



Law Council  
OF AUSTRALIA

# **Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020**

**Senate Community Affairs Legislation Committee**

**2 November 2020**

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>Introduction</b> .....	<b>6</b>
Background.....	6
CDC trials.....	6
Income Management regime – Northern Territory and Cape York.....	8
2019 Bill.....	9
2020 Bill.....	9
<b>Issues</b> .....	<b>12</b>
Truncated timeframes.....	12
Lack of evidence base.....	12
Value for money.....	15
Impacts of cashless debit card on human rights.....	16
Rights of equality and non-discrimination.....	17
Right to self-determination and free, prior, informed consent.....	20
Right to social security.....	22
Prohibition on interference with privacy.....	24
Justifications of limitation on rights.....	24
Is the limitation aimed at achieving a legitimate objective?.....	25
Is there a rational connection between the limitation and the objective?.....	26
Is the limitation proportionate to that objective?.....	28
Interaction with Racial Discrimination Act.....	30
Section 10.....	30
Special measures.....	32
Section 9(1A).....	35
<b>Conclusion</b> .....	<b>35</b>
<b>Recommendations</b> .....	<b>36</b>

## 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 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

## Acknowledgement

The Law Council is grateful for the advice of its National Human Rights Committee, Indigenous Legal Issues Committee and the Queensland Law Society in developing this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to respond to the Senate Community Affairs Legislation Committee (**the Committee**) regarding its inquiry into the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (**the Bill**).
2. To inform its response, the Law Council draws on its earlier submission to the Committee regarding the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017,<sup>1</sup> as well as more recent information, and constituent bodies and expert committee views.
3. The Law Council does not support the Bill in its current form. It is concerned that a number of features of the cashless debit card (**CDC**), including as amended by the Bill, undermine human dignity, a concept which is at the heart of human rights. It also also limits enjoyment of participants' human rights, including the:
  - rights of equality and non-discrimination;
  - right to self-determination;
  - right to social security (and to an adequate standard of living); and
  - prohibition on interference with privacy.
4. It also undermines the principle of free, prior and informed consent. In the Law Council's view, there is inadequate justification that the CDC is necessary, reasonable and proportionate in its limitation of these rights. Its concerns regarding the CDC extend to compulsory income management in the Northern Territory (**NT**). While it is unable to be definitive, there is also a possibility that the CDC (including as amended by the Bill) may be inconsistent with the key provisions of the *Racial Discrimination Act 1975* (Cth) (**RDA**).
5. The Law Council underlines that the Bill is being progressed in the absence of a full and independent evaluation of its merits, or adequate community consultation as to the CDC as amended by the Bill – including its reframed objects, permanent nature, more limited safeguards and expanded application to largely Indigenous communities. It is also concerned that there has been little regard to, or cost-benefit of, alternative options, including expanding support services which meet individuals' complex needs.
6. Should some form of income management be pursued, the Law Council considers that a less restrictive and proportionate approach to the Bill – and to the existing CDC trial and compulsory income management schemes contained in the Act – would be to ensure that:
  - participation in the CDC and/or income management is based on full, free and informed individual consent (opt-in), and meaningful community consultation;
  - individuals are properly assessed in relation to their suitability to participate rather than more blanket approaches being applied;
  - a full suite of support programs should underpin this implementation, noting that these are lacking in many relevant rural, regional and remote communities; and

---

<sup>1</sup> Law Council of Australia, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, Senate Community Affairs Legislation Committee, 4 October 2017.

- it should be accompanied by expanded access to culturally competent legal assistance services for social security law matters in relevant communities.
7. To facilitate this, the Australian Government should work in genuine partnership with First Nations peoples and communities to reform the CDC and income management schemes, and develop a voluntary, community-led model supported by real job opportunities.

## Introduction

### Background

#### CDC trials

8. Part 3D of the *Social Security (Administration) Act 1999* (Cth) (**the Act**) provides for the temporary trial of CDC welfare arrangements. The trial's current objects are to:
- reduce the amount of restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs;
  - determine whether such a reduction decreases violence or harm in trial areas;
  - determine whether such arrangements are more effective when community bodies<sup>2</sup> are involved; and
  - encourage socially responsible behaviour.<sup>3</sup>
9. The original CDC trial was established via the *Social Security Amendment (Debit Card Trial) Act 2015* (Cth) and covered three trial sites. It was to operate as a trial from 1 February 2016 to 30 June 2018, and was originally capped at a maximum of 10,000 participants. Since then the trial has been expanded by legislation to additional trial sites and its duration extended.<sup>4</sup>
10. Under Part 3D of the Act, a cap of 15,000 participants currently applies.<sup>5</sup> The trial currently applies in the Ceduna, Goldfields and East Kimberley regions, as well as the Bundaberg and Hervey Bay region (to a narrower range of income support recipients).
11. Within the Ceduna region, the East Kimberley and the Goldfields regions, the CDC trial applies to all people who receive a working age payment.<sup>6</sup> Age Pension recipients may volunteer to participate.
12. In the Bundaberg and Hervey Bay region, the program applies to all people aged 35 years and under who receive Jobseeker Payment, Youth Allowance, or Parenting Payment.<sup>7</sup>

---

<sup>2</sup> Bodies (incorporated or unincorporated) may be authorised by the Minister as community bodies if they provide, or intend to provide, services relating to the care, protection, welfare or safety of adults, children or families: the Act, s 124PE.

<sup>3</sup> The Act, s 124PC.

<sup>4</sup> *Social Services Legislation Amendment (Cashless Debit Card) Act 2017* (Cth); *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Act 2018* (Cth); *Social Security (Administration) Amendment (Income Management and Cashless Welfare) Act 2019* (Cth).

<sup>5</sup> The Act, s 124PF(3).

<sup>6</sup> See, eg, for Ceduna, s 124PG(1) which requires that a person be (inter alia) living in the Ceduna area, receiving a trigger payment, and have not reached pension age. A trigger payment is defined as: a social security benefit (other than a mature age allowance); certain social security pensions (carer payment, disability support pension, pension PP (single)); or a payment under the ABSTUDY scheme.

<sup>7</sup> The Act, s PGC(1).

