



Law Council
OF AUSTRALIA

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

Senate Community Affairs Legislation Committee

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Lack of evidence base to support further expansion of the cashless debit card program	8
Impacts of the cashless debit card on human rights not adequately taken into account	11
Whether there is a ‘rational connection’ between cashless debit card and its objectives	13
Whether the cashless debit card is a proportionate measure	14
Impact of the cashless debit card on the rights of trial participants has not been addressed	15
Right to social security	15
Right to a private life	16
Rights to equality and non-discrimination.....	17
Right to self-determination	17
Lack of formal requirement for community consultation and other legislative safeguards	19

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its Human Rights Committee, the Law Society of New South Wales and Queensland Law Society for their assistance in the preparation of this submission.

The Law Council extends special thanks to the community organisations in Western Australia that it consulted as part of its Justice Project for sharing their views on the cashless debit card.

Executive Summary

1. The Law Council is grateful for the opportunity to make a submission on the *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Bill)*.
2. The cashless debit card was initially introduced following the enactment of the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) (2015 Bill)*. The 2015 Bill provided for a 'trial' of the cashless debit card, which was ultimately rolled out in two communities, Ceduna and East Kimberley. In those communities, any working-age welfare recipients had 80% of their welfare entitlement linked to the cashless debit card, which could not be withdrawn as cash nor spent on alcohol, drugs or gambling, other than lottery tickets. The remaining 20% of the welfare entitlement was available in cash.¹ The objectives of the cashless debit card were outlined as being:

*reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.*²
3. The Bill seeks to remove section 124PF of the *Social Security (Administration) Act 1999 (Cth)*, which limits the trial of the cashless debit card to three sites, to no more than 10 000 people and states that it will end on 30 June 2018. This restriction has been removed to enable the expansion of the program to further sites that will be specified by delegated legislation.³ On 1 September 2017, the Government announced that the cashless debit card will be rolled out in the Goldfields, Western Australia, from early 2018 following a 'successful trial' in Ceduna and East Kimberley.⁴
4. The Law Council was not in a position to make a submission on the 2015 Bill. However, the Law Society of New South Wales, one of the Law Council's constituent bodies, made a submission. The Law Council agrees with the views of the Law Society of New South Wales as set out in that submission, namely that:
 - there was not sufficient evidence that the cashless debit card would be effective to achieve its objectives, given evaluations of other income management schemes operating in the Northern Territory;
 - the trial locations made it likely that Aboriginal and Torres Strait Islander people would be subject to the cashless welfare card than non-Aboriginal and Torres Strait Islander people, which therefore likely attracted the operation of the *Racial Discrimination Act 1975 (Cth)*, but the cashless debit card scheme likely did not meet the requirements for a 'special measure' under the Act (namely, being a measure of last resort and the least restrictive option);
 - while the cashless debit card pursued a legitimate objective, as a measure it appeared to function in a way inconsistent with Australia's international and domestic human rights obligations; and

¹ Explanatory Memorandum, *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*, 3.

² Explanatory Memorandum, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, Statement of Compatibility with Human Rights, 2.

³ Explanatory Memorandum, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, 2.

⁴ Prime Minister of Australia, 'Cashless Welfare Card for WA Goldfields' (1 September 2017) *Australian Government* <<https://www.pm.gov.au/media/2017-09-01/cashless-welfare-card-wa-goldfields>>.

- the cashless debit card scheme should be supplemented with additional programs that address the rights to food, education, housing and provide support for financial literacy and budgeting skills.⁵
5. The Law Council considers that these concerns remain in relation to the proposed expansion of the cashless debit card program. In particular, the Law Council is concerned that:
- the expansion of the cashless debit card program is insufficiently evidenced-based;
 - the human rights impacts of the cashless debit card have not been properly assessed and taken into account;
 - the Bill will place additional pressures upon those individuals without restricted welfare payments, contrary to the objectives of the Bill; and
 - the Bill lacks adequate safeguards, in particular to ensure community consultation and consent.
6. If it is to be effective, participation by the communities involved must be consensual, and the cashless debit card must be part of a suite of adequate support services. This includes properly funded and culturally appropriate alcohol, drug and mental health and legal services that address the complex problems the concerned communities face. These services should be in place prior to any expansion of the cashless debit card program to ensure that income management is only one of the tools available to the communities involved. The Government should also be subject to an obligation to consult with affected communities in relation to the implementation of the program, and to provide adequate and culturally appropriate support services.
7. The Law Council makes the following recommendations:
- if the cashless debit card program is to be effective and expanded:
 - the Bill should be amended to include requirements that:
 - individual participation in the cashless debit card program is on the basis of their free, prior and informed consent;
 - individuals are properly assessed in relation to their suitability to participate in the program, and that individual participation is appropriately tailored to the particular needs of the participant;
 - in communities where the cashless debit card is introduced, it should be part of a larger suite of support services, including legal services and counselling for alcohol, drug and gambling addiction;
 - the Bill should not be enacted before the human rights concerns of the Parliamentary Joint Committee on Human Rights have been satisfactorily resolved;
 - if enacted, the Bill should be amended to include a requirement for ongoing monitoring for human rights impacts, and that adverse impacts should be addressed in an adequate and culturally appropriate way with the full participation of the individuals and communities concerned;
 - if enacted, the Bill should be amended to include requirements that:

⁵ The Law Society of New South Wales, Submission No 28 to the Senate Standing Committees on Community Affairs, Parliament of Australia, *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*.

