21 September 2018

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

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

Re: Invited Submission to the Inquiry into the Social Security Legislation Amendment (Community Development Program) Bill 2018

I welcome the opportunity to make a submission to the Senate Standing Committee on Community Affairs on the proposed Bill. I make this submission as an academic with a disciplinary background in law whose research focuses on issues of public policy, social justice, human rights and Indigenous peoples.

My previous submissions on the CDP program outline many of my concerns about its *design, operation, ideological underpinnings, and human rights violations*:

- Submission No 11 to the Senate Finance and Public Administration Committee, The appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP), 8 June 2017, 1-5.
- Submission to the Department of the Prime Minister and Cabinet, *Consultation Paper: Changes to the Community Development Programme*, 15 April 2016, 1-3.
- Submission No 19 to the Senate Finance and Public Administration Committee, *Social Security Legislation Amendment (Community Development Program) Bill 2015*, 5 February 2016, 1-18.

These submissions arise from my research and engagement undertaken as the Inaugural Braithwaite Research Fellow at the School of Regulation and Global Governance (RegNet) at the Australian National University, which I now continue as an ARC DECRA Fellow[1] at Griffith Law School at Griffith University for the project *Regulation and Governance for Indigenous Welfare: Poverty Surveillance and its Alternatives*.

The proposed Bill retains many problematic parts of CDP

On reading the proposed Bill I was struck by how many unfavourable aspects of the current CDP would be retained – harsh penalties for persistent and wilful non-compliance, paltry payments for the vast majority of CDP participants who will

[1] Australian Research Council Discovery Early Career Researcher Award (DECRA) (DE180100599).

continue to be locked into frequently meaningless activities[2] five days a week, and the ongoing discriminatory impact of the CDP when compared to mutual obligation requirements under the Jobactive scheme.

Importantly, the CDP would remain a coercive program where individual participants would have very little input or agency as to how they structure their lives. This is known to have serious adverse effects for many CDP participants.[3] It can also create significant impediments for them in managing their day to day lives, where travel is frequently required to attend medical appointments and to purchase groceries.[4]

The government claims that CDP is a success and has led to positive outcomes,[5] but a program that has resulted in children 'going without food', grossly increased penalties, labour exploitation, and workers labouring in unsafe conditions cannot legitimately be called a success.[6]

As this Committee embarks upon yet another Inquiry into CDP, it is pertinent to point out CDP findings from the 2017 Senate Finance and Public Administration Committee Inquiry:

> The committee is concerned about the significant and far-reaching negative impacts of the CDP on individuals and communities since its establishment in mid-2015. The evidence has shown that CDP is causing real harm to people engaged in CDP and the remote communities in which they live. At the heart of these problems are the heavy-handed financial penalties being applied to CDP participants who do not and cannot comply with the onerous requirements of the CDP.
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> Suspension of payments, in conjunction with reduced pay and conditions under the CDP (compared to its predecessor programs), is resulting in individuals and communities being pushed further into poverty. Furthermore, the committee is disturbed by evidence that suggests increasing levels of

[2] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 60.
[3] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 48, 53-57.
[4] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 26.
[5] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 20, 117; Commonwealth of Australia (2018). *Parliamentary Debates*, The Senate, 23 August (Senator Anne Ruston, Assistant Minister for Agriculture and Water Resources) 29.
[6] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 18, 47-48, 56, 64; Australian National Audit Office, *Design and Implementation of the Community Development* Programme, ANAO Report No. 14 2017—18, 6.

> poverty are leading to an upsurge in crime and other social issues in remote communities. …
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> The committee notes that certified training within the CDP is virtually non-existent and certainly not funded. Work-like activities are described as 'pointless' as they do not relate to the interests of the participants or the job opportunities that exist in the local area. The evidence has shown that the CDP is not orientated towards real employment outcomes. It is the committee view that CDP does not lead to job creation or pathways to real jobs. Furthermore, the working conditions that CDP participants are exposed to are not those of a real job.[7]

These findings are diametrically opposed to the claims made by the Federal Government about CDP in the second reading speech introducing this Bill. The proposed Bill merely tinkers at the edges of a failing system. The proposals in the Bill cannot redeem the CDP scheme from merited charges of perpetuating cruelty in the name of 'mutual obligations'.

Penalising welfare conditionality has led to people going without essentials for extended periods of time, further impoverishing people in remote communities,[8] and retaining this feature of the CDP scheme with eight week penalty periods will continue to exacerbate these issues. The Liberal Government has stressed that those subject to penalising conditions attached to social security payments can seek to have these penalties waived,[9] however, this process is burdensome for penalised people who experience language barriers and other difficulties in securing restoration of their social security payments.[10] The process unnecessarily creates more hoops for social security recipients to jump through, and is a further tax on their time in addition to the already burdensome CDP workfare obligations.

The Targeted Compliance Framework (TCF)

I note that the proposed Bill would introduce the TCF to CDP regions.[11] Submission No 4 to this Inquiry by the Aboriginal Peak Organisations Northern Territory (APONT) raises the following concerns regarding the TCF:

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[7] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 64-65.
[8] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 56, 58, 64.
[9] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 125-126.
[10] Australian National Audit Office, *Design and Implementation of the Community Development* Programme, ANAO Report No. 14 2017—18, 62.
[11] Explanatory Memorandum, Social Security Legislation Amendment (Community Development Program) Bill 2018 (Cth), 3.

> Across the areas in which the members of APO NT operate we have heard, and continue to hear, stories of hardship, of people going hungry and of rising family stress. The application of penalties at an unprecedented rate is having a devastating impact. But the harm caused by 8 week penalties has been mitigated by the ability of participants to have their payment re-start if they go back to Work for the Dole. The TCF will remove this ability so that those who receive penalties will have the whole amount of any penalties (1,2 or 4 weeks) applied. People who were unable to call their provider because they had to travel to support a family member, or to a funeral, or because of illness, will have no practical way of having their income restored. In communities and families already under stress, this will make things much worse.

I therefore recommend that the TCF not be applied to CDP regions.

CDP is not a sound regulatory approach and Indigenous peoples affected by the program have not consented to these arrangements

Sound regulatory systems do not commence with a heavy-handed punitive approach in the first instance – as CDP does with its mandatory workfare obligations. Valerie Braithwaite's psychosocial approach to regulation offers insight into specific problems that can occur with poorly designed regulatory systems. She highlights that impasses can occur when perceptions 'given to regulation by those being regulated' do 'not match that of regulators.'[12] For instance, when rules are contested by those regulated then this can result in 'motivational postures' such as 'defiance' and 'disengagement'.[13] It is evident from the government's own CDP penalty statistics that the program suffers from such deficiencies.[14]

Context, culture and history are critically important when designing a regulatory framework that is genuinely responsive to the needs of Indigenous peoples. The CDP approach has been very much an array of hierarchically ordered sanctions providing limited scope for dialogue and review and no scope for alteration of the regulatory design for the Indigenous communities who are subject to it. The idea of a 'punishment pyramid'[15] seems to have been pursued with vigour in the sphere of Australia's Indigenous community development.

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[12] Valerie Braithwaite, 'Closing the gap between regulation and the community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Canberra: Australian National University Press, 2017) 28.

[13] Valerie Braithwaite, 'Closing the gap between regulation and the community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Canberra: Australian National University Press, 2017) 33-34.

[14] Lisa Fowkes, 'Impact on Social Security Penalties of Increased Work for the Dole Requirements' (Canberra: Centre for Aboriginal Economic Policy Research Working Paper No. 112/2016, Australian National University, 2016) 1-7.

[15] As opposed to responsive regulation, which is often depicted as involving a pyramid of possible regulatory choices with non-coercive measures at the base of the pyramid that are to be tried first before any other measures that escalate intervention e.g., Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35.

Responsive regulation emphasises that there needs to be genuine agreement about outcomes.[16] Indigenous communities need to be involved in the design of regulatory frameworks affecting them, not simply offered the opportunity to comment upon the governments unilaterally designed regulatory frameworks.