13. In August 2019, of all 11,547 CDC active recipients, 38 per cent were Indigenous (ranging from 82 per cent in the East Kimberley down to 17 per cent in Bundaberg/Hervey Bay).<sup>8</sup>
14. The Act previously set an end date of 30 June 2020 for the CDC trials. On 5 May 2020, the end date for all CDC sites was extended to 31 December 2020 under the deferred sunset provisions contained in the *Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (the Omnibus Act)*.<sup>9</sup>
15. Under the CDC trial, 80 per cent of participants' welfare payments are quarantined (**the restricted portion**),<sup>10</sup> with this amount going onto the CDC (or Indue) Card. The restricted portion may be used to buy goods or services other than alcoholic beverages, gambling or cash-like products that could be used to obtain alcoholic beverages or gambling.<sup>11</sup> The remaining 20 per cent of the payment (**the unrestricted portion**) may be used at the person's discretion, and is provided into their regular bank account (and can be withdrawn as cash).
16. The Secretary must determine that a person is not a trial participant if he or she is satisfied that being a trial participant would pose a serious risk to the person's mental, physical or emotional wellbeing (**a wellbeing exemption**).<sup>12</sup> Such a determination may not be revoked.<sup>13</sup> However, the Secretary is not required to inquire into whether a person being a trial participant would pose such a serious risk.<sup>14</sup> This exemption can be obtained by the participant contacting Services Australia, or attending a Centrelink service centre.<sup>15</sup>
17. A person can, however, apply to the Secretary to exit the CDC trial.<sup>16</sup> Under this process, the Secretary may determine that the person is not a trial participant if satisfied that the person can demonstrate reasonable and responsible management of the person's affairs (including financial affairs), taking into account certain legislated criteria.<sup>17</sup> If the Secretary refuses a person's application, reasons must be provided.<sup>18</sup> Should the Secretary agree to the application, however, a health or community worker who considers that they should remain on the trial for medical or safety reasons may request that the Secretary's decision be reconsidered.<sup>19</sup>
18. The Secretary may vary restricted portions to zero per cent for persons in certain emergency circumstances – eg, a technological fault with the card or account, a

---

<sup>8</sup> Senate Community Affairs Committee, Additional information, Social Services Portfolio, Supplementary Budget Estimates 2019–20, [Cashless debit card and income management summary as at 30 August 2019](#), Table 1.1, 2.

<sup>9</sup> Omnibus Act, sch 16.

<sup>10</sup> The Act, s 124PJ(1).

<sup>11</sup> Ibid, s 124PM.

<sup>12</sup> Ibid, s 124PHA(1).

<sup>13</sup> Ibid, s 124PHA(3).

<sup>14</sup> Ibid, s 124PHA(2).

<sup>15</sup> Australian Government Department of Social Security, 'Cashless Debit Card – Frequently Asked Questions'.

<sup>16</sup> The Act, s 124PHB(1).

<sup>17</sup> Ibid, s 124PHB(3), under which the criteria are: the interest of any children for which the person is responsible; whether the person has been convicted of an offence or imprisoned in the last 12 months; risks of homelessness; the health and safety of the person and the community; the responsibilities and circumstances of the person; the person's engagement in the community, including the person's employment or efforts to obtain work; and whether the person satisfies any requirements determined by the Minister under a legislative instrument (124PHB(6)). No such instrument exists.

<sup>18</sup> The Act, s 124PHB(4).

<sup>19</sup> Ibid, s 124PHB(8). Decisions made under Part 3B of the Act are generally subject to internal review (under Part 4) and merits review (under Part 4A).

natural disaster or severe financial hardship due to exceptional and unforeseen circumstances.<sup>20</sup>

19. If the Minister or Secretary causes a review of the CDC trial to be conducted, the Minister must cause the review to be evaluated within six months.<sup>21</sup> This evaluation must be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy. The independent expert must consult trial participants, and make recommendations as to whether cashless welfare arrangements are effective; and whether they should be implemented more broadly. A written report about the evaluation must be laid before Parliament.<sup>22</sup>

### **Income Management regime –NT and Cape York**

20. The Income Management regime is set out in Part 3B of the Act. Income Management was first introduced in the NT in 2007 under the NT Emergency Response, and now operates in several locations<sup>23</sup> of which the NT is by far the most substantial.
21. In the NT, Income Management applies for various reasons including if a person is: a 'disengaged youth'; a 'long term welfare payment recipient'; referred by a child protection or social worker; a vulnerable welfare payment recipient; or a volunteer.<sup>24</sup>
22. Income Management is also directed towards preventing income support recipients from spending their payments on potentially harmful goods and services such as alcohol, illicit drugs and gambling. The vast majority of people on Income Management use the BasicsCard, which only operates in stores which have opted-in and signed a merchant agreement with Services Australia. By comparison, the CDC works everywhere except when individuals try to purchase alcohol, gambling products and some gift cards and to withdraw cash.
23. Income Management participants have between 50 and 90 per cent of their payment quarantined. Most of the NT cohort are either disengaged youth or long term welfare recipients,<sup>25</sup> and have 50 per cent of their payment quarantined.<sup>26</sup> As at August 2019:
  - there were 24,974 people on Income Management. 22,321 of these, or 89 per cent, were in the NT; and

---

<sup>20</sup> The Act, s 124 PJ(4).

<sup>21</sup> Ibid, s 124PS.

<sup>22</sup> Ibid, s 124PS.

<sup>23</sup> Eg, Logan (Qld), Rockhampton (Qld), Bankstown (NSW), Greater Shepparton (Vic) and Playford (SA); APY Lands (SA), Ng Lands (WA), Kiwirrkurra Community (WA); Perth metropolitan (WA), Peel and Kimberley regions (WA), Greater Adelaide (SA): Australian Government, 'Income Management Locations' (April 2018).

<sup>24</sup> Australian Government, 'Income Management Locations' (April 2018). Relevant criteria under contained under Part 3B of the Act, with the NT declared for such purposes under legislative instruments. For example, one relevant criteria is that a person is a 'long term welfare payment recipient' under section 123UCC. The Social Security (Administration) (Specified income management Territory – NT) Specification 2012 states that the NT is specified for the purposes of paragraph 123UCC(1)(c) of the Act.

<sup>25</sup> Senate Community Affairs Committee, Additional information, Social Services Portfolio, Supplementary Budget Estimates 2019–20, [Cashless debit card and income management summary as at 30 August 2019](#), Table 2.1, 4–5.

<sup>26</sup> Australian Government Department of Social Security, *Social Security Guide*, Version 1.273 - Released 25 September 2020 (11.5, 11.6).