- there must be meaningful and culturally-appropriate consultation in order to ascertain the level of community support for the cashless debit card program;
- the cashless debit card should only be introduced in communities where there is strong community support for the program and on the basis of the free, prior and informed consent of the community;
- any delegated legislation should include:
 - a sunset date for the roll-out of the cashless debit card at any new location; and
 - a requirement for independent evaluation of the effectiveness of the cashless debit card at new locations in consultation with the individuals and communities concerned.

Lack of evidence base to support further expansion of the cashless debit card program

8. The Law Council strongly supports evidence-based policy-making. The Law Council is concerned that there does not appear to be a strong evidence base to justify expanding the cashless debit card program. Although it has not been described as such, the Law Council considers the cashless debit card program, which quarantines welfare payments into cash and non-cash portions, and sets limits on what the non-cash portions can be spent on, to be a form of income management. The Law Council notes extensive research that has shown that income management schemes are ineffective, or produce mixed results at best.⁶
9. ORIMA Research was commissioned to undertake an independent evaluation of the cashless debit card trials in Ceduna and East Kimberley. At the time of the publication of the Explanatory Memorandum, the *Wave 1 Interim Evaluation Report for the Cashless Debit Card Trial in Ceduna and East Kimberley (Interim Report)* had been released, with the final evaluation pending (though it has since been completed).⁷
10. The Law Council is concerned that these research findings were insufficiently analysed by the Government in order to determine whether there is an evidence base to support the expansion of the program. This is supported in part by the fact that the decision to expand the program was made before the final evaluation of the trial had been completed.
11. In addition, the Explanatory Memorandum appears to have selectively focused upon positive findings from the Interim Report in order to justify the expansion of the program, while not reflecting the negative. For example, the Explanatory Memorandum states that ‘the trial is having positive early impacts in relation to alcohol consumption, illegal drug use, and gambling’, and that ‘early indications are that the next stage of the report will continue to demonstrate positive results’.⁸ However, and as noted by the Parliamentary Joint Committee on Human Rights (**PJCHR**), more mixed findings were not reflected, for example that:
 - 49% of participants said the trial had made their lives worse, as did 37% of family members;
 - 37% of participants reported noticing an increase in ‘humbugging’ or harassment for money, as did 35% of family members; and
 - 49% of participants reported experiencing problems with their card.⁹

⁶ See Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks: Income Management – Social Security Law*, Report No 117 (2012) [10.2]; Luke Buckmaster and Carol Ey, ‘Is Income Management Working?’ (Parliamentary Library, Parliament of Australia, 2012) 4; Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (July 2012) xviii;

⁷ See Department of Social Services, ‘Cashless Debit Cards – Evaluation Reports’ (2017) *Australian Government* <<https://www.dss.gov.au/families-and-children/programs-services/welfare-quarantining/cashless-debit-card-trial-evaluation-reports>>.

⁸ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cth) 3.

⁹ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 37.

12. Nor does any consideration appear to have been given to the serious concerns raised by independent experts, including Australian National University's Centre for Aboriginal Economic Policy Research (CAEPR),¹⁰ the Centre for Excellence in Child and Family Welfare (CFECFW),¹¹ and Eva Cox AO,¹² in relation to serious methodological and other flaws in the Interim Report and the research underlying it.
13. Concerns were raised in relation to questionnaire design, including ethical concerns about the questions asked, who was surveyed and how, problems with sampling, and the legitimacy of the 'triangulation' carried out. For example, according to Ms Cox, responses provided by participants may have been contaminated, given that researchers promised participants a \$30 or \$50 gift card on completion of the questionnaire, and that respondents were required to provide identification.¹³ Ms Cox noted that:
- given Indigenous anxieties about authority, and welfare, they are likely to give acceptable answers. It is also not clear if the interviews were private or in the presence of others, which may also affect answers. The above effects on the data collected are likely to be serious and undermine the legitimacy of responses.*¹⁴
14. Ms Cox concluded that 'most responses to the survey should be seen as seriously unreliable as they [are] seriously flawed'.¹⁵ Other concerns identified by CAEPR and CFECFW include that the Interim Report does not account for the influence of external factors (such as changes to the alcohol management schemes during the period of the trials), presents statistics in a way that emphasises the positive impact of the program,¹⁶ and provides no cost-benefit analysis of the program or comparison with other policy responses, such as increased support services.¹⁷
15. This latter aspect is particularly concerning given the principles enshrined in the *Australian Government Guide to Regulation* which include that regulation should not be the default option for policy makers and that the policy option offering the greatest net benefit should always be the recommended option.¹⁸ and that regulation should

¹⁰ Janet Hunt, 'The cashless debit card trial evaluation: a short review' *Centre for Aboriginal Economic Policy Research* (2017) <http://caepn.anu.edu.au/sites/default/files/Publications/topical/CAEPR%20Topical%20Issues%201_2017.pdf>

¹¹ Centre for Excellence in Child and Family Welfare, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017) <<https://www.cfecfw.asn.au/wp-content/uploads/2017/09/Review-of-the-Evaluation-of-the-CDC-Trial.pdf>>.

¹² Eva Cox, 'Brief critique of data and methodology of qualitative and quantitative surveys' (4 September 2017) *Sydney Morning Herald* <<http://www.smh.com.au/cqstatic/gycbvc/Critiqueofdataandmethodologyofsurveys.pdf>>.

¹³ *Ibid* 1-2 <<http://www.smh.com.au/cqstatic/gycbvc/Critiqueofdataandmethodologyofsurveys.pdf>>.

¹⁴ *Ibid* 2.

¹⁵ *Ibid* 3.

¹⁶ 'For example, the report highlights that, of the 66% participants who reported drinking alcohol, taking drugs or gambling during or before the Trial, 33% reported a reduction in at least one of these things. Another way of reporting this is that 78% of the overall number of participants made to participate in the scheme did not report a reduction in alcohol, drugs or gambling (which was the very reason the program was developed)': see Centre for Excellence in Child and Family Welfare, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017) 8-9 <<https://www.cfecfw.asn.au/wp-content/uploads/2017/09/Review-of-the-Evaluation-of-the-CDC-Trial.pdf>>.

¹⁷ *Ibid* 11.

¹⁸ Australian Government, *The Australian Guide to Regulation: Ten Principles for Australian policy makers* (2017) principle 1 <<https://cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>>.

only be imposed when it offers a net benefit.¹⁹ It is not clear from the Interim Report or any other source whether the estimated maximum cost of the trial of \$18.9 million²⁰ is offset by any demonstrated positive outcomes as no cost-benefit analysis appears to have been conducted. As noted by CAEPR in its review of the Interim Report:

The lists of service needs from the stakeholders in each location illustrate the many challenges they are facing. The opportunity costs of undertaking [cashless debit card] trials rather than using all available funds to provide some of these much-needed services has to be justified, even acknowledging that some effort to improve services is underway. Government resources are finite and the funds dispersed in operating the [cashless debit card] could instead be spent on a much-needed service.²¹

16. Further, there appears to have been no evaluation as to whether an increase in support services for those suffering from addictions to alcohol, drugs and gambling could reduce the harm the cashless welfare card seeks to address in an equal or better way. This makes it difficult to determine whether or not the regulatory intervention of the cashless debit card is the best option. Without performing a cost-benefit analysis of the cashless debit card, or assessing alternate policy options, it is difficult to see how the Government could have acted consistently with its policy-making principles.
17. The *Cashless Debit Card Trial Final Evaluation Report (Final Report)* notes some positive improvements in terms of a reduction in alcohol consumption, drug use and gambling, but 'it is important to note that... crime statistics showed no improvement since the commencement of the Trial'.²² That is, that while alcohol consumption, illegal drug use and gambling may have somewhat decreased, the harm caused by these behaviours did not. Given the objective of the cashless debit card was to reduce harm caused by these behaviours,²³ this raises questions as to whether or not the cashless debit card could be deemed 'successful' so as to justify its further expansion.
18. The Law Council considers the cashless debit card to be a blunt tool to address complex issues that require a nuanced policy response. Successful policy measures require community engagement, participation and consent, as well as a network of culturally appropriate and responsive support services provided through a therapeutic, non-punitive, framework. If the Government proposes to continue and to expand the cashless debit card program, it should do so on the basis of evidence on 'what works' in terms of income management schemes.

¹⁹ Ibid principle 2.

²⁰ See Dan Conifer, 'Centrelink cashless welfare card trial costing taxpayers \$10,000 per participant' (2 May 2017) *ABC News* <[http://www.abc.net.au/news/2017-05-02/cashless-welfare-trial-costing-taxpayers-\\$10k-per-participant/8488268](http://www.abc.net.au/news/2017-05-02/cashless-welfare-trial-costing-taxpayers-$10k-per-participant/8488268)>.

²¹ Janet Hunt, 'The cashless debit card trial evaluation: a short review' *Centre for Aboriginal Economic Policy Research* (2017) 6 <http://caepr.anu.edu.au/sites/default/files/Publications/topical/CAEPR%20Topical%20Issues%201_2017.pdf>

²² ORIMA Research, *Cashless Debit Card Trial Evaluation Final Evaluation Report* (August 2017) 4 <https://www.dss.gov.au/sites/default/files/documents/08_2017/cashless_debit_card_trial_evaluation_-_final_evaluation_report.pdf>.

²³ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, Statement of Compatibility with Human Rights, 2.

19. Research by the CAEPR reviewing various income management schemes in Australia concluded that the more successful income management schemes are voluntary and target individuals with high needs as part of a suite of support services.²⁴ The Law Council heard views from community organisations that it consulted in the Goldfields which are consistent with these research findings. The PJHRC has noted, by way of contrast, the example of the more voluntary income management program in Cape York, which allows for individual assessment of particular circumstances, and individual management of welfare payments.²⁵

Recommendations

- **If enacted, the Bill should be amended to include requirements that:**
 - **individual participation in the cashless debit card program is on the basis of their free, prior and informed consent; and**
 - **individuals are properly assessed in relation to their suitability to participate in the program, and that individual participation is appropriately tailored to the particular needs of the participant.**
- **In communities where the cashless debit card is introduced, it should be part of a larger suite of support services, including legal services and counselling for alcohol, drug and gambling addiction.**

Impacts of the cashless debit card on human rights not adequately taken into account

20. A number of features of the cashless debit card trial restrict the human rights of trial participants. As set out in the Law Council's *Policy Statement on Human Rights and the Legal Profession*, where legislation appears to limit rights, three key questions must be considered:

- Whether and how the limitation is aimed at achieving a legitimate objective;
- Whether and how there is a rational connection between the limitation and the objective; and
- Whether and how the limitation is proportionate to that objective.²⁶

21. As noted above, the objectives of the cashless debit card are:

reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that

²⁴ J Rob Bray, *Income management evaluations – What do we know? Placing the findings of the evaluation of new income management in the Northern Territory in context (CAEPR Working Paper No 11) (2016) 1* <http://caepr.anu.edu.au/sites/default/files/Publications/WP/Income%20Management%20Evaluations_WP111_2016.pdf>.

²⁵ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 38-39.

²⁶ Law Council of Australia, *Policy statement on human rights and the legal profession: Key principles and commitments* (May 2017) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/human-rights-policy>>.

*welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.*²⁷

22. In particular, the cashless debit card seeks to reduce the violence and harm caused by alcohol, illegal drug abuse and gambling. It does so by reducing the ability of trial participants to purchase alcohol, drugs and to gamble, by making only twenty per cent of welfare payments available as cash, and with the remaining eighty per cent linked to the cashless debit card which physically cannot be used on purchases of alcohol, drugs or to gamble (except for lottery tickets).
23. The Statement of Compatibility with Human Rights attached to the Explanatory Memorandum (**Statement of Compatibility**) identifies the right to social security, the right to private life, the right to privacy and the rights of equality and non-discrimination as engaged by the cashless debit card, and concludes that any restrictions are 'reasonable and proportionate'. It also notes that the cashless debit card does not impact the right to self-determination, the right to an adequate standard of living or the rights of children.
24. The Law Council agrees that the cashless debit card pursues a legitimate objective. Alcohol and illegal drug dependence, and gambling, can have catastrophic consequences for affected individuals, their families and their communities, and require an appropriate policy response. As noted by the CAEPR, 'both Ceduna and the East Kimberley have major social and economic problems that are complex, and have resulted from a range of historical factors, as well as contemporary policies'.²⁸ However, the Law Council does not consider that the case has been made that the restrictions on human rights imposed by the cashless debit card demonstrate a rational connection with, nor are proportionate to achieve, the stated objectives.²⁹
25. The Statement of Compatibility simply asserts that 'any limitation... is reasonable and proportionate', without explaining how or why. As noted above, the Statement of Compatibility emphasises positive findings from the Interim Report, but does not address the negative or mixed findings. This may present an incomplete picture of the impact of the cashless debit card on human rights, and does not provide an appropriate basis for informed decision-making by relevant decision-makers, including communities.
26. The Law Council considers that the questions of whether there is a rational connection between the cashless debit card and the harm it seeks to prevent, and whether it is a proportionate restriction on human rights, require fresh and thorough examination. That is, it must be considered whether the cashless debit card adopts a means that is rationally connected to its objective and that are no more restrictive than required to

²⁷ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, Statement of Compatibility with Human Rights, 2.

²⁸ Janet Hunt, 'The cashless debit card trial evaluation: a short review' *Centre for Aboriginal Economic Policy Research* (2017) 6
<http://caepr.anu.edu.au/sites/default/files/Publications/topical/CAEPR%20Topical%20Issues%201_2017.pdf>

²⁹ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 39.

achieve the purpose of the limitation. To address those issues, the Attorney-General Department's guidance for those who have a role in Commonwealth legislation, policy and programs suggests the following questions may be useful:

- Will the limitation in fact lead to a reduction of that problem?
- Does a less restrictive alternative exist, and has it been tried?
- Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?
- Does the limitation destroy the very essence of the right at issue?³⁰

Whether there is a 'rational connection' between cashless debit card and its objectives

27. As noted above, for a restriction on rights to be permissible there must be a 'rational connection' between the restriction and the objective to be achieved. In other words, as noted by the PJCHR in its *Guidance Note on Drafting Statements of Compatibility*:

*... proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.*³¹

28. The Law Council considers that reasoned and evidence-based explanation of how the cashless debit card is likely to be effective in achieving its objectives has not provided. For example, the Statement of Compatibility asserts that 'there is a clear, rational connection between the program's objectives... and the restrictions on the right to private life',³² without providing evidence to support this connection. In fact, it does not appear that the limitations imposed by the cashless debit card have necessarily led to a reduction of the problem of alcohol, illegal drug and gambling-related harm. As noted above, the overall findings of the Interim Report were mixed at best, independent experts have questioned the soundness of the underlying research, and there was no improvement in crime in the trial locations, with the exception of drug driving offences and apprehensions under the *Public Intoxication Act 1984* (SA) in Ceduna.³³

³⁰ Attorney-General's Department, 'Permissible limitations' *Australian Government* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>>.

³¹ Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.

³³ ORIMA Research, *Cashless Debit Card Trial Evaluation Final Evaluation Report* (August 2017) 4 <https://www.dss.gov.au/sites/default/files/documents/08_2017/cashless_debit_card_trial_evaluation_-_final_evaluation_report.pdf>.

29. Another issue is that while the objectives of the cashless debit card include preventing harm caused by alcohol, illegal drug abuse and gambling, and promoting socially responsible behaviour, the measure does not directly target people who abuse alcohol, illegal drugs, and gambling, and engage in socially irresponsible behaviour. Rather, it targets working-age persons receiving welfare entitlements. An assumption appears to have been made that welfare dependency is a reliable indicator of dependency on alcohol, illegal drugs and gambling, and other socially irresponsible behaviour.
30. However, evidence has not been provided to demonstrate such a connection, and an unsupported assumption that working-age people receiving welfare entitlements are socially irresponsible unless restricted risks the program being viewed as paternalistic, which is particularly problematic if it is rolled out further in Aboriginal and Torres Strait Islander communities. It also does not account for the fact that a lack of jobs, rather than irresponsible social behaviour, may be responsible for welfare dependence in rural, regional and remote areas.³⁴
31. The Law Council does not consider that a sufficient evidence-base has been established to demonstrate the effectiveness of the cashless debit card in achieving its objectives. Therefore, the Law Council considers the Bill should not be passed until Government has adequately resolved the PJCHR's request for further information regarding how the cashless debit card is effective to achieve its stated objectives.³⁵

Whether the cashless debit card is a proportionate measure

32. Nor does the Law Council consider the cashless debit card to be the 'least restrictive means' to achieve the objective of reducing harm. This is because it is a 'blanket' measure with no flexibility that enables different cases to be treated differently. The trial is not voluntary, and there is no capacity to opt-out, even for persons who have not reported using drugs, alcohol or gambling, or suffering from addictions to any of those three. The Law Council considers that the mandatory nature of the cashless debit card program creates a disproportionate restriction on human rights.
33. The Statement of Compatibility does not address the question of whether a less restrictive alternative exists, or whether it has been tried. It would appear, for example, that an increase in funding for alcohol, drug and gambling addiction counselling and rehabilitation services would provide a less restrictive alternative. This measure would also directly target the harm the cashless debit card seeks to address without also subjecting persons dependent on welfare to additional restrictions. There is no indication in the Explanatory Memorandum, nor in the Interim Report, that increased

³⁴ Elise Klein, 'The Cashless Debit Card causes social and economic harm – so why trial it again?' (30 March 2017) *The Conversation* <<https://theconversation.com/the-cashless-debit-card-causes-social-and-economic-harm-so-why-trial-it-again-74985>> citing Kimberley Development Commission, *An analysis of the 2011 Census for key population metrics or Aboriginal employment, education and housing* (September 2014) <<https://kdc.wa.gov.au/wp-content/uploads/2016/08/3-Aboriginal-Wellbeing-A-Census-Analysis.pdf>>.

³⁵ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 39.

funding for drug, alcohol and gambling counselling and rehabilitation has been tried and/or evaluated.³⁶

34. The Law Council notes remarks from community members in the Goldfields that '...when you take alcohol away from an alcoholic, and drugs away from a drug [addict], you need policies and procedures in place to help these people'.³⁷ Concerns about the lack of existing drug, alcohol and gambling support services were echoed by organisations the Law Council consulted in the Goldfields, many of whom are also based in communities being considered as possible future locations for the trial. The Law Council considers that better funding these services would be a less restrictive means of achieving the same objective.

Impact of the cashless debit card on the rights of trial participants has not been addressed

35. The Law Council is particularly concerned that sufficient regard has not been paid to the human rights of those affected by the cashless debit card trial. The Statement of Compatibility contains only scant mapping of the rights engaged by the cashless debit card against its actual human rights impacts, and contains no mention of any negative impact on rights. The Law Council considers that these impacts have not been adequately taken into account and addressed by the Government.
36. In particular, the Law Council is concerned by the human rights impacts of the cashless debit card on Aboriginal and Torres Strait Islander people. Relevantly, as set out in the Law Council's *Policy Statement on Indigenous Australians and the Legal Profession*, the Law Council is committed to promoting effective measures to ensure continuing improvement of the economic and social conditions of Aboriginal and Torres Strait Islander peoples.³⁸ Likewise, the Law Council is committed to challenging legislation, policies and practices that may violate the human rights of Aboriginal and Torres Strait Islander peoples and promoting implementation of the *United Nations Declaration on the Rights of Indigenous peoples*.³⁹ Against this background, the Law Council has identified a number of concerns regarding cashless debit card's impact on the right to social security, private life, equality and non-discrimination and self-determination, discussed below.

Right to social security

37. The Statement of Compatibility notes that the card functions like a regular debit card, is supported by a mobile application, and partners at trial sites that can assist with

³⁶ Centre for Excellence in Child and Family Welfare, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017) 11 <<https://www.cfecfw.asn.au/wp-content/uploads/2017/09/Review-of-the-Evaluation-of-the-CDC-Trial.pdf>>.

³⁷ Jarrod Lucas and Sam Tomlin, 'Cashless welfare card rollout gets mixed reception from possible WA trial town Laverton' (22 August 2017) *ABC News* <<http://www.abc.net.au/news/2017-08-22/no-decision-yet-on-cashless-card-third-trial/8827944>>.

³⁸ Law Council of Australia, *Indigenous Australians and the Legal Profession* (2010) [13] <<https://www.lawcouncil.asn.au/docs/971f3e13-cc39-e711-93fb-005056be13b5/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>>.

³⁹ *Ibid* [15], [16].

account checking.⁴⁰ However, this fails to account for experience that in rural areas there is a greater reliance on cash than card, and many businesses are not set up to process card-only transactions.⁴¹

38. In addition, many trial participants were reported to have not received a letter about the trial and how it worked, as there is no postal delivery service in many rural areas, and participants are required to check at the post office for their mail.⁴² When many participants received their card, they struggled to use it, as the manual was filled with technical jargon, and the mobile app was inappropriate for the audience, making it difficult for participants to check their account balance.⁴³ The difficulties experienced with using the card is evidenced by the high rate of transaction errors.⁴⁴
39. These issues, not addressed in the Statement of Compatibility, significantly impedes the practical capacity of trial participants to access their social security entitlements.

Right to a private life

40. The Statement of Compatibility states that the measure is 'reasonable and proportionate' because the card looks and operates like a normal bank card, and only six per cent of participants surveyed raised stigma or shame associated with the card as an issue. This does not take into account how the card has operated in practice.
41. It has been reported that the 'rushed' roll out of the trial meant many businesses and service providers did not have the infrastructure to use the cards.⁴⁵ For example, it was reported that the Kununurra Agricultural Show was unable to process the cashless debit cards, despite advertising that they were accepted, causing shame for persons whose cards were declined in front of others and leaving them without funds to spend at the show.⁴⁶ There have also been reports of effective segregation in venues that sell alcohol and food where one till is used for the cashless card and the other till for other transactions. This effectively created an Aboriginal till and non-Aboriginal till.⁴⁷
42. In addition, the Statement of Compatibility made no reference to the stigma and shame in relation to the cashless card widely raised by community organisations

⁴⁰ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cth) Statement of Compatibility with Human Rights, 5.

⁴¹ Sarouche Razi and Peter Sutherland, 'Cashless Welfare Card (Paper presented at NACLC Conference, Canberra, 9 August 2017).

⁴² Ibid.

⁴³ Elise Klein, 'The Cashless Debit Card causes social and economic harm – so why trial it again?' (30 March 2017) *The Conversation* <<https://theconversation.com/the-cashless-debit-card-causes-social-and-economic-harm-so-why-trial-it-again-74985>>.

⁴⁴ ORIMA Research, *Cashless Debit Card Trial Evaluation: Wave 1 Interim Evaluation* (February 2017) A4-A5 <https://www.dss.gov.au/sites/default/files/documents/03_2017/final_cdct_evaluation_-_wave_1_interim_evaluation_report_9_february_2017.pdf>. See also Centre for Excellence in Child and Family Welfare, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017) 10 <<https://www.cfecfw.asn.au/wp-content/uploads/2017/09/Review-of-the-Evaluation-of-the-CDC-Trial.pdf>>.

⁴⁵ Sarouche Razi and Peter Sutherland, 'Cashless Welfare Card (Paper presented at NACLC Conference, Canberra, 9 August 2017).

⁴⁶ Ibid.

⁴⁷ Ibid.

consulted for the purposes of the Interim Report.⁴⁸ The Law Council also heard views from community organisations in the Goldfields about the shame and stigma associated with the cashless debit card.

Rights to equality and non-discrimination

43. The Statement of Compatibility states the rights to equality and non-discrimination are not directly limited as the trial locations were determined by reference to objective criteria, including 'high levels of welfare dependence and social harm'. Both Ceduna and East Kimberley appeared to fit this description, and the Statement of Compatibility acknowledges that there may be an indirect restriction on these rights as, for example, in East Kimberley, Aboriginal and Torres Strait Islander people make up around 83 per cent of the total income support payment population.⁴⁹
44. The Statement of Compatibility then explains that '[given] the indirect impact the Cashless Debit Card currently has on Aboriginal and Torres Strait Islander people, in identifying new sites, priority will be given to including communities with lower Aboriginal and Torres Strait Islander populations'.⁵⁰ First, the Law Council notes that the next location for the cashless debit card, the Goldfields, has a relatively high population of Aboriginal and Torres Strait Islanders compared with the rest of the country. Second, including non-Aboriginal and Torres Strait Islander persons in the cashless debit card program does not abate or ameliorate the disproportionate impact that the cashless debit card has on Aboriginal and Torres Strait Islander persons and communities.
45. Meaningfully addressing the restriction on the rights to equality and non-discrimination requires more than simply including non-Aboriginal and Torres Strait Islander persons in the cashless debit card program. Given that the provisions of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**) are likely to be engaged by the cashless debit card, the Law Council considers that the Government should follow the Australian Human Rights Commission guidelines for insuring income management measures are consistent with the Racial Discrimination Act.⁵¹

Right to self-determination

46. The Statement of Compatibility states that the right to self-determination is not engaged by the cashless debit card. The Law Council disagrees with this view. The cashless debit card, with its imposed and compulsory income management measures, may affect the ability of Aboriginal and Torres Strait Islander peoples to 'freely determine their political status and freely pursue their economic, social and cultural

⁴⁸ Centre for Excellence in Child and Family Welfare, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017) 7 <<https://www.cfecfw.asn.au/wp-content/uploads/2017/09/Review-of-the-Evaluation-of-the-CDC-Trial.pdf>>.

⁴⁹ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cth) 12.

⁵⁰ *Ibid* 7.

⁵¹ Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (2009) <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/draft-guidelines-ensuring>>.

development'.⁵² The Law Council's *Policy Statement on Indigenous Australians and the Legal Profession* recognises that Aboriginal and Torres Strait Islander peoples have the right to self-determination.⁵³

47. If the cashless debit card is not voluntary and does not include safeguards to ensure its adoption and implementation are community-driven, and on the basis of the free, prior and informed consent of the individuals and communities affected, and with their full and effective participation, it restricts the right to self-determination. In addition, it may restrict many other rights in the United Nations *Declaration on the Rights of Indigenous Peoples* (in particular, articles 4 (right to autonomy and self-government), 18 (right to participation in decision-making), 19 (State duty to cooperate in good faith with the indigenous peoples) and 23 (right to determine and develop priorities and strategies for exercising right to development)). The Law Council notes the findings of the Special Rapporteur on the Rights of Indigenous Peoples, following her recent visit to Australia, where she observed that 'the policies of the Government do not duly respect the rights to self-determination and effective participation', and that this failure is 'alarming'.⁵⁴
48. The Law Council is concerned that the cashless debit card program, as currently designed, may be inconsistent with Australia's human rights obligations. As noted above, the Law Council considers the PJCHR's request for further information from the Minister as to how the limitation on human rights is reasonable and proportionate to achieve the stated objectives (among other issues) should be satisfactorily resolved before the Bill is passed.⁵⁵
49. In addition, should the Bill be enacted, the Law Council considers that any expansion of the cashless debit card program should include on-going monitoring for rights impacts which should be addressed in an adequate and culturally appropriate way with the full participation of the individuals and communities concerned.

Recommendations

- **The Bill should not be enacted before the human rights concerns of the Parliamentary Joint Committee on Human Rights have been satisfactorily resolved; and**
- **If enacted, the Bill should be amended to include requirements there is ongoing monitoring for human rights impacts, and that adverse impacts are addressed in an adequate and culturally appropriate way with the full participation of the individuals and communities concerned.**

⁵² *Charter of the United Nations* art 1(2); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

⁵³ Law Council of Australia, *Indigenous Australians and the Legal Profession* (2010) [9] <<https://www.lawcouncil.asn.au/docs/971f3e13-cc39-e711-93fb-005056be13b5/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>>.

⁵⁴ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 18, 7.

⁵⁵ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 39.

Lack of formal requirement for community consultation and other legislative safeguards

50. As currently drafted, the Law Council is concerned that the Bill lacks adequate safeguards on important matters such as sunset clauses, participant criteria and models for community consultation, which are left to delegated legislation. The Explanatory Memorandum notes that:

*The legislation continues to ensure that the program cannot be implemented in any location without the introduction of a disallowable instrument. These instruments can also specify other parameters, including sunset dates and participant criteria. This provides the opportunity for the Government to co-design these parameters with interested communities, and tailor the program to meet community needs. It also allows those communities to make decisions about these arrangements in their own time.*⁵⁶

51. While this statement anticipates a series of tailored programs created in consultation with communities, the Law Council considers it preferable that the primary legislation contains explicit safeguards. Given how widely the cashless debit card program could be rolled out, legislative safeguards are essential. In this respect, the Law Council notes the remarks of the Senate Standing Committee on Scrutiny of Bills that:

*in converting a trial into complete authority to implement cashless debit cards, the case for enabling such matters to be provided for in delegated legislation rather than the primary legislation has not yet been established... A legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.*⁵⁷

52. If the Bill is enacted, the obligation to consult with the community concerned in order to obtain their free, prior and informed consent should be enshrined in the primary legislation. Genuine consultation with affected community organisations and individuals is important as a policy principle generally,⁵⁸ but particularly when Aboriginal and Torres Strait Islander communities are affected by the policy interventions. The UN *Declaration on the Rights of Indigenous Peoples* provides in article 19 that:

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*⁵⁹

53. The Law Council also notes the conclusion of the Special Rapporteur on the Rights of Indigenous Peoples following her visit to Australia that:

⁵⁶ Explanatory Memorandum, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cth) 2.

⁵⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 25-26.

⁵⁸ Australian Government, *The Australian Guide to Regulation: Ten Principles for Australian policy makers* (2017) Principle 5 <<https://cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>>.

⁵⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2017) art 19.

*the Government could achieve significant progress in realizing the rights of indigenous peoples if it consulted, financially supported and worked hand-in-hand with [indigenous community-led] organizations.*⁶⁰

54. The Statement of Compatibility indicates that where communities have high Aboriginal and Torres Strait Islander populations, the Government will 'uphold its commitment to "work with" first Australians'.⁶¹ However, questions have been raised as to whether consultation processes in Ceduna and East Kimberley were truly representative given that many community representatives were non-Aboriginal and Torres Strait Islander persons,⁶² despite the introduction of cashless welfare card disproportionately impacting Aboriginal and Torres Strait Islander persons.
55. The Law Council notes that there is a plethora of material available on how to conduct meaningful and effective consultations with Aboriginal and Torres Strait Islander peoples. Relevantly, Reconciliation Australia has identified ten principles for successful Aboriginal and Torres Strait Islander policies and programs, namely:
1. Genuine engagement with communities in talking about, developing and implementing policies.
 2. Active and well-supported Aboriginal and Torres Strait Islander led decision-making in program-design.
 3. Grass-roots, bottom-up approaches that knit together local knowledge within a national framework.
 4. Local and region-specific programs that are tailored to the needs of particular communities rather than "one size fits all" approaches.
 5. Investment in and support for local Aboriginal and Torres Strait Islander leadership.
 6. Long-term investment in strengthening communities at a local level to decide and manage their own lives.
 7. Programs and policy approaches that are geared towards long-term achievements.
 8. Real investment of dollars and people based on need and ongoing support for programs that work.
 9. Regular and independent public evaluation of programs and policies to make sure we learn from mistakes and successes.
 10. Co-operative, cross sector approaches which reduce the burden of duplication and red-tape on community organisations.⁶³
56. Given the divided community sentiment regarding expansion of the cashless welfare card,⁶⁴ the Law Council considers it essential that there be extensive, adequate resourced community consultation before the card is introduced in new locations.

⁶⁰ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 18.

⁶¹ Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Report 9 of 2017* (5 September 2017) 43.

⁶² Sarouche Razi and Peter Sutherland, 'Cashless Welfare Card (Paper presented at NACLIC Conference, Canberra, 9 August 2017).

⁶³ Reconciliation Australia, *Respectful relationships: Ten top tips* <<http://www.shareourpride.org.au/sections/respectful-relationships>>.

⁶⁴ See for example, Jarrod Lucas and Sam Tomlin, 'Cashless welfare card rollout gets mixed reception from possible WA trial town Laverton' (22 August 2017) *ABC News* <<http://www.abc.net.au/news/2017-08-22/no-decision-yet-on-cashless-card-third-trial/8827944>> and Eliza Laschon, 'Goldfields to get cashless welfare card after report finds drinking, drug use down' (1 September 2017) *ABC News* <<http://www.abc.net.au/news/2017-09-01/cashless-welfare-card-to-hit-goldfields-next-pm-to-announce/8861556>>.

57. In relation to legislative safeguards other than an obligation to consult communities, the Law Council considers that delegated legislation should specify a sunset date for the roll-out of the cashless debit card at any new location and an evaluation process to assess the effectiveness of the cashless debit card at the new location.

Recommendations

- **If enacted, the Bill should be amended to ensure that:**
 - **there must be meaningful and culturally-appropriate consultation in order to ascertain the level of community support for the cashless debit card program; and**
 - **the cashless debit card is only be introduced in communities where there is strong community support for the program and on the basis of the free, prior and informed consent of the community;**
- **Any delegated legislation should include:**
 - **a sunset date for the roll-out of the cashless debit card at any new location; and**
 - **a requirement for independent evaluation of the effectiveness of the cashless debit card at new locations in consultation with the individuals and communities concerned.**