* stipulates that: 'States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.' The full

[21] Shelley Bielefeld and Jon Altman, 'Australia's First Peoples – still struggling for protection against racial discrimination' in *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975* (Cth) *Conference*, August 2015, 202.
[22] Shelley Bielefeld and Jon Altman, 'Australia's First Peoples – still struggling for protection against racial discrimination' in *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975* (Cth) *Conference*, August 2015, 202.
[23] Lisa Fowkes, Submission No 1 to the Senate Finance and Public Administration Committee, *Social Security Legislation Amendment (Community Development Program) Bill 2015*, 2 February 2016, 3.
[24] In their 2014 report on poverty, the Australian Council of Social Services observed that '61% of people below the poverty line relied upon social security as their main income' and that 'many social security payments fall below the poverty line, even with Rent Assistance and other supplementary payments added to household income.' Australian Council of Social Services, *Poverty in Australia 2014* (Sydney: 2014) at 8, 10, online: <http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf>.

realisation of this right is not ensured by a system of penalties that reduces finances for children's needs.

The language choice in the Explanatory Memorandum accompanying the Bill is telling. Several times the Explanatory Memorandum states that the CDP scheme 'will capture' various welfare recipients.[25] The Concise Oxford English Dictionary defines capture as meaning to 'take into one's possession by control or force'. Is 'capture' really an appropriate policy framework for twenty-first century Australia when dealing with Indigenous or other welfare recipients? The stance seems synonymous with slavery. Indeed workfare has been described as 'a modern form of slavery' by the Director of the Centre for Welfare Reform in the United Kingdom, Dr Simon Duffy.[26] As concerns Indigenous welfare recipients, this has parallels with Australia's earlier colonialism.

Review rights

The Explanatory Memorandum states that 'The Social Security Administration Act is amended to clarify the application of the existing compliance arrangements and confirm the right to seek merits review for remote income support recipients.'[27] It is all very well to have legislated review rights, however as Standing observes: 'Rights are only meaningful if individuals are able to exercise them.'[28] Any appeal rights contained within the Bill can only be exercised by those who have:

- knowledge of them,
- the necessary skills to exercise them, or
- the financial resources to pay an advocate to assist them in exercising such review rights.

It is a lot to ask of people already struggling on low incomes that they find the resources to participate in review processes if the applicant cannot navigate the process themselves. It is also likely that Indigenous people whose first language is not English who are affected by the CDP Bill will find navigation of the review process complex. Access to justice needs to be real rather than merely theoretical. Inserting a legislative provision containing a review right that many of those affected may well find difficult to exercise is inadequate. It would be better not to institute a repressive paternalistic bureaucracy in the first place rather than setting up a myriad of hurdles through which the poor are expected to jump in their attempt to access justice.

[25] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, 23, 24, 27.
[26] Simon Duffy, 'Workfare is Modernised Slavery', Huffington Post, 27 February 2013, <http://www.huffingtonpost.co.uk/dr-simon-duffy/workfare-is-modernised-slavery_b_2773051.html>.
[27] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, 4.
[28] Guy Standing, *Beyond the New Paternalism – Basic Security as Equality* (Verso, 2001) 178-179.

Will job seekers be working for compulsory income managed/quarantined welfare payments?

Income managed welfare recipients most generally use a BasicsCard to spend their quarantined funds at government approved stores and are prohibited from spending such income on alcohol, tobacco, pornography and gambling products. Though there are also now new arrangements for some welfare recipients to experience the Healthy Welfare Card, with 80 per cent income management, and prohibitions on expenditure of such funds on alcohol and gambling products.[29] The Explanatory Memorandum does not make clear whether those subject to these workfare arrangements will also be subject to welfare quarantining in the form of income management. For Indigenous peoples, coercive workfare regimes have long been despised, and Australia has a lengthy colonial history of using such mechanisms against First Peoples whilst spuriously claiming that such approaches were beneficial for those subject to them.[30] The following statement by Peter Inverway articulates well the sense of injustice created by workfare combined with income management:

> I told the consultation people I've been trying to get a job for more than two years now, but they just keep forcing me to work for the BasicsCard. It's like the old days, before our walk-off, when the station workers were just paid in rations.[31]

Similarly, John Leemans states:

> Since CDEP and the Daguragu Council were taken away from us, there are hardly any jobs. And so many of the jobs like Night Patrol are being done now by white people. We do not want to work for the dole and BasicsCard. We are the people who went on strike for equal wages and for land rights. We are still fighting strongly. It's clear the government wants us to leave our lands in search of work but we will keep fighting until we get the message through – our land is our life and we will not leave.[32]

Relatedly, Northern Territory elder Dr Gondarra stated that it 'was never our dream to come to the white man's yard. It wasn't our dream to come and work for the white man as a slave.'[33] As these statements show, coercive workfare arrangements are

[29] Commonwealth of Australia, *The Forrest Review* (2014) 100-108; Shelley Bielefeld, Submission to the Senate Standing Committee on Community Affairs, *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*, 18 September 2015, 1-15.
[30] Shelley Bielefeld, 'Income Management, Indigenous Peoples and Structural Violence **–** Implications for Citizenship and Autonomy' (2014/2015) 18(1) *Australian Indigenous Law Review* 99, 100-103.
[31] Gurindji worker Peter Inverway quoted in 'Media Release from the Gurindji' in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (Concerned Australians, 2015) 104.
[32] John Leemans, 'Stronger Futures' in in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (Concerned Australians, 2015) 160.
[33] Dr Gondarra in the documentary *Our Generation* quoted in Melissa Lucashenko, 'What I heard about the Intervention', in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology*, (Concerned Australians, 2015) 108.

particularly inappropriate for Australia's First Peoples because they can be seen as unjustly furthering colonialism. Any CDP scheme should be based on voluntary participation, as was the case under the former CDEP scheme. The Bill in its current form should be withdrawn. Genuine and thorough consultation needs to take place with affected Aboriginal communities prior to the drafting of a proposed legislative instrument, in a manner that complies with Australia's international human rights obligations. Such consultation must be undertaken in accordance with the ethical principles to which I previously referred, with a view to obtaining informed and free consent from affected communities.

Human Rights Compatibility Issues

The Human Rights Compatibility Statement (HR Statement) accompanying the Bill falls far short of a rigorous rationale for the significant limitations on human rights contained under this scheme. Indeed it entirely omits reference to several significant human rights that are relevant to the Bill. It is unclear whether the drafters of the government's HR Statement genuinely lack understanding of some pertinent human rights issues or whether this is wilful ignorance on the part of the Bill's proponents.

The HR Statement asserts that the Bill is compatible with Australia's human rights obligations outlined in the international instruments in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This assertion runs counter to human rights scholarship on workfare which reveals that such schemes involve violation of multiple human rights.[34] One of these is the 'right to social security' contained in Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Rather than promoting the 'right to social security', as is asserted in the Human Rights Compatibility Statement, coercive workfare arrangements effectively place welfare recipients in a position where they have to earn their social security payment. This is inappropriate. Human Rights that have to be earned are not human 'rights' at all. As Louis Henkin states:

> Human rights are *rights*; they are not merely aspirations, or assertions of the good. To call them rights is not to assert, merely, that the benefits indicated are desirable or necessary … To call them "rights" implies that they are claims "as of right", not by appeal to grace or charity … they need not be earned or deserved.[35]

In critiquing the 'rights and responsibilities' rhetoric popular with new paternalists and proponents of behavioural economics Megan Davis notes that Australia's approach to Indigenous peoples has often been premised upon the notion that they 'have to

[34] Mick Carpenter, Stuart Speeden and Belinda Freda (eds), *Beyond the Workfare State: Labour markets, equalities and human rights* (The Policy Press, 2007) Chapters 1 and 11.
[35] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 3 in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 1151.

earn rights'.[36] This is contrary to the internationally accepted idea that human rights have been developed in order to ensure that all people are accorded human dignity.[37]

In the HR Statement accompanying the CDP Bill the government claims that the Bill supports the 'right to work contained in Article 6 of the ICESCR. However a close reading of this Article reveals that the government has missed something fundamental about the 'right to work' as set out under Article 6:

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Choice in this account implies a lack of coercion – yet coercion is at the heart of the workfare regime imposed by the CDP Bill. To the extent to which job seekers are said to 'accept' conditions imposed by workfare, the issue of economic duress warrants consideration. The high penalty rate for Indigenous workers under workfare outlined in Submission 1 raises questions about whether Article 6 is really complied with in the CDP scheme. Reluctant compliance and creative non-compliance regarding workfare should not be seen as acceptance for the purposes of Article 6.

Further on the 'right to work', the HR Statement has under this heading mention of the penalty regime to be imposed upon non-compliant job seekers. That financial penalties be portrayed as incentivising and supporting the 'right to work' is perverse nonsense. It is to turn the language of human rights on its head and empty it of all meaning. Does the government truly believe that if people are harassed, hungry and homeless then they will be more job ready? This cannot reasonably be supposed to comply with Australia's international human rights obligations.

In their 2 February 2016 Report the Parliamentary Joint Committee on Human Rights considered human rights compatibility issues with the CDP Bill.[38] Some of their key findings are as follows:

> The committee's assessment of the new obligations and penalty arrangements against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is compatible with international human rights law. … the new obligations and penalty arrangements engage and limit the right to social security. The statement of compatibility does not justify that limitation for the

[36] Megan Davis, 'Arguing over Indigenous Rights: Australia and the United Nations' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation* (Arena Publications, 2007) 104.
[37] Megan Davis, 'Arguing over Indigenous Rights: Australia and the United Nations' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation* (Arena Publications, 2007) 104.
[38] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016).

purposes of international human rights law. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:

- the objective to which the proposed changes are aimed, and why they address a pressing and substantial concern;
- the rational connection between the limitation and that objective; and
- reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.[39]

The PJCHR also concluded that the HR Statement did 'not address the effect of the new compliance obligations or penalty arrangements on recipients' rights to … an adequate standard of living.'[40] This seems particularly important given the high rate of penalties imposed on Indigenous job seekers under workfare arrangements, as Submission 1 to this Committee outlines in striking detail.

The HR Statement states that 'The Bill is … consistent with the rights to equality and non-discrimination.' This is extremely unlikely. By geographically targeting areas where there are high numbers of Indigenous unemployed people the Bill can still fall foul of Article 1 of the *International Convention on the Elimination of All Forms of Racial Discriminatio*n (ICERD), which takes into account not just the stated purpose of legislation but its consequences. Article 1 provides:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose **or effect** of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (emphasis added)

Although the government has sought to define all areas affected by the Bill as 'remote income support regions' under the proposed section 1061ZAAZ – it is possible that there are individual communities where the entire cohort subject to CDP will be Aboriginal. Clearly there are still issues of discrimination at work in such circumstances. Relevantly, General Recommendation 23 4(d) of the Committee for the Elimination of Racial Discrimination requires that 'no decisions directly relating to' the 'rights and interests' of Indigenous peoples are to be 'taken without their informed consent.'[41] This imposes a more substantial obligation than the mere 'consultation' flagged in the Explanatory Memorandum.

[39] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 9-10.
[40] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 9.
[41] Committee on the Elimination of Racial Discrimination, *General Recommendation 23 on the rights of indigenous peoples* (Seventy-first session, 1997).

As concerns ICERD, the PJCHR pointed out that the CDP Bill would overwhelmingly affect Indigenous peoples:

> Indigenous people will be disproportionately affected by this measure as more than 80 per cent of people currently supported by Community Development Program providers are Aboriginal and Torres Strait Islander people.[42]

They said that although not constituting direct racial discrimination for the purposes of ICERD, there is an issue to be considered with indirect discrimination:

> [I]ndirect discrimination may occur when a measure which is neutral on its surface has a disproportionate impact on groups of people with a particular attribute, such as race. Where a measure impacts on particular groups disproportionately, it establishes prima facie, that there may be indirect discrimination.[43]

The PJCHR stated that:

> Under international human rights law such a disproportionate impact may be justifiable if it can be demonstrated that it seeks to pursue a legitimate objective, is rationally connected to that objective and is proportionate. Such a disproportionate impact may also be justifiable if it is a special measure designed to assist or protect disadvantaged racial groups.[44]

There is nothing in either the CDP Bill or the Explanatory Memorandum indicating that CDP is intended to be a special measure.

Finally, the PJCHR stated that:

> The committee's assessment of the new obligation requirements and penalties for remote income support recipients against articles 2 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the measure is a proportionate limitation on the rights of remote income support recipients.[45]

As the preceding human rights related points indicate, the concept of proportionality is critically important in assessing whether any limitations imposed upon human rights are legitimate under international human rights law. Yet the PJCHR concluded

[42] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 11.
[43] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 11.
[44] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 12.
[45] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 12.

that the government had not given any information upon which to base a proportionality assessment.[46] Therefore there was a grave inadequacy in the HR Statement. The sole reference to proportionality in the HR Statement was contained in the concluding paragraph:

> The amendments are compatible with human rights because they promote rights to social security, an adequate standard of living, to work and are consistent with the right to equality and non-discrimination. To the extent (if any) that they may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of supporting job seekers in remote Australia, by strengthening the existing incentives for remote job seekers to actively engage with a range of mutual obligations requirements and opportunities to participate and remain in paid work.[47]

This involved an assertion of human rights compliance rather than a reasoned account of how such measures could possibly be compliant and proportionate.

The concept of proportionality is increasingly significant in the human rights domain.[48] Although there are varying ways in which the concept is delineated, it is often considered to involve four key questions:

1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
2. Are the means in service of the objective rationally connected (suitable) to the objective?
3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[49]

The Human Rights Compatibility Statement accompanying the Bill squares poorly against the above criteria. This is particularly apparent with criterion 4 when considered against the imposition of a penalty regime that leaves already poor

[46] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 12.
[47] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, 7.
[48] Grant Huscroft, Bradley Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 1.
[49] Grant Huscroft, Bradley Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 2.

people with even fewer finances to live. Criterion 3 is also worthy of further reflection, as there are arguably a number of alternatives by which the government could seek to achieve the objectives set out in the CDP Explanatory Memorandum. For example, as mentioned above, the finances used to fund this resource intensive paternalistic framework could instead be used to create genuine job opportunities for job seekers.

An alternative to workfare is Basic Income grants, also canvassed in Submission 3 by Elise Klein and Submission 8 by Jon Altman, which entail unconditional welfare payments. Standing proposes that governments introduce a basic income with 'an amount … sufficient to cover basic material needs, while facilitating the pursuit of other life-enhancing goals.'[50] This approach would not require the same resource intensive bureaucracy to implement as workfare and other welfare conditionality regimes. It would be a citizenship right, not dependent upon bourgeois moralistic behavioural economics.[51] Basic income trials are currently taking place in the Netherlands and in many other places.[52] I submit that the workfare approach is fundamentally misguided and ought to be abandoned. In its place Australia should investigate the trial of Basic Income grants in these remote communities, after full consultation and consent of affected communities in compliance with Australia's international human rights obligations.

Although an important contribution to the discussion about human rights limitations with the CDP Bill, like the HR Statement, the PJCHR report omits reference to several relevant human rights that warrant consideration. Although the PJCHR referred to the *International Covenant on Civil and Political Rights* (ICCPR), they omitted reference to prohibitions on 'forced labour' which are directly relevant for workfare. Article 8(3)(a) of the ICCPR states that 'No one shall be required to perform forced or compulsory labour'. The permissible exceptions under Article 8(3) are as follows:

> (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
>
> (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

[50] Guy Standing, *A Precariat Charter: From Denizens to Citizens* (Bloomsbury, 2014) 317.
[51] See Shelley Bielefeld, 'Income Management and Indigenous Peoples – Nudged into a *Stronger Future*?' (2014) 23(2) *Griffith Law Review* 285-317 for a critique of nudge paternalism and behavioural economics.
[52] 'The Dutch "basic income" experiment is expanding across multiple cities', Quartz, 13 August 2015, <http://qz.com/473779/several-dutch-cities-want-to-give-residents-a-no-strings-attached-basic-income/>; 'Basic Income News', Basic Income Earth Network, <http://www.basicincome.org/news/>.

> (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
>
> (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
>
> (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
>
> (iv) Any work or service which forms part of normal civil obligations.

CDP does not fall within the class of activities in Article 8(3)(b) and (c). Although the government might like to portray workfare schemes as part of 'normal civil obligations' – these are not normal – otherwise forced labour to benefit society would be required from the idle rich not solely from the idle poor.

The other provision of the ICCPR that is relevant to consider in the context of the CDP Bill is Article 17, which provides:

> 1. 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.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The issue referred to above regarding disclosure of cultural business relates to Article 17(1), as an infringement of the right to privacy.

The HR Statement and the PJCHR Report also entirely omit reference to the *Convention on the Rights of Persons with Disabilities*, and yet the Explanatory Memorandum makes clear that the Bill is to apply workfare arrangements to those in receipt of a Disability Support Pension under the age of 35.[53] This is contrary to Article 27(2) of the Disability Convention which provides:

> States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

[53] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2015, 7.

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Since the CDP scheme imposes more onerous obligations upon those living in remote areas than metropolitan areas, workfare is not being experienced on an equal basis by remote welfare recipients, including those with disability issues.

As stated by then Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma in 2007, 'Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well-being of these communities in both the short and longer term.'[54]

Conclusion

The most recent McClure Report indicated the government is interested in ensuring that welfare payments are less favourably treated than other forms of income.[55] This strategy is currently being pursued by the Australian government with great gusto. I suggest that workfare arrangements have more to do with what W. E. Du Bois refers to as the creation of a 'psychological wage',[56] than benefits to remote Indigenous communities. Although Du Bois originally applied this concept in the context of benefits given to poor white labourers in the United States, it is arguably an apt concept to describe the push towards market oriented valuation embedded in contemporary neoliberal regulatory states. In short, those who are employed in the market economy are given a 'psychological wage' in addition to their monetary wage, that of not being subject to workfare, stigmatising welfare discourse and other forms of welfare conditionality. This is not a progressive but a regressive strategy. It is socially divisive and unlikely to produce the positive outcomes claimed by workfare proponents. Australia is embarking on further punitive welfare policy at the same time as several other western nations are either experimenting with or contemplating more enlightened approaches such as provision of a basic income.[57]

I conclude with the following recommendations:

1. I recommend that the Bill not be implemented as legislation, for the reasons outlined above.
2. I recommend that a penalty structure be abandoned for welfare recipients already struggling on below poverty line welfare payments.
3. I recommend that no job seeker be subject to income managed workfare payments.
4. I recommend that Basic Income be trialled in place of workfare.

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[54] Tom Calma, *Social Justice Report 2007* (Human Rights and Equal Opportunity Commission, 2007) 248.

[55] Department of Social Services, *A New System for Better Employment and Social Outcomes – Final Report of the Reference Group on Welfare Reform to the Minister for Social Services* (Commonwealth of Australia, 2015) 9.

[56] W. E. Du Bois, *Black Reconstruction in America 1860-1880* (The Free Press, 1998) 700.

[57] For example, contemplation of Basic Income is underway in Finland and France: 'Towards a Universal Basic Income in France: elements for a debate', Basic Income Earth Network, 1 February 2016, <http://www.basicincome.org/news/2016/02/towards-a-universal-basic-income-in-france-elements-for-a-debate/>.

5. I recommend that the Committee give consideration to the numerous human rights compatibility problems outlined in this submission and the PJCHR Report but not considered in the government's HR Statement.

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

Yours sincerely,

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