

11 October 2018

Human Rights and Technology Project,
Australian Human Rights Commission,
GPO Box 5218
Sydney NSW 2001

By email: tech@humanrights.gov.au

Dear Australian Human Rights Commission,

NSSRN submission to the Human Rights and Technology Project

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

The NSSRN welcomes this consultation on human rights and technology. Our submission draws attention to some of the recent developments in the use of technology, data and automation in the social security space and how these impact on the right to social security and to an adequate standard of living.¹

The NSSRN supports and embraces new technology that makes the social security system more accessible, transparent, inclusive, secure and generally less frustrating for recipients and claimants. However, some of the recent developments in the use of technology, data and automation in the social security space have adversely impacted social security recipients and claimants. These adverse impacts have been particularly significant for those who already face complex intersections of disadvantage and risks of abuse.

Future expansion of online welfare provision should be guided by ethical principles that ensure technological development does not further entrench existing social disadvantage or breach fundamental principles of rule of law and human rights. A number of key safeguards should be introduced. In-person and telephone-based services must be made widely available as an alternative to online service provision in order to prevent exclusion and abuse, and there must be an adequate level of oversight of digital service provision. The collection of data must be accompanied by appropriate disclosure of purpose and at least some recipient control over data use. Lastly, data must not be used in a way that disproportionately targets certain groups. Only by placing these principles at the forefront of welfare technology can we build an up-to-date model of service provision that truly serves the needs of all citizens, particularly those most vulnerable.

¹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 and 11.1.

1. What types of technology raise particular human rights concerns? Which human rights are particularly implicated?

The increasing use of various types of technology, including use of self-service online interactions, use of data for predictive modelling, data matching, and AI, have concerning implications for the right to social security and an adequate standard of living.²

The application of technology in the social security system also raises other considerations around the right to privacy and non-discrimination.

For example in 2018, it was reported that DHS intended to introduce facial recognition software to the online claims process.³ In the future, when a person makes a claim for a new social security payment, their identity will be verified once a series of images of their face at various angles is uploaded to the system. These images will then be cross-matched to the Department of Human Affairs' database of passport images. It is expected that states and territories will also supply driver licence photos to expand this database. Those who do not consent to the use of facial recognition software will be unable to access government services online.⁴ As staff numbers at Centrelink offices decrease (see below response to question 4), those who do not consent to facial recognition will effectively be subject to longer wait times. Further, those who are unable to regularly attend a Centrelink office in person will be solely reliant on the phone self-service, which in 2017-18 recorded an average waiting time of 15 minutes 56 seconds and 36.3 million callers receiving a busy signal.⁵ As recipients face increasingly frequent income and activity reporting requirements, the difference in efficacy between online and in person or telephone provision could effectively elicit forced consent to the use of facial recognition.

The discriminatory outcomes of the use of data for predictive modeling are discussed in more detail in the response to question 3.

2. Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people (such as children and young people; older people; women and girls; LGBTI people; people of culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander peoples)?

It is likely that the digital transformation will result in many improvements to the social security system. However, we should not lose sight of social security recipients or claimants who will not benefit from the changes – people who are not digitally literate, who have language or literacy

² To assist with this submission, we have used the NSSRN Human Rights Advocacy Tool. The tool outlines which international human rights norms are relevant to social security laws and policies, and how those norms can be used in a domestic advocacy setting. See National Social Security Rights Network, Human Rights Advocacy Tool, <http://www.nssrn.org.au/briefing-paper/human-rights-advocacy-tool/>

³ Henry Belot, 'Government's facial recognition scheme could be abused, lawyers warn', ABC News (online), 3 May 2018, <http://www.abc.net.au/news/2018-05-03/facial-recognition-scheme-could-be-abused-law-council/9723494>

⁴ Ally Foster, 'Welfare recipients to undergo face scan in order to get payments', News.com.au, 2 July 2018 <https://www.news.com.au/technology/online/security/welfare-recipients-to-undergo-face-scan-in-order-to-get-payments/news-story/9ca653201454c0f64c5b331a36564cf5>

⁵ Christopher Knaus, 'Christopher Knaus, ting times blow out for jobs and family lines'ing times blow out for jobs and famil<https://www.theguardian.com/australia-news/2018/may/31/centrelink-call-waiting-times-blow-out-for-jobs-and-family-lines>

barriers, who live in remote or regional areas without regular or cheap access to the internet, or who have physical or mental impairments that are not supported by accessible technology. To ensure that these most vulnerable groups of people are not further excluded, the introduction of any new technology to the social security system must be accompanied by a continuation of a range of services to people with barriers to participating in the digital world.

The experience of many clients assisted by our member centres is perfectly captured in the fictional story told in the 2016 film, *I, Daniel Blake*, for which British filmmaker Ken Loach won the Palme d'Or at the Cannes Film Festival.⁶ The character, Daniel Blake, is a man in his late 50s who suffers a heart attack at work and attempts to receive disability payments under the UK social security system. Although his doctor advises against returning to work, his social security work capability assessment comes to a different conclusion, and he becomes dependent on an inadequate job seeker payment. He has worked his entire life as a carpenter and never had cause to use a computer. The film portrays the barriers that he faces in trying to claim payments, appeal adverse decisions and interact with the social security system while digitally illiterate. It provides a compelling picture of the vulnerability of people who have barriers to using digital tools and the risk that they will not be able to access the support they need from the system.

Of course, there are many people within the social security system who have no barriers to using digital technology. However, the Australian Digital Inclusion Index 2018 has indicated that people in low levels of income represent the most digitally excluded group in Australia.⁷ Other key excluded groups are people over 65, people with disabilities and Indigenous people - people that are represented across the social security system.⁸ This means that many social security recipients have barriers to using and accessing digital technologies. This must be taken into consideration when social security services are increasingly moved online.

Below we provide examples of groups which are likely to face particular hurdles when more social security services are moved into the online space: people experiencing family violence, people who are less digitally literate (including older people), and people who live in remote areas.

People experiencing family violence:

Our 2018 report '*How well does Australia's social security system support victims of family and domestic violence?*' highlighted some of the unintended consequences of shifting more service provision into the online space for people experiencing family and domestic violence.⁹ As noted in the report, many people who approach Centrelink are initially referred to the computer to access MyGov or to the telephone to access Centrelink's call centre. However, for many people experiencing family violence this is not appropriate. Many people require urgent access to Centrelink social workers who can assist with access to other support agencies, such as emergency housing, and facilitate access to crisis payments that will provide financial security that will support a person to leave a violent environment. Face-to-face services increase the likelihood that people can comfortably share their

6 I, Daniel Blake (eOne Films, 2016), Trailer https://www.youtube.com/watch?v=ahWgxw9E_h4

7 Justin Thomas, Chris K Wilson, Kay Cook, Jo Barraket, Yee Man Louie, Indigo Holcombe-Jones Thomas, 2018, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2018*, RMIT University, Melbourne, for Telstra, 6. <https://digitalinclusionindex.org.au/wp-content/uploads/2018/08/Australian-digital-inclusion-index-2018.pdf>

8 *ibid*, 14-15.

9 National Social Security Rights Network, '*How well does Australia's social security system support victims of family and domestic violence?*' (Report, August 2018) http://www.nssrn.org.au/wp/wp-content/uploads/2018/08/NSSRN_Report2018_FamilyViolence_SocialSecurity_sm.pdf, 48-49.

story, and also increase a person's confidence that a social worker understood and acknowledged the gravity of their circumstance. However currently:

*"In the experience of NSSRN member centres, there are not enough frontline staff or social workers to: deal with cases involving family and domestic violence; resolve issues that cannot be resolved by referral to a depersonalised telephone-based system that undermines the ability to build rapport between staff and client; build rapport which increases the likelihood of a client disclosing details of their difficult circumstances because they feel supported."*¹⁰

Timely access to face-to-face services is required in order to provide better support to people experiencing family and domestic violence.

Requiring social security recipients to use online tools to access their payments may also increase the risk that violent partners may interfere with a person's entitlement, or monitor their income reporting to Centrelink. Although technology can also be used as a protective measure by people experiencing violence, and the intent of digital services may be to increase efficiency and reduce cost, alternative modes of communicating with government that deliver the same quality of service must remain available, particularly for those at risk of violence through digital technology. For example, the Domestic Violence Resource Centre Victoria has reported the rise of technology-facilitated domestic violence through their SmartSafe project.¹¹ It has been reported that domestic violence now "almost always involves some form of digital technology," with the most common forms being "monitoring someone's habits via social media, harassing via text messages, or using GPS tracking technology to stalk."¹² The risk of technology-facilitated domestic violence is further heightened by the privacy implications of storing recipients' data online. In 2016, for example, hundreds of users' e-mails were sent to other users due to a clerical error.¹³ Such breaches could put recipients at risk of having their details exposed to violent ex-partners, endangering their safety.

People less digitally literate:

Concerns associated with financial control and abuse also extend to those people who are not competent or unable to use digital tools to access government services. Our member centres report that some clients have shared their myGov authentication credentials with other people because they require assistance to digitally interact with government agencies such as Centrelink. The sharing of myGov logins and passwords with payday lenders and other companies has also been reported.¹⁴ In our view, encouraging people to use digital tools (and limiting the ability for people to interact with the social security system in more traditional ways) may have significant and adverse consequences in exposing people to financial abuse, as people seek the help of others to communicate online with government.

National Seniors Australia recently reported that "[m]ost seniors (regardless of socio-economic background) opt to seek a helping hand when applying for their Age Pension rather than attempting

¹⁰ *ibid*, 48

¹¹ Delanie Woodlock, 'Technology-facilitated Stalking: Findings and Recommendations from the SmartSafe Project', (Domestic Violence Resource Centre Victoria 2013).

¹² Antony Funnell, 'How technology can be used to safeguard against domestic violence', ABC News (online), 26 September 2017, <http://www.abc.net.au/news/2017-09-26/how-technology-can-be-used-to-stop-domestic-violence/8981478>

¹³ Noel Towell, 'Noel Towell, 16ogises for new privacy breach', The Sydney Morning Herald (online), 2 November 2016 <https://www.smh.com.au/public-service/centrelink-apologises-for-new-privacy-breach-20161101-gsf1cp.html>

¹⁴ Arial Bogle, 'Payday lenders ask customers to share myGov and banking passwords, putting them at risk', ABC News (online), 8 January 2018, <http://www.abc.net.au/news/science/2018-01-08/payday-lenders-ask-for-mygov-banking-passwords-security/9249086>

it independently.”¹⁵ Those that made their application for the pension online were overwhelmingly dissatisfied with their experience because access was so hard.¹⁶ Once others gain access to myGov accounts, the risk of financial abuse increases. Seniors Rights Service has recently reported that around 5% of older Australians experience some form of abuse, with financial abuse the most commonly observed type.¹⁷

The push to make social security recipients ‘self-manage’ their interaction with the system through online platforms also extends to employment services managed by the Department of Jobs and Small Business. Most people on unemployment payments who live in non-remote Australia must participate in the *jobactive* employment services program.¹⁸ This program requires that people agree to a job plan which typically involves looking for work and attending mutual obligation activities. Recent changes emphasise the jobseekers’ ‘personal responsibility’, and they are required to report their attendance and participation, increasingly with online tools (including a mobile phone app). However, if someone is not capable of using the tools, the provider bears the onus of reporting on behalf of that person. Given this additional burden on the provider, we are concerned that many people will be pressured to use the online systems even if they are not digitally competent or have other barriers to using digital tools. For example, refugees who have spent many years in refugee camps may have never had access to this kind of technology, leaving them demoralised and confused when they are left to navigate it themselves.¹⁹

People living in remote Australia and without access to reliable digital services:

For those living in remote Australia, there are significant infrastructure barriers to accessing digital spaces. For example, the Australian Digital Inclusion Index 2018 surveyed the remote Indigenous community of Ali Curung, NT. They found that “high levels of geographic isolation and socioeconomic disadvantage pose distinct challenges for digital inclusion”²⁰ and that “remoteness further diminishes digital inclusion for Indigenous Australians, particularly with regards to Access and Affordability.”²¹ Many people living remotely access the internet through their mobile phone service, however mobile data is more expensive than fixed lined internet connections. Whilst there is a Telephone Allowance available as an additional payment to people on income support payments, most people are only eligible for the basic rate which is \$28.80 paid every 3 months.²² This payment cannot sufficiently cover the expense of remaining connected, particularly for people living remotely.

The geographical isolation also raises a number of issues when access to social security benefits are heavily reliant on functioning technology, such as areas with widespread income management and restricted access to cash. For example, the wet season in early 2018 brought monsoonal storms to the Tiwi Islands, north of Darwin, causing damage to a Telstra tower and interfering with resident’s access to fuel, internet and phones over a 3-day period.²³ During this time EFTPOS machines were down and many residents struggled to buy essential items due to their lack of access to cash. Only one of the

15 National Seniors and Retirement Essentials, ‘The Centrelink Experience: From ‘waiting, frustrating, hopeless’ to ‘helpful’, friendly, positive’ (National Seniors Australia, 2018), 4.

16 *ibid*.

17 National Ageing Research Institute, ‘Elder Abuse Community Action Plan for Victoria’, (February 2018), 9.

18 The program is managed by the Department of Jobs and Small Business, who contract employment services to various providers (many of whom run for profit).

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

20 *above n 8*, 15.

21 *above n 8*, 6.

22 Department of Human Services, Telephone Allowance, Page last updated: 12 May 2018, <https://www.humanservices.gov.au/individuals/services/centrelink/telephone-allowance>.

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

two shops in Wurrumiyanga, on Bathurst Island could process non-cash sales. When questioned about the options available to people with no access to cash, Minister for Indigenous Affairs, Nigel Scullion, argued that people could telephone the DHS Income Management line – however the phone lines were also down during this period.²⁴

Even the Administrative Appeals Tribunal has considered unreliable technology as a special circumstance in the recently reported decision of *Shaikh and Secretary, Department of Social Services*²⁵. This matter concerned the applicant’s eligibility for payment of a bonus that had a strict application time, extended only where special circumstances exist. The applicant attempted to claim for the now extinct Job Commitment Bonus on the last day available to him (90 days after the completion of 1 year of work). He tried several computers and browsers but could not complete the application due to server issues. He submitted his application a couple of weeks later. The Tribunal considered his evidence, including the failure to receive SMS notifications of incoming reminder letters and his other life stresses. The Tribunal found special circumstances existed to extend the application time, finding at 113:

“I find the fact that he did all he reasonably could to lodge it on the last day of the 90 day period and the fact that the department’s computers malfunctioned in itself amounted to special circumstances that entitled him to a further 90 days period in which to lodge his claim which he easily did, lodging it successfully on 27 July 2016.”

3. How should Australian law protect human rights in the development, use and application of new technologies? In particular:

a) What gaps, if any, are there in this area of Australian law?

b) What can we learn about the need for regulating new technologies, and the options for doing so, from international human rights law and the experiences of other countries?

c) What principles should guide regulation in this area?

Use of data for predictive modelling and the risk of discriminatory outcomes

Internationally, attention has been given to the use of social security data by governments to engage in predictive modelling, and wholly or partially automated decision making processes. In her book *Automating Inequality*, Virginia Eubanks has described how poor people “bear a much heavier burden of monitoring, tracking, and social sorting than advantaged groups”.²⁶ Her work describes the level of surveillance and ‘digital social sorting’ experienced by people who rely on social security payments. She writes:

“Across the country, poor and working-class people are targeted by new tools of digital poverty management and face life-threatening consequences as a result. Automated eligibility systems discourage them from claiming public resources that they need to survive and thrive. Complex integrated databases collect their most personal information, with few safeguards for privacy

²⁴ *ibid.*

²⁵ *Shaikh and Secretary, Department of Social Services* [2018] AATA 458.

²⁶ Virginia Eubanks, ‘The Digital Poorhouse’, *Harper’s Magazine* (online), January 2018 <https://harpers.org/archive/2018/01/the-digital-poorhouse>.

or data security, while offering almost nothing in return. Predictive models and algorithms tag them as risky investments and problematic parents. Vast complexes of social service, law enforcement, and neighborhood surveillance make their every move visible and offer up their behavior for government, commercial, and public scrutiny.”

In Australia, it has been reported that DHS is investing in data analytics and predictive modelling through their Department of Human Services’ (DHS) Welfare Payment Infrastructure Transformation (WPIT) project.²⁷ Garrett MacDonald from DHS has indicated that the focus of their predictive modelling may prevent overpayments, stating:

“So what we’re looking at is how do we deploy predictive analytics so we can take a look at an individual’s circumstances, and say ‘what do you think the probability is that you may end up with an inadvertent overpayment and how can we engage with you proactively throughout the year to help true that up, so that you don’t reach the end of the year and have an overpayment that we need to recover’?”²⁸

We are concerned about the risk of adverse consequences as a result of predictive modelling and query what data will be used in the probability assessment that someone may be overpaid in the future. Eubanks has described how some groups of people are disproportionately targeted in predictive modelling, including people of colour.²⁹ It is not known whether certain groups of social security recipients will be subjected to greater scrutiny, or have further conditions imposed on them, if the data predicts that they may be more likely to be overpaid or fail to meet their mutual obligation requirements.

4. In addition to legislation, how should the Australian Government, the private sector and others protect and promote human rights in the development of new technology?

Maintain an adequate level of human-delivered service

Many of the recent technological developments in the social security system largely relate to the service-delivery end of the social security system and have been driven by of the WPIT project.³⁰ Other developments have come through higher level policy and whole of government approaches to sharing data and automating decision-making processes.

The DHS WPIT project is an important opportunity to improve Centrelink service delivery and to reduce the time and number of interactions a person has with a Centrelink worker, either physically in the Centrelink office or on the telephone.³¹ Theoretically, as more digitally capable people use online self-management tools, the capacity of DHS customer service officers to provide better assistance to the more vulnerable people in the social security system is enhanced. However, the push

27 Ry Crozier, DHS wants analytics to stop ‘inadvertent’ overpayment of benefits, IT News (online) 21 March 2018, <https://www.itnews.com.au/news/dhs-wants-analytics-to-stop-inadvertent-overpayment-of-benefits-487375>

28 *ibid.*

29 Alyssa Edes and Emma Bowman, ‘Automating Inequality’: Algorithms in public services often fail the most vulnerable’, NPR (online), 19 February 2018, <<https://www.npr.org/sections/alltechconsidered/2018/02/19/586387119/automating-inequality-algorithms-in-public-services-often-fail-the-most-vulnerab>>

30 The WPIT project aims to overhaul DHS’ 30 year old IT systems. The NSSRN is a member of an advisory group to the WPIT program, and we have had the opportunity to be consulted on many new changes to how DHS delivers its services.

31 Average wait times....

for more digital interactions has been coupled with a number of staffing cuts across the Department, effectively eliminating this opportunity.

The Government's 2018-2019 Budget indicated that around 1300 positions at DHS will be cut. This follows a reduction of 1200 staff in the previous 2017-2018 budget.³² Although DHS is outsourcing some of their services, including some Centrelink call centres, these figures do not balance the staff loss.³³ The wider community sector also is concerned that the quality of service provided to social security recipients will decrease when companies are contracted to run social services for-profit.³⁴ Despite persistent criticisms aimed at DHS for failing in their service delivery of social security, the Government is not adequately resourcing DHS.

Maintaining an adequate level of human-delivered services will not only ensure that digitally-challenged vulnerable people will have a way of accessing the services they need, but also provide a point of comparison with and oversight of the digitally delivered services as well as an essential backup when digital services fail.

Ethical frameworks, including the requirement of consent

The NSSRN supports and embraces new technology that makes the social security system more accessible, transparent, inclusive, secure and generally less frustrating for recipients and claimants.

Unfortunately, we have seen the introduction of a number of concerning measures that do not fully satisfy these principles. For example, the debt-related measure colloquially known as Robodebt has resulted in a significant number of people receiving baseless allegations of social security overpayments as a result of automated data matching.³⁵ The measure is arguably illegal and has apparently been made without any consideration of the ethical implications or impact on human rights.³⁶ There needs to be a clear and publicly available ethical framework for decision-making in matters concerning technology and social security.

Further discussion of the human rights implications of Robodebt is below in response to questions on AI.

The collection of personal data through welfare conditionality raises another set of concerns relating to the absence of consent for the collection and use of this data.

While most social security payments are not sufficient to meet the basic standard of living cost,³⁷ some of the most socio-economically disadvantaged individuals in Australia rely on these payments to meet basic living expenses, such as housing, food, utilities and health care. For most of these people,

32 Doug Dingwall and Sally Whyte, 'Budget 2018: Human Services cuts loom, Coalition muscles up security', The Canberra Times (online), 8 May 2018, <https://www.canberratimes.com.au/business/the-economy/human-services-cuts-loom-while-coalition-muscles-up-security-20180507-h0zq73.html>.

33 Stephen Easton, on-tiwis/9387250..net.au/news/2018-02-02/storms-highlight-welfare-card--stop-domestic-violence/8https://www.themandarin.com.au/96888-centrelink-to-outsource-another-1500-call-centre-staff/

34 ACOSS, 'Taking the 'human' out of human services', 23 April 2018, https://www.acoss.org.au/media_release/taking-the-human-out-of-human-services/; CPSA, 'Slippery slope to privatizing Centrelink', 17 November 2017, <http://www.cpsa.org.au/news/other-news/1815-slippery-slope-to-privatising-centrelink>; Christopher Knaus, 'Public sector union condemns Centrelink move to privatise call centre', The Guardian (online), 11 October 2017, <https://www.theguardian.com/australia-news/2017/oct/11/public-sector-union-condemns-centrelink-move-to-privatise-call-centre>.

35 At least 20,000 as at January 2018; SBS, 'Centrelink robo-debt faces fresh inquiry', SBS (online), 13 June 2018, <https://www.sbs.com.au/news/centrelink-robo-debt-faces-fresh-inquiry>.

36 Terry Carney, 'Robo-Debt Illegality: A Failure of Rule of Law Protections?', AUSPUBLAW, 30 April 2018, <https://auspublaw.org/2018/04/robo-debt-illegality/>.

37 Peter Saunders and Megan Bedford, 'New Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians' (Social Policy Research Centre, August 2017).

social security is not a choice. They must engage with the system to survive and this inevitably means that they must give over a significant amount of personal data to government. There is very little limitation on how the government can use this information.

The social security system is intended to ensure that all individuals have access to basic needs and is closely connected to the right of individuals to have an adequate standard of living.³⁸ The recognised right to social security is also not dependant on an individual's behaviour or conduct. However, as described by academic Beth Goldblatt, Australia's social security system has increasingly shifted from an individual's right to social security, towards "conditional entitlements based on 'mutual obligation'".³⁹ Payment of social security benefits are increasingly subject to great scrutiny and compliance obligations, leading Goldblatt to argue that social security is used "as a punitive mechanism to control the behaviours of marginal groups, rather than viewing it as an entitlement of citizenship".⁴⁰ Behavioural control of social security recipients is demonstrated in income management schemes, in proposed drug testing trials, and in the 'no job, no pay' policy, where families who fail to immunise children do not receive family assistance payments. All these measures compulsorily require access to other sensitive personal data of social security recipients and this data is used to determine a person's entitlement to payment.

For instance, all social security recipients who are subject to income management schemes have the majority of their spending decisions scrutinised by DHS and exposed to a privately contracted payments company, Indue. This is because a person subjected to income management has 50 to 80 per cent of their social security payments quarantined into a Centrelink administered account to spend on 'priority needs', typically defined as food, utilities, clothing, health care and education. The payments into this account are commonly accessed via a BasicsCard, or a Cashless Debit Card, which is similar to a bank issued debit card without the ability to withdraw cash. All purchases on the card are recorded. As of June 2018, 24,800 people were on income management, with another 10,000 participating in the Cashless Debit Card trials.⁴¹ The schemes disproportionately target Indigenous communities: an overwhelming 78% of people on income management are Indigenous.⁴²

In the Cashless Debit Card trial sites, a social security recipient may apply to a Community Panel to reduce the percentage of benefit quarantined to the card.⁴³ However, the Community Panel must be satisfied of a person's compliance with a number of behaviours or indicators. Some concerning evaluation criteria includes whether an applicant's home is in good care, whether their rent has been paid, and whether the person has had recent contact with police⁴⁴ - information that should not be relevant to a person's right to social security.

In another example, Parliament is currently considering a bill that will establish a two-year drug testing trial for 5000 new recipients of Newstart Allowance and Youth Allowance in certain trial locations.⁴⁵ This measure will require a random selection of new claimants to undergo a drug test. If a person

38 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, 3, <http://www.refworld.org/docid/3ae6b36c0.html>, art 11(1).

39 Law Council, n1, 23, quoting Beth Goldblatt, 'Social (In)Security and Inequality in Australia: The Limited Role of Human Rights in the Policy Debate' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (The Federation Press: 2017), 183.

40 *ibid.*

41 See Part 3D of Social Security (Administration) Act 1999 (Cth).

42 Department of Social Services, *Income Management and Cashless Debit Card Summary* (29 June 2018) <https://data.gov.au/dataset/income-management-summary-by-measure-inc-basicscard/resource/df226907-69a5-4f02-bedf-8d3328d9e41a>.

43 Department of Social Services, *Ceduna Region Community Panel Guidelines* (May 2016), 3; Department of Social Services, *Kununurra Region Community Panel Guidelines* (September 2016), 4.

44 Department of Social Services, *Wyndham Region Community Panel Guidelines*, n 31, 9.

45 See *Social Services Legislation Amendment (Drug Testing Trial) Bill 2018*.

refuses to consent to the drug test, they will have their payments suspended for 28 days. If a person tests positive to their initial drug test, they will become subject to income management for a 24 month period, regardless of whether they have an ongoing substance use problem. Any further positive drug test will result in the person being referred for a treatment assessment. If treatment is recommended, this treatment will be included in a person's employment pathway path. If a person fails to comply with this plan, they will be subject to penalties or payment suspensions. A person who fails a second or subsequent test is also required to pay the costs of the test by deduction from their payment.

In our view, these welfare conditionality measures are intrusive and punitive to those who experience the greatest financial hardship and disadvantage in our society. They also provide the government with a huge amount of data on people on social security. The scrutiny and collection of spending data, drug use data, and other information, aim to control and manage social security recipients, and disproportionately target Indigenous people on income support. This view is supported by a 2013 evaluation of income management in the Northern Territory that found that:

'the early indications are that income management operates more as a control or protective mechanism than as an intervention which increases capabilities'.⁴⁶

Despite evidence demonstrating that these racially discriminatory measures disempower communities and further entrench issues of poverty and displacement,⁴⁷ these types of welfare conditionality measures are increasingly being introduced into the system.

Another innovation which raises issues of informed consent to the collection and use of data is the introduction of virtual assistants. DHS has already introduced machine learning into their digital space. 'Sam' and 'Oliver' are two virtual assistants that people can interact with in the non-authenticated space, or after they login using their Centrelink credentials. There is very little information made available on how the interaction between people and the virtual assistants are recorded, particularly in the authenticated space where a person's identity is known. On the one hand, a person may act on the basis of information provided from the virtual assistant, even though this may not be accurate. Alternatively, a person may give Centrelink contradictory information to what they provided to the virtual assistant, assessing different eligibility criteria. We are concerned that this may be recorded and flagged by the compliance section of DHS, and even used as evidence of fraud.

In the collection and use of data in the social security system, at the very least it should be made clear to recipients and claimants what information is recorded and for what purpose. However, real consent for the collection and use of data cannot be obtained from social security recipients and claimants in a system which is based on welfare conditionality.

5. How well are human rights protected and promoted in AI-informed decision making?

46 Dr Luke Buckmaster, 'Does income management work?', Parliamentary Library Briefing Book, 2013, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/IncomeManagement quoting Australian Government, 'Income Management Evaluations', Department of Families, Housing, Community Services and Indigenous Affairs website, 18 July 2013.

47 For example, in the Cashless Debit Card trial's Final Evaluation Report, many of the surveyed participants disclosed running out of money to buy food, or to pay for items for their children. The report stated that 52% of participants ran out of money to buy food at least once in the previous 3 months. Approximately one quarter of surveyed participants reported running out of money to buy food "about once every 2 weeks or more", which is equivalent to the payment frequency of their benefit allowance. See ORIMA Research, Cashless Debit Card Trial Evaluation: Final Evaluation Report, released by the Department of Social Services (August 2017), 17.

In particular, what are some practical examples of how AI-informed decision making can protect or threaten human rights?

The best recent example from the social security system of the potential risks to human rights in using AI-informed decision making is DHS's automated, data-driven debt recovery program, colloquially known as "Robodebt".

Data matching between government agencies and the Australian Taxation Office (ATO) for the purposes of identifying social security overpayments has been used in the social security space since 1990.⁴⁸ Since that time, technological developments have enhanced the ability for government to cross-check a recipient's declared income with their ATO records. In 2001, the *Social Security (Administration) Act 1999* was amended to allow computer programs to make decisions under social security law⁴⁹ and this provision primarily related to debt recovery.⁵⁰ However historically, as we understand it, a Department of Human Services' officer would oversee these calculations and approve the decision to raise the debt.

In July 2016, key changes were made by the Department of Human Services to the way in which they compared income declaration data from the Australian Tax Office and income reported by social security recipients. This process, known as the Online Compliance Intervention (OCI, or colloquially, Robodebt), became entirely automated, removing the role of any human intervention. The process also involved averaging out the ATO reported income across the relevant financial year – a practice that unsurprisingly caused the significant numbers of calculated debts to be wrong.⁵¹ In 9 months, approximately 20,000 people were notified of a debt or the likelihood of a debt.⁵² Many people reliant on social security payments simply did not earn the exact same amount of income every fortnight of the year. The OCI process also reversed the onus of proof – DHS identified a possible overpayment but required the former recipient to provide evidence of payslips or bank statements that would satisfy DHS that their calculation overpayment was not correct.

Robodebt has been widely criticised and its legality has rightly been questioned.⁵³ It has caused a number of people significant financial stress. However, the process is yet to be legally challenged in a higher court. It is an ongoing measure and the Government intends to continue to use the technology. The Department of Human Services has recently trialled the measure on groups of people originally excluded due to their vulnerability – that is, people living in remote areas and people with a marked vulnerability indicator on their Centrelink file.⁵⁴ Some vulnerable people have received letters stating

48 This was as a result of the Data-matching Program (Assistance and Tax) Act 1990 (Cth). For more commentary on debt identification, please see Peter Sutherland, 'Social Security and Debt Recovery, Presentation to the AIAL National Administrative Law Conference, Hotel Realm, Canberra : Thursday 20 July 2017

http://communitylegalqld.org.au/sites/default/files/downloads/webinars/peter_sutherland_draft_paper_july_2017.pdf.

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

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

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

52 Department of Human Services, Questions on Notice, Question number 742, 31 May 2017, <https://parlwork.aph.gov.au/house/questions/742>.

53 above n 36.

54 Christopher Knaus, 'Centrelink's new robodebt trial bypasses previous safeguard for mentally ill', *The Guardian* (online), 15 August 2018, <https://www.theguardian.com/australia-news/2018/aug/15/centrelinks-new-robodebt-trial-bypasses-previous-safeguard-for-mentally-ill>

that they may have been overpaid, however there is a significant possibility that these overpayment calculations are incorrect.

It is alarming that the Government is pursuing a debt recovery scheme that is riddled with errors. The averaging of ATO income data across the year is non-sensical and the reversal of the onus of proof offends the rule of the law.

Unless legally challenged, it is likely that Robodebt will continue to target historical overpayments for the indefinite future. However, eventually the process will be exhausted. In July 2018, the ATO commenced their Single Touch Payroll initiative. This involves collecting employee pay data on each pay cycle from large employers who employ more than 20 staff. From 1 July 2019, the ATO will also begin collecting data from small employers. Single Touch Payroll will give DHS the ability to automatically match employer reported data with the income reported by social security recipients. Any discrepancies in income reported will be identified in close proximity to the reporting time.⁵⁵ Ultimately, DHS may offer the option for people to confirm or reject the ATO data when reporting their income, rather than having to provide the exact details themselves. We are not opposed to this move, as ultimately it may help to prevent debts arising and will put an end to the Robodebt debacle.

Robodebt is another example where the balance between automation/digital service and human-delivered service was insufficient to provide the necessary oversight to protect human rights. The previous intervention of a Department of Human Services' officer to oversee the automated debt calculations and approve the decision to raise the debt greatly reduced the risk of incorrect and unfair decisions.

Contact for this submission

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⁵⁵ ATO, 'Regulation Income Statement: Single Touch Payroll', October 2015, 29.