Although the government claims consultation has occurred to inform its latest iteration of proposed CDP reform, I note that Submission No 4 to this Inquiry by APONT indicates otherwise:

> APO NT has been working with a broad alliance of around 30 Indigenous organisations and peak bodies to raise concerns about the CDP and to develop a detailed alternative scheme. We have repeatedly requested negotiations over the CDP reform process in order to ensure that affected communities are included in decisions that have such an important impact on their lives. …
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> Despite this we find ourselves, once again, responding to a Bill and a set of reforms that have not been the subject of prior consultation. Again, there is very little detail about key aspects of the overall reform package and it is proposed that much be left to delegated legislation. Again, we have very little time to respond to the submission deadline.
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> The Government repeatedly says that it wishes to do things with, not to First Nations people. Yet the story of the CDP has been one of top down decision making – from the decision to impose daily Work for the Dole on participants, to the failed 2015 CDP2 Bill, to this current proposal.
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> No measure that affects First Nations people to the extent that this Bill does should come before Parliament without first having been negotiated with affected First Nations people and their organisations. No Bill of this type should be adopted until and unless the Government provides evidence that it has consulted fully and openly with affected communities and they have given their free, prior and informed consent. As an alliance of peak Indigenous organisations in the NT, and as part of a wider alliance of Indigenous organisations, we are telling you that we have not been asked for our view in relation to this proposal and we do not consent to its passage.

I share the concerns raised by APONT in this statement.

A genuine consultation would be open to the possibility of a variety of regulatory models for a diverse range of Indigenous communities rather than presuming that the governments unilaterally designed CDP is the only or best regulatory option. Indigenous communities are not homogenous, they consist of First Nations with diverse aspirations and a responsive regulatory framework would accommodate such diversity. Some may prefer to return to a CDEP framework which has a proven

[16] John Braithwaite, 'The essence of responsive regulation' (2011) 44(3) *UBC Law Review* 475, 493.

track record of delivering more positive socio-economic development opportunities without the stigma of welfare. Additional options may also be revealed through dialogue with Indigenous elders based in each remote Indigenous community.

Whilst Indigenous people are familiar with 'the heavy hand of regulation in their lives',[17] Indigenous communities are frequently 'marginalized from conversations about regulatory priorities'[18] and the methods by which such priorities are to be obtained. The excoriating stigma attached to welfare recipients by the government's dominant discourse indicates that government authorities lack trust in those whom they regulate in this sphere. This manifests not only in work for the dole regimes with their attendant obsessive, expensive and time consuming monitoring and data entry, but also in other forms of welfare conditionality such as compulsory income management. However, this lack of trust is counter-productive to positive regulatory relationships.[19] Were trust instead of distrust the dominant framework for distribution of social security more productive possibilities would arise.

There is a performative illusion at work in CDP – that the government is effectively redressing the problem of socio-economic disadvantage for remote living Indigenous peoples. However, this is an approach which adopts similar punitive endeavours rigorously tried and applied throughout the bulk of Australia's colonial history without success. CDP is imbued with 'cognitive imperialism', an ideological approach that 'seeks to change the consciousness of the oppressed, not change the situation that oppressed them.'[20] Attentiveness to the principle of responsivity would shift the focus in these regions to market failure and away from a portrayal of individuals who need social security as pathological scroungers whose deviance must be driven out of them via coerced labour.

The Opportunity Cost and Risks of CDP

In their CDP report, the Australian National Audit Office (ANAO) documented the considerable funds that have thus far been injected into CDP, $1603.4 million, with an 'estimated unit cost (per job seeker) of delivering employment services in CDP regions … around double the estimated cost for delivery under the RJCP' at $10,494.[21] Given the numerous problems CDP has created for Indigenous participants with penalising conditionality, the impediments it has placed in the paths of local Indigenous communities seeking self-determination, and the alternative

[17] Mary Ivec, Valerie Braithwaite and Nathan Harris, '"Resetting the Relationship" in Indigenous Child Protection: Public Hope and Private Reality' (2012) 34(1) *Law and Policy* 80, 84.
[18] Mary Ivec, Valerie Braithwaite and Nathan Harris, '"Resetting the Relationship" in Indigenous Child Protection: Public Hope and Private Reality' (2012) 34(1) *Law and Policy* 80, 83.
[19] John Braithwaite, 'The essence of responsive regulation' (2011) 44(3) *UBC Law Review* 475, 519.
[20] Marie Battiste, 'Maintaining Aboriginal Identity, Language, and Culture in Modern Society' in Marie Battiste, (ed), *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000) 198.
[21] Australian National Audit Office, *Design and Implementation of the Community Development* Programme, ANAO Report No. 14 2017—18, 21, 41.

constructive uses to which CDP funding could be put,[22] it is arguable that there has been a significant opportunity cost in government funding of CDP.

In terms of alternatives to CDP, the Senate Finance and Public Administration Committee concluded that:

> [T]here should be a move away from the compliance and penalty model towards the provision of a basic income with a wage-like structure to incentivise participation. Furthermore, the program should be driven and owned by the local community ensuring appropriate community development consistent with the unique requirements of each community, whilst remaining culturally appropriate and flexible.[23]

I endorse this alternative to CDP.

The ANAO states that government 'planning should reflect adequate consideration of key risks.'[24] The government has stated that the risk of long term welfare dependency is a key factor in their re-design of CDP[25] – yet this is simply one risk out of many important risks to consider in this context. For instance, there is a genuine risk (and one that has been realised) that denying crucial resources to social security recipients through penalising conditionality will result in children missing out on essentials, as well as causing people to struggle with access to health, wellbeing and housing. Does the government truly believe that if people are harassed, hungry and homeless then they will be more job ready? There is also a key risk that bad regulation will be more costly to remedy in the long term.

Human Rights Compatibility Issues

The Human Rights Compatibility Statement accompanying the Bill falls far short of a rigorous rationale for the significant limitations on human rights contained under this scheme.[26] This 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

[22] Including trials of a Basic Income, as others and I have argued in previous CDP submissions, also see the alternatives in the Aboriginal Peak Organisations Northern Territory (APONT) Report *Developing Strong and Resilient Remote Communities: Proposal for Establishment of a Remote Development and Employment Scheme*, May 2017.
[23] Senate Finance and Public Administration Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017, 105.
[24] Australian National Audit Office, *Design and Implementation of the Community Development* Programme, ANAO Report No. 14 2017—18, 11.
[25] Statement of Compatibility with Human Rights, Social Security Legislation Amendment (Community Development Program) Bill 2018 (Cth), 19.
[26] Some of which were identified by the Parliamentary Joint Committee on Human Rights in their analysis of the 2015 CDP Bill: Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* (Thirty-third report of the 44th Parliament, 2016) 9-10.

scholarship on workfare which reveals that such schemes involve violation of multiple human rights.[27]

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.[28]

The Human Rights Compatibility Statement also maintains that the CDP Bill promotes the 'right to an adequate standard of living' contained in Article 11 of the ICESCR. Evidence put before the Senate Finance and Public Administration Committee indicates that the penalising conditions attached to CDP are preventing the enjoyment of an adequate standard of living for numerous CDP participants. It is not at all clear from the government's Human Rights Compatibility Statement how lengthy penalty periods are both proportionate and rationally connected to promoting legitimate objectives connected to Article 11.

In the Human Rights Compatibility Statement the government claims that the 2018 CDP 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 CDP. 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 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.

Conclusion and Recommendations

1. ***I recommend that the Bill not be passed in its current form.***

[27] 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.
[28] 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.

2. ***I recommend that the government cease applying penalising welfare conditionality in affected CDP regions.***
3. ***I recommend that in place of penalty oriented CDP the government introduce a regulatory structure of supports to be determined with the free, prior and informed consent of affected First Nations communities.***
4. ***I recommend that First Nations communities have control over methods by which policy objectives are to be achieved in the current CDP regions, with adequate long term funding arrangements put in place by government.***

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

Yours sincerely,

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