- 79 per cent of people on Income Management (and 83 per cent of the NT cohort) were Indigenous.<sup>27</sup>
24. The Cape York Income Management model was established under the Cape York Welfare Reform trial in 2008 and has been extended by legislation multiple times.<sup>28</sup> It involves conditional income management used as a sanction for individuals who have breached their obligations. Under section 123UF of the Act, the Queensland Family Responsibilities Commission (**FRC**) must give the Secretary a written notice requiring that a particular person be subject to the Income Management regime. A person is usually income managed for 3 to 12 months, after which, the FRC will review their progress. Depending on the result, Income Management may continue. The Omnibus Act enabled the end date for Income Management in Cape York to be extended from to 1 July 2020 to 31 December 2020.<sup>29</sup>

### **2019 Bill**

25. The Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (Cth) (**the 2019 Bill**) proposes (inter alia) to: establish the NT and Cape York as CDC trial sites; transition income management participants onto the CDC; extend the end date of all CDC trial sites to 30 June 2021; remove the cap on the number of CDC participants; and remove the requirement that an evaluation be conducted by an independent expert within six months of the completion of a review of the CDC trial.
26. This Bill has been passed by the House of Representatives but remains before the Senate. The Committee's report on this Bill was split along party lines.<sup>30</sup>

### **2020 Bill**

27. The Bill was preceded by the Australian Government's 2020-21 budget announcements of 6 October 2020 that it was providing ongoing funding for the existing CDC sites, as well as additional funding for technological enhancements for the CDC and to support the transition of Income Management participants to the CDC in the NT and Cape York.<sup>31</sup> However, the forward estimates figures for these measures were not published due to commercial-in-confidence sensitivities.<sup>32</sup>
28. The Bill was introduced into the House of Representatives and referred to the Committee on 8 October 2020, with submissions due on 23 October 2020 and the Committee to report by 6 November 2020.
29. The Bill establishes the CDC as an ongoing program, rather than a trial, in existing sites.<sup>33</sup> It also provides for the transition of income management participants in the

<sup>27</sup> Senate Community Affairs Committee, Additional information, Social Services Portfolio, Supplementary Budget Estimates 2019–20, [Cashless debit card and income management summary as at 30 August 2019](#), Table 2.1, 4–5.

<sup>28</sup> Most recently under the *Social Services Legislation Amendment (Queensland Commission Income Management Regime) Act 2017* (Cth).

<sup>29</sup> Omnibus Act, sch 16.

<sup>30</sup> Senate Community Affairs Legislation Committee, *Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 [Provisions] report* (November 2019).

<sup>31</sup> Australian Government Department of Social Services, *Budget Papers 2020-2021: Portfolio Budget Statements 2020-2021*, Budget-Related Paper No 1.12, Social Services Portfolio (2020), 19.

<sup>32</sup> *Ibid*, 26-28.

<sup>33</sup> The Bill, Part 1 – Stage 1 amendments.

NT and Cape York region to the CDC.<sup>34</sup> Under the Bill, around 25,000 Income Management participants in the NT and 150 Cape York Income Management participants will transition to the CDC.<sup>35</sup> The CDC will then operate on an ongoing measure in the new NT and Cape York areas, including for new income support recipients in these areas who meet the criteria.<sup>36</sup> The legislated cap on CDC participants will be removed.<sup>37</sup>

30. The Act currently provides that a person is automatically placed on the CDC once they meet the participant criteria. The Bill will add an additional criterion in all existing sites that the Secretary must give a person a notice informing the person that they are a CDC program participant, before the person is triggered onto the program.<sup>38</sup> The Secretary may also revoke that notice.<sup>39</sup> This is intended to ensure that unforeseen circumstances can be managed. However, a person who was already a participant will not require such a notice.<sup>40</sup> A notice must also be given to a person to facilitate the staggered rollout of the CDC arrangements across the NT.<sup>41</sup> The provision of a notice is not subject to merits review.<sup>42</sup>
31. According to its Second Reading Speech, the Bill is intended to reduce hardship and deprivation, help welfare recipients with their budgeting strategies and reduce the likelihood that they will remain on welfare.<sup>43</sup> It is also intended to provide current NT and Cape York income management participants, who use the Basics Card, with greater choices in their purchasing while also reducing red tape for businesses.<sup>44</sup>
32. The Bill amends the CDC's objects to include 'support program participants and voluntary participants with their budgetary strategies',<sup>45</sup> alongside the existing objects of reducing payments available to be spent on alcohol etc and encouraging socially responsible behaviour.<sup>46</sup> It deletes the current objects of determining whether such reductions decrease violence or harm in trial areas, or whether such arrangements are more effective when community bodies are involved.<sup>47</sup> This is a shift in the CDC's objects.
33. Participants transitioning from the Income Management regime to the CDC program will keep their existing quarantine rate under the Bill.<sup>48</sup> However, the Bill also enables the Minister to vary these rates for NT participants (or cohorts), via notifiable instrument, so that up to 80 per cent of payments are restricted.<sup>49</sup> Such a notifiable instrument is not subject to disallowance. While the Explanatory Memorandum (**EM**)

---

<sup>34</sup> The Bill, Part 2 – Stage 2 amendments. Note that item 5 of the Bill extends the sunset date for Income Management in Cape York from 30 June 2020 to 31 December 2021 under paragraphs 123UF(1)(g) and 123UF(2)(h) of the Act. This reflects that transition to the CDC in Cape York will not occur until after the existing test time of 31 December 2020.

<sup>35</sup> Parliament of the Commonwealth of Australia, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020, Explanatory Memorandum (**EM**), 4.

<sup>36</sup> The Bill, item 74 (proposed sections 124PGD and 124PGE).

<sup>37</sup> *Ibid*, item 16.

<sup>38</sup> *Ibid*, Items 101, 103, 105 and 107.

<sup>39</sup> *Ibid*.

<sup>40</sup> *EM*, 6.

<sup>41</sup> The Bill, Item 74 (eg, proposed ss 124PGE(1)(f), and 124PGE(5)).

<sup>42</sup> *Ibid*, Items 94, 95, 109, 110, 111 and 112.

<sup>43</sup> Parliament of Australia, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020, Second Reading, 8 October 2020 (The Hon Trevor Mark Evans).

<sup>44</sup> *Ibid*.

<sup>45</sup> The Bill, item 9.

<sup>46</sup> The Act, ss 124PC(a) and (d).

<sup>47</sup> The Bill, item 9.

<sup>48</sup> *Ibid*, item 84.

<sup>49</sup> *Ibid*, item 87 (proposed subsections 124PJ(2A) and 124PJ(2B)).

states that this will only occur following a request from a relevant community,<sup>50</sup> the Minister's powers are not restricted in this manner.

34. As noted, under the Act, a person may apply to the Secretary to exit the CDC program if they can demonstrate reasonable and responsible management of their affairs, and provides specific criteria to which the Secretary must have regard in making this decision.<sup>51</sup> The Bill inserts a new power to enable the Minister, via legislative instrument, to determine decision-making principles for the current exit criteria.<sup>52</sup> This instrument will be subject to disallowance. The Secretary must comply with any such decision-making principles.<sup>53</sup> As well as guiding the future exercise of discretion, this amendment is intended to provide participants with greater clarity regarding relevant considerations.<sup>54</sup> However, it is unclear how such decision-making principles will be framed.
35. The Bill also provides that the Secretary must revoke existing and future exit determinations, if he or she ceases to be satisfied that a person is reasonably and responsibly managing their affairs.<sup>55</sup>
36. The Bill also repeals the Secretary's current inability to revoke a wellbeing exemption.<sup>56</sup> It provides that a State or Territory officer or employee<sup>57</sup> may request the Secretary to reconsider a wellbeing exemption, where he or she considers that it is necessary for the person to be a program participant for medical or safety reasons relating to the person *or* the person's dependents.<sup>58</sup> If the Secretary receives such a request and is no longer satisfied that being a trial participant would pose a serious risk to the person's mental, physical or emotional wellbeing, he or she must revoke the determination.<sup>59</sup>
37. The Law Council notes that there is no requirement that the relevant State or Territory officer or employee have any particular expertise to trigger this process, including about the participant's health. The employee or officer is not required to be a health or community officer, as under current subsection 124PHB(8) (for exit determinations). While the EM states that this will only occur in 'specific circumstances where the officer or employee considers that there is no information that needs to be considered to demonstrate there is no risk to the person's wellbeing and will ensure the CDC continues to support welfare recipients to budget and manage their finances',<sup>60</sup> this threshold is not reflected in the Bill. Nor is there a requirement that the participant be notified and provided a right to respond prior to any decision being taken. The Secretary may, however, make a future wellbeing exemption determination regarding the participant.<sup>61</sup>
38. The Bill also significantly amends the Act's current evaluation provisions under items 47, 48 and 114. The effect is that:

---

<sup>50</sup> Or, for participants under proposed new subsections 124 PGE(2) or (3) (child protection authority referrals or vulnerable welfare payment recipients), to reflect requests made by a recognised State or Territory authority in the NT or a child protection authority: EM, 21-22.

<sup>51</sup> The Act, s 124PHB(3).

<sup>52</sup> The Bill, Item 37 (new subsections 124PHB(7A) and (7B)).

<sup>53</sup> Ibid.

<sup>54</sup> EM, 6.

<sup>55</sup> The Bill, item 39 (new subsection 124PHB(9A)).

<sup>56</sup> Ibid, item 32 (new subsection 124PHA(3), repealing current section 124PHA(3)).

<sup>57</sup> Or an officer or employee of an agency or body of a State or Territory: Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> The Bill, item 32 (new subsection 124PHA(3A)).

<sup>60</sup> EM, 6.

<sup>61</sup> The Bill, item 32 (new subsection 124PHA(3B)).

- If the Minister or Secretary causes a review of Part 3, it will be of the extent to which the operation of Part 3D has achieved the Bill's revised<sup>62</sup> objects in section 124PC – that is, whether it has reduced the payments available to be spent on alcohol etc, supported program participants and voluntary participants with their budgetary strategies, and encouraged socially responsible behaviour. It will not consider the extent to which it has decreased violence or harm in CDC areas;<sup>63</sup>
  - while any review of the CDC must still be evaluated, the current requirements regarding evaluation in subsections 124PS(2) and (3) are repealed.<sup>64</sup> These currently require that the evaluation be conducted by an independent expert with significant expertise in social and economic aspects of welfare policy. The expert must consult with trial participants and make recommendations about whether the CDC arrangements are effective and should be expanded.
39. These amendments remove the need for any independent evaluation of the CDC. They undermine the ability of the Australian community to understand whether the CDC is value for money, is effective in addressing harm to relevant individuals or communities, or has unintended consequences.

## Issues

### Truncated timeframes

40. The Bill imposes permanent measures which significantly curtail individuals' freedoms. It was not announced until 6 October 2020, and was introduced into Parliament two days later.
41. The Law Council is concerned that the short timeframes for the Committee's inquiry may not permit adequate public consultation and scrutiny of the Bill's implications or merits, also noting that the current Budget papers do not detail the measure's forward estimate figures (see discussion below). The Law Council considers that it would be preferable to extend the timeframes for the CDC trial to permit greater public debate instead of rushing the Bill through Parliament.

### Lack of evidence base

42. The Law Council strongly supports evidence-based policy-making. It is concerned that there does not appear to be a strong evidence base to justify making permanent the CDC trial, or extending it to NT or Cape York cohorts. Although it has not been described as such, the Law Council considers the CDC trial, 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. Extensive research has shown that income management schemes are ineffective, or produce mixed results at best.<sup>65</sup> It is unclear why any form of income management, whether the CDC or not, should continue.

---

<sup>62</sup> Under the Bill, item 9 (as discussed above).

<sup>63</sup> The Bill, item 48.

<sup>64</sup> *Ibid*, item 111.

<sup>65</sup> 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; J Rob Bray, Matthew Gray, Kelly Hand and Ilan Katz, *Evaluating New Income Management in the Northern Territory: Summary report* (2014), SPRC Report 25e/2014, Social Policy Research Centre, UNSW Australia (**Bray et al, NT Income Management Evaluation**).

43. To support the Bill, the EM refers to 2017 evaluation report findings by ORIMA Research regarding the early stages of the CDC trials. ORIMA's final report from that period found that the CDC had a 'considerable positive impact' in Ceduna and the East Kimberley. It concluded that the CDC 'had been effective in reducing alcohol consumption and gambling in both sites and [was] also suggestive of a reduction in the use of illegal drugs', and that there was 'some evidence that there has been a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling.'<sup>66</sup>
44. Serious concerns have been raised by independent academics about ORIMA's methodology, including by the Australian National University's Centre for Aboriginal Economic Policy Research (**CAEPR**),<sup>67</sup> the Centre for Excellence in Child and Family Welfare (**CFECFW**)<sup>68</sup> and Eva Cox AO, in relation to methodological flaws in the underlying research.<sup>69</sup> These include ethical issues regarding the questions asked, who was surveyed, and how, problems with sampling and the potential contamination of responses given that participants were promised gift cards on completion and were required to provide identification.<sup>70</sup>
45. In 2018, the Australian National Audit Office (**ANAO**) also raised concerns about the ORIMA evaluation, noting that it did not use all relevant data to measure the impact of the trial, despite this being part of the agreed Evaluation Framework.<sup>71</sup> It further found that the Department of Social Services (**the Department**) did not include evaluation in the CDC trial design, nor did it collaborate and coordinate data collection to ensure an adequate baseline to measure the impact of the trial, including any change in social harm.<sup>72</sup> It concluded that the approach taken to monitoring and evaluation by the Department was inadequate. As a consequence, 'it was difficult to conclude whether there had been a reduction in social harm and whether the card was a lower cost welfare quarantining approach'.<sup>73</sup>
46. The EM also refers to the 2018 Future of Employment and Skills Research Centre (**FES**) (University of Adelaide) independent baseline data collection study, taken in the Goldfields at the time of the CDC rollout,<sup>74</sup> which was adopted in response to the ANAO's findings. It states that 'many of the respondents who took part in the baseline data collection reported that positive impacts relating to improvements in child welfare and wellbeing were *starting to be observed*'<sup>75</sup> [emphasis added].
47. The Law Council queries the validity of using baseline data collection explicitly taken at the outset of a trial, and against which later progress is benchmarked, to justify the trial's permanent entrenchment. Further, while FES has been funded to conduct

---

<sup>66</sup> EM, 57-58, citing ORIMA Research, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, [https://www.dss.gov.au/sites/default/files/documents/10\\_2018/cashless-debit-card-trial-final-evaluation-report\\_2.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2018/cashless-debit-card-trial-final-evaluation-report_2.pdf).

<sup>67</sup> Janet Hunt, 'The cashless debit card trial evaluation: a short review', CAEPR Research 2017.

<sup>68</sup> CFECFW, *Review of the Cashless Debit Card Trial in Ceduna and East Kimberley* (June 2017).

<sup>69</sup> Eva Cox, 'Brief critique of data and methodology of qualitative and surveys' (4 September 2017) *Sydney Morning Herald* (online).

<sup>70</sup> *Ibid.* For example, Ms Cox noted that given Indigenous anxieties about authority, and welfare, they were likely to give acceptable answers. It was also not clear if interviews were private or in the presence of others, which may affect answers. She concluded that the effects on data collected were likely to be serious and undermine the legitimacy of responses.

<sup>71</sup> Australian National Audit Office, 'The Implementation and Performance of the Cashless Debit Card Trial', 17 July 2018, Summary and Recommendations.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> EM, 36.

<sup>75</sup> *Ibid.*

evaluations of the CDC trial, these are yet to be finalised or released. On this basis, it is clearly premature to establish the CDC as a permanent measure.

48. Most recently, Marston et al's 2020 *Hidden Costs: An Independent Study into Income Management in Australia* report,<sup>76</sup> conducted under an Australian Research Council project, reported on outcomes for both CDC and income management participants (together, compulsory income management or **CIM**), based on a mixed methods survey open to all participants (199 eligible responses received), and detailed in-depth qualitative interviews at four sites, including two CDC sites (114 interviews conducted). Several aspects of this study are cited below. Overall, however, its authors commented that its findings:

*...highlight the hidden costs of CIM for individuals and communities. The deep sense of shame and stigma, the daily anxiety of not knowing if the card will work, the administrative bungles that leave people with core needs unmet, the restrictions on basic financial freedoms and rights that most Australians take for granted all add up to a cumulative and heavy burden, with few recognisable benefits. These costs are not just economic and practical, they are also personal and social, getting to the very core of how people see themselves reflected in a policy that for the most part renders them as 'failed subjects.'*<sup>77</sup>

49. A minority (13 per cent) of the respondents thought that there were advantages to the scheme. However, for a majority of participants, being placed on income management (including the CDC) not only failed to alleviate (largely non-existent) challenges, but had also caused significant financial and other problems that did not previously exist.<sup>78</sup> Income management hindered rather than helped with management of their financial affairs, and reduced their sense of autonomy, wellbeing and overall locus of control.
50. A strong theme was that many participants had experienced a significant decline in their mental health and wellbeing as a result of the challenges they faced navigating their lives on the cards.<sup>79</sup> This stress and anxiety were directly related to the feelings of stigma and shame associated with being on income management.<sup>80</sup>
51. The study's authors found that the core income management policy assumptions were 'deeply flawed'.<sup>81</sup> They were concerned that contrary to its aims, income management appears to weaken the financial position and capabilities of those subjected to it, finding tentative support for the conclusion that income management is associated with a weaker internal locus of control, which has been found in other research to have negative implications for work-search behaviours, job transitions and a range of other health and wellbeing outcomes.<sup>82</sup>

---

<sup>76</sup> Greg Marston, Philip Mendes, Shelley Bielefeld, Michelle Peterie, Zoe Staines and Steven Roche, *Hidden Costs: An Independent Study into Income Management in Australia* (2020), School of Social Science, The University of Queensland, Brisbane, Australia (**Marston et al, Hidden Costs Study**).

<sup>77</sup> *Ibid*, 16.

<sup>78</sup> *Ibid*, 9.

<sup>79</sup> *Ibid*, 10.

<sup>80</sup> *Ibid*, 11.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*, 12.

52. As such, they found that income management may *undermine* rather than support stated policy objectives of creating more autonomous, independent individuals who will be more likely to transition into employment.<sup>83</sup>
53. This conclusion reflects the earlier conclusions made in 2014 by Bray et al, summarising New Income Management in the NT between 2010 and 2014.<sup>84</sup> These authors found that for many people, the program has acted to make people more dependent on the welfare system.<sup>85</sup>
54. Further, 'the evaluation could not find any substantive evidence that the program achieved significant change relative to its key policy objectives, including changing peoples' behaviour'.<sup>86</sup> There were no substantial improvements with respect to spending patterns, or overall improvements in financial wellbeing. More general measures of wellbeing at the community level also showed no improvement, including for children. While people reported a reduction at a personal level of having some problems due to alcohol, drugs and gambling, they also reported no improvement – and potentially a worsening of severe problems from these causes.<sup>87</sup>

## Value for money

55. While the EM refers to the need to ensure taxpayer funded welfare is meeting its objectives in a cost effective manner,<sup>88</sup> as noted, there is no Budget information for the forward estimates regarding the measures behind the Bill.
56. The EM highlights that the CDC presents a significant reduction in costs to the Australian Government, compared to the costs associated with administering Income Management.<sup>89</sup> It states that income management in 2018-2019 totalled around \$76 million, while the total cost of the CDC was around \$80 million from 2015-16 to the end of the 2019-2020 financial year.<sup>90</sup> The cost of the CDC rollout has also reportedly become more cost-effective over time. At the most recent site, the Bundaberg and Hervey Bay region in Queensland, it is estimated that the cost is approximately \$820 per annum per head.<sup>91</sup>
57. The Law Council understands the need for the Australian Government to reduce its expenditure, particularly at the current time of the pandemic. However, it is concerned that there is little evidence that neither compulsory income management *nor* the CDC provides value for money in achieving improvements in affected communities, in terms of addressing violence and harm in communities, supporting better budgeting, and overcoming welfare dependence. As discussed, recent evidence points towards the possibility that they may even undermine these objectives.
58. A cost of \$820 per annum per participant for CDC remains substantial. In the Law Council's view, this funding could be better spent on programs and services which address the complex underlying needs of many income support recipients. It is

---

<sup>83</sup> EM, 12.

<sup>84</sup> Bray et al, NT Income Management Evaluation.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Regulatory Impact Statement, EM, 1.

<sup>89</sup> *Ibid.*, 30.

<sup>90</sup> *Ibid.*, 25. The Law Council notes in this context that the CDC has involved a trial of fewer participants which has gradually expanded over this period. It understands that around 11,000 people are now on the CDC compared to around 25,000 on income management.

<sup>91</sup> *Ibid.*

acutely aware, for example, that many people with disability (eg, with cognitive impairment, mental health conditions or hearing or communication difficulties) eventually become caught up in the criminal justice system – particularly in regional and remote areas, in which justice outcomes are noticeably worse – in circumstances where better early diagnosis and support would have helped prevent such automatic pathways. Homelessness also dramatically increases a person’s likelihood of ultimately being charged and convicted.<sup>92</sup>

59. The Law Council underlines that there is no cost-benefit analysis around cessation of compulsory income management or the CDC altogether and redirecting the substantial funds towards services which address these complex issues.
60. As noted above, the ANAO concluded due to the adequate approach taken to monitoring and evaluation it was difficult to conclude whether there had been a reduction in social harm and whether the card was a lower cost welfare quarantining approach.<sup>93</sup> While the EM states that the CDC is a significantly lower cost than income management, and that deficiencies identified by the ANAO have been addressed,<sup>94</sup> it remains the case that it is impossible to conclude that the CDC is value for money.

## Impacts of cashless debit card on human rights

61. A number of features of the CDC (and income management more generally) undermine human dignity, a concept which lies at the heart of human rights.<sup>95</sup> They also interfere with the human rights of participants, including the:
  - rights of equality and non-discrimination;<sup>96</sup>
  - right to self-determination;<sup>97</sup>
  - right to social security<sup>98</sup> (and to an adequate standard of living);<sup>99</sup> and
  - prohibition on interference with privacy.<sup>100</sup>
62. It also undermines the principle of free, prior and informed consent, as reflected in Article 19 of the United Nations Declaration of the Rights of Indigenous persons<sup>101</sup> (UNDRIP). This requires States to:

*... consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain*

---

<sup>92</sup> See, eg Law Council of Australia, *Justice Project – Final Report* (2018), People with Disability and People who are Homeless Chapters.

<sup>93</sup> Australian National Audit Office, ‘The Implementation and Performance of the Cashless Debit Card Trial’, 17 July 2018, Summary and Recommendations.

<sup>94</sup> EM, 60.

<sup>95</sup> As reflected in the preambles to, eg, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (and article 1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**); *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (**CERD**).

<sup>96</sup> ICCPR, arts 2; 26; CERD, arts 1, 5.

<sup>97</sup> ICCPR, art 1; ICESCR, art 1, UNDRIP, art 3.

<sup>98</sup> ICESCR, art 9; see also CERD, art 5(e)(iv).

<sup>99</sup> ICESCR, art 11(1).

<sup>100</sup> ICCPR, art 17; CRC, art 16; CRPD, art 22.

<sup>101</sup> GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (**UNDRIP**). While UNDRIP is not a treaty and does not itself create legally binding obligations, many, if not all of its provisions, have been recognised as reflecting customary international law.



*their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

## **Rights of equality and non-discrimination**

63. As noted above, the CDC (and income management of NT and Cape York income support recipients) disproportionately impacts upon Aboriginal and Torres Strait Islander persons, who make up 38 per cent of all CDC trial active recipients (82 per cent of the East Kimberley recipients).<sup>102</sup> Around 83 per cent of the NT income management recipients, who will be transitioned onto the CDC, are Indigenous.<sup>103</sup>
64. Relevant in this regard is Article 26 of the ICCPR, which provides that:
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
65. When a State party adopts legislation, it must comply with the requirement of Article 26 and ensure that its content is not discriminatory. The application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided in the ICCPR (as with Article 2), but is a free-standing guarantee of non-discrimination in relation to all rights,<sup>104</sup> including the right to social security.<sup>105</sup>
66. The Bill's Statement of Compatibility with Human Rights (**HR Compatibility Statement**) states that the rights to equality and non-discrimination are not directly limited by the CDC, as the program is not applied on the basis of race or cultural factors, CDC locations have been chosen based on objective criteria, and the CDC program is not targeted at people of a particular race, but to welfare recipients who meet particular criteria.<sup>106</sup>
67. The Law Council disagrees with this statement. It is plainly inconsistent with definitions of discrimination under international law which is binding on Australia.<sup>107</sup> The Human Rights Committee (**HRC**) has observed that the meaning of 'discrimination' in Article 26 extends to 'any distinction... based on any ground... which has the *purpose or effect* of nullifying and impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'<sup>108</sup> (emphasis added). Therefore, Article 26 can be violated by a rule which is indirectly discriminatory – that is, neutral at face value or without intent to discriminate, if its detrimental effects disproportionately affect persons having a particular race.<sup>109</sup>
68. The HRC has also indicated that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective,

---

<sup>102</sup> Senate Community Affairs Committee, Additional information, Social Services Portfolio, Supplementary Budget Estimates 2019–20, [Cashless debit card and income management summary as at 30 August 2019](#).

<sup>103</sup> Ibid.

<sup>104</sup> Human Rights Committee (**HRC**), *General Comment 18: Non-discrimination*, 37<sup>th</sup> sess (10 November 1989) (**General Comment 18**); HRC, *Views: Communication Number 172/1984*, 29<sup>th</sup> sess, UN Doc CCPR/C/29/D/172/1984 (9 April 1987) ('*Broeks v Netherlands*').

<sup>105</sup> *Broeks v Netherlands*, [12.4].

<sup>106</sup> EM, 34.

<sup>107</sup> Eg, ICCPR, arts 26 and 2, ICESCR, art 2(2), ICERD, arts 1, 2, 5.

<sup>108</sup> HRC, General Comment 18, [6].

<sup>109</sup> HRC, *Althammer v Austria* (998/01).

and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>110</sup> For the reasons discussed below (Justification of limitations on rights), the Law Council does not consider these standards are met.

69. Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) requires States to take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.'
70. Article 5 of the ICERD, which corresponds with Article 2(2), is also fundamental in the context of the Bill. It requires States to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of certain rights, including the right to social security.<sup>111</sup> Accompanying this is Article 2(1)(c), which provides that States shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.
71. Whereas Article 26 of the ICCPR is general and broad in its expression, Article 5 of ICERD is more specific – both as to the form of discrimination prohibited, and the kinds of rights in respect of which discrimination is prohibited.
72. With respect to Article 5, the Committee on the Elimination of Racial Discrimination (**CERD Committee**) has stated that:

*Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.*

*Whenever a State imposes a restriction upon one of the rights listed in Article 5 which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with Article 1 of the Convention as an integral part of international human rights standards.<sup>112</sup>*

73. Article 1 defines racial discrimination to include:

*any distinction, exclusion, restriction or preference which has the 'purpose or effect' of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

74. The CERD Committee has commented that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of

---

<sup>110</sup> HRC, *General Comment 18* [13].

<sup>111</sup> ICERD, art 5(e)(iv).

<sup>112</sup> CERD Committee, *General Recommendation 20 on Article 5 of the Convention*, 48<sup>th</sup> sess, UN Doc A/51/18 (8 March 1996) annex VIII at 124 [1]-[2].

Article 1(4) of the Convention.<sup>113</sup> In seeking to determine whether an action would contravene the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>114</sup> These concepts are further discussed below (Justification of limitations on rights).

75. Article 1(4) provides that special measures do not constitute discrimination. It states that:

*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided however, that such measures shall not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

76. According to the CERD Committee, 'special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.'<sup>115</sup> Special measures do not amount to discrimination when taken for the 'sole purpose' of ensuring equal enjoyment of human rights and fundamental freedoms.<sup>116</sup>
77. It further states that special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.<sup>117</sup> State parties should further ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.<sup>118</sup>
78. Domestically, Australia has given effect to the ICERD in the RDA. This includes section 10, which gives effect to Australia's obligations under Articles 2(1)(c) and 5 of the Convention,<sup>119</sup> section 9(1A) (indirect discrimination) and Article 8(1), concerning special measures. These provisions are discussed below (Interaction with Racial Discrimination Act).
79. At this juncture, however, the Law Council notes that the Australian Government does not appear to have characterised the CDC (including as amended by the Bill) as a 'special measure' for the purposes of the ICERD.

---

<sup>113</sup> CERD Committee, General Recommendation 14 on article 1, paragraph 1, of the Convention, 42nd sess, U.N. Doc. A/48/18 (16 March 1993) annex VIII at 1 [2].

<sup>114</sup> Ibid, [2].

<sup>115</sup> CERD Committee, General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Discrimination, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) 6 [20].

<sup>116</sup> Ibid, [21].

<sup>117</sup> Ibid, [16].

<sup>118</sup> Ibid, [18]. The Law Council acknowledges that in *Maloney v The Queen* (2013) 252 CLR 168 (**Maloney**), the RDA's special measures provision in subsection 8(1) was interpreted not to require consultation: see discussion below (Interaction with Racial Discrimination Act).

<sup>119</sup> *Maloney*, 127 [325] (Gageler J).

80. In its 2017 Concluding Observations on Australia, ICERD highlighted that it was 'deeply concerned that Indigenous Peoples continue to experience high levels of discrimination across all socioeconomic indicators.' In particular, it highlighted that it was:

*...concerned that Indigenous Peoples including those living in remote areas face discrimination in access to social security benefits, notably through the mandatory income management scheme...*<sup>120</sup>

81. It recommended that Australia:

*Reconsider the mandatory income management scheme which in effect disproportionately affects Indigenous Peoples, maintain only an opt-in income management scheme, and remove discriminatory conditions in access to social security benefits by claimants living in remote areas, the vast majority of whom are indigenous.*<sup>121</sup>

82. It is clear that the CERD Committee did not consider that compulsory income management could be characterised as a special measure. In the Law Council's view, these comments may be seen as equally attributable to the CDC and compulsory income management schemes such as in the NT, noting that strong concerns were raised about both in the NGO shadow report.<sup>122</sup>
83. Along with the CERD Committee, the Special Rapporteur on the Rights of Indigenous Persons has also raised concerns that the compulsory income management in the NT is punitive, stigmatising, detrimental to autonomy and dignity, and significantly interfere with individuals' private and family life.<sup>123</sup> On this basis, the Law Council queries the HR Compatibility Statement's justification that the Bill is simply introducing the CDC into the NT where income management arrangements already exist.<sup>124</sup> It is insufficient to address concerns about discrimination by replacing one set of discriminatory arrangements with another.

### **Right to self-determination and free, prior, informed consent**

84. The right to self-determination encompasses the ability of all persons – most relevantly here, Aboriginal and Torres Strait Islander income support recipients - to 'freely determine their political status and freely pursue their economic, social and cultural development'.<sup>125</sup>
85. The HR Compatibility Statement states that the transition of Income Management participants to the CDC program will not impact on or interfere with such rights as: under the CDC people may spend their restricted funds on any goods or services except alcohol, gambling and illicit drugs; the transition from Income Management to CDC will offer more opportunities for participants to spend their quarantined welfare

---

<sup>120</sup> CERD Committee, Concluding observations - on the eighteenth to twentieth periodic reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 6 [23].

<sup>121</sup> Ibid.

<sup>122</sup> Australian NGO Coalition, *Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*, Submission to the UN Committee on the Elimination of Racial Discrimination, October 2017, 50-52.

<sup>123</sup> 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).

<sup>124</sup> EM, 33.

<sup>125</sup> Eg, ICCPR, art 1; ICESCR, art 1, UNDRIP, art 3.

payments, eg through online shopping; and the limitation of funds will protect vulnerable people from substance abuse, harm and violence.<sup>126</sup>

86. The Law Council disagrees with this assessment. The Bill permanently entrenches the CDC trial under which a disproportionately Indigenous group of income support recipients will have 80 per cent of their payments restricted. It also moves large numbers of Indigenous persons from the NT onto the CDC, while enabling the Minister to vary their rates of restricted payments to up to 80 per cent, with or without the consent of the community or individual.
87. In general, individuals are automatically placed or moved onto the CDC under the Bill on the basis of blanket criteria,<sup>127</sup> regardless of their consent to participate. As is discussed below, it is also difficult for them to obtain an exit from the CDC, and the Bill may compound this issue by enabling exit decision-making principles which fetter the Secretary's decision-making, and increase the likelihood of exit determinations and wellbeing exemptions being revoked. The Bill's new process to trigger a wellbeing exemption revocation also, as discussed, bypasses the individual.
88. As the CDC is not, generally, voluntary and does not include safeguards to ensure that its adoption and implementation are community-driven and implemented 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.
89. The HR Compatibility Statement notes that the CDC rollout has been and continues to be the subject of an extensive community consultation process, for example:

*The Department of Social Services has held several information sessions throughout the Northern Territory in preparation for the transition and consulted with key community leaders and organisations to provide information about the CDC and seek guidance about the most appropriate way to consult with the broader community. The information sessions focused on providing communities with an understanding of the CDC, how it operates, and how the card is different in both policy and function to the BasicsCard in the IM [income management] regime.*<sup>128</sup>
90. The Regulatory Impact Statement also refers to extensive community consultations having occurred during the life of the CDC trials.<sup>129</sup>
91. The Law Council appreciates the Department's efforts in this regard. However, it notes that the summary regarding the NT above may be characterised as CDC information sessions, rather than seeking free, prior and informed consent. It also remains aware of substantial concerns expressed amongst many First Nations people and communities about the CDC, and income management more generally, which raise questions about whether such consent exists.<sup>130</sup>
92. Many of the parameters regarding prior CDC trial consultations have also now fundamentally changed, undermining their relevance. The Bill substantially alters and reduces the CDC's purposes, makes it permanent rather than a trial, and

---

<sup>126</sup> EM, 35.

<sup>127</sup> With the possible exception of the Cape York model, which an individual is notified by the Queensland Commission on the basis of their individual behaviour.

<sup>128</sup> EM, 29.

<sup>129</sup> EM, 35-42.

<sup>130</sup> Eg, Isabel Moussalli and Rebecca Nadge, 'Australian Government opts to enshrine cashless debit card, or CDC, system for welfare recipients', ABC News online, 11 October 2020.

reduces safeguards which were incorporated (eg no independent evaluation, potential fetters on Secretarial exit decision-making, greater revocation of exits and wellbeing exemptions). In the truncated timeframes since the Bill was announced and introduced (early October 2020), it is not possible to say that adequate community consultation has occurred. This is exacerbated by the lack of independent evidence of the CDC's effectiveness.

### Right to social security

93. Article 9 of the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**) provides for the right of everyone to social security, including social insurance.<sup>131</sup> The Committee on Economic, Social and Cultural Rights (**CESCR**) has emphasised that this right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their other rights under the ICESCR.<sup>131</sup> As indicated above, this right should be provided without discrimination.<sup>132</sup>
94. Marston et al's 2020 *Hidden Costs: An Independent Study into Income Management in Australia* report,<sup>133</sup> conducted under a broader Australian Research Council project, reported on outcomes for both CDC and income management participants, based on a mixed methods survey open to all participants (199 eligible responses received), and detailed in-depth qualitative interviews at four sites, including two CDC sites (114 interviews conducted).
95. The report revealed significant practical and personal difficulties created by the CDC for many participants (many of which were also identified with respect to income management more generally). These included:
  - not having enough cash for essential items;
    - a reduced capacity to participate in cash-based consumption for second-hand goods, including furniture or clothes, being effectively shut out of the second-hand cash market (in this context, the Law Council notes 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<sup>134</sup>);
    - difficulty providing for children – eg cash for school excursions or Christmas parade items, as well as reduced capacity to access and participate in community events such as local shows;
    - difficulties sharing or giving cash to family or friends, or pooling money to purchase more expensive items such as second-hand cars;
  - diminished choices as consumers due to reduced access to financial products such as credit cards and bank loans - eg banks not accepting the CDC to pay credit card bills, or individuals being unable to demonstrate a capacity to pay bills given 80% of their Centrelink payments were placed on the card;<sup>135</sup>
  - a range of technical difficulties with the CDC, including:

---

<sup>131</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 19 – The Right to Social Security, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008).

<sup>132</sup> Ibid, ICESCR, art 2(2); ICCPR, art 26; ICERD, art 5.

<sup>133</sup> Marston et al, Hidden Costs Study.

<sup>134</sup> Sarouche Razi and Peter Sutherland, 'Cashless Welfare Card (Paper presented at NACLC Conference, Canberra, 9 August 2017).

<sup>135</sup> Marston et al, Hidden Costs Study, 84-85.

- numerous interviewees experiencing payment declines and having to either spend limited cash reserves or call family members for assistance
- problems making bill payments, including transferring funds for bills such as rent, with some payments inexplicably or failing to go through. Some feared being evicted as a result;
- with online Indue platforms (particularly for those with digital barriers) and seeking phone support from Indue representatives;
- difficulties with EFTPOS systems in general and the Indue system in particular, leaving people on CDC with scarce accessible funds. The Law Council adds in this context that the CDC relies on regular and reliable access to the internet and mobile phone coverage. This is not the case for many remote communities in the NT;
- the Indue system not differentiating between products, impacting on situations where people wished to buy meals or other permitted items at premises where alcohol was sold – with participants unable to dine at restaurants eg with family members, and another unable to enrol their child at a football club which sold alcohol;<sup>136</sup>
- numerous businesses not accepting the CDC, reducing consumer choices and limiting access to cheaper goods and services:
  - particular difficulties using Indue card outside the trial site, due to some businesses not knowing what the card was, or not set up to accept it – one respondent could not buy cheaper Costco groceries out of town, another was saving all their cash for petrol to visit their child in out-of-home care, as the card did not work in external petrol stations;
  - even when businesses purportedly accepted the card, CDC payments at times declined;
  - interviewees having to contact businesses in advance to see whether it would be accepted; and
  - incurring additional fees and charges from businesses due to CDC payment failures.<sup>137</sup>

96. The report's authors highlighted that 'far from helping cardholders to engage in more responsible spending behaviours, the CDC thus limited some families' access to cheaper goods and services and introduced additional costs for others'.<sup>138</sup> The CDC was described as creating financial stress and disempowering predicaments for many people, and having a corrosive impact on their socio-emotional wellbeing, given the humiliation, stress and reduced feelings of self-worth.<sup>139</sup> The authors stated that 'some problems had the potential to cause profound material harm', such as where rent was now in arrears and participants feared being evicted.

97. This suggests that for many participants, the CDC significantly interferes with the ability to enjoy the right to social security in practice, including in circumstances which uphold their human dignity. While it has not discussed these in detail, some of the findings outlined above suggest that it may also limit the enjoyment of the right

---

<sup>136</sup> Ibid, 102.

<sup>137</sup> Ibid, 86-87, 101-105.

<sup>138</sup> Ibid, 102.

<sup>139</sup> Ibid, 106-109.

to an adequate standard of living, which includes adequate food, clothing and housing.<sup>140</sup>

98. It is permissible to limit the enjoyment to ICESCR rights.<sup>141</sup> However, the UN Committee has stated that such limitations must be proportional and the least restrictive alternative where several types of limitations are available.<sup>142</sup> The onus is on the Australian Government to demonstrate this. As discussed below (Justifications of limitations on rights), the Law Council is concerned that it has failed to do so, in light of problems with evaluation and negative emerging results.

### **Prohibition on interference with privacy**

99. No one is to be subject to arbitrary or unlawful interference with their privacy, and everyone has the right to the protection of the law against such interference.<sup>143</sup>
100. Privacy is not thoroughly defined. However, it is suggested that it comprises 'freedom from unwarranted and unreasonable intrusions into activities that society recognises as belonging to the realm of individual autonomy'.<sup>144</sup>
101. Compulsory income management in any form, whether through the Basics Card or the new CDC, interferes with private life and undermines personal autonomy and dignity.
102. The report discussed above highlights substantial concerns regarding the interference with private life, and undermining of personal autonomy and dignity due to income management (including the CDC). It describes individuals needing to continually disclose their status as income-managed welfare recipients – with the connotations that they cannot manage their finances - to businesses (including restaurants, grocery stores etc), schools, local clubs, family members and landlords in order to use their card and overcome issues associated with its use.
103. For many, this is reported to cause substantial shame, humiliation and stigma.<sup>145</sup> While the Law Council acknowledges the Department's efforts to reduce stigma through changing the CDC Indue card to look and function like an ordinary card,<sup>146</sup> the report clearly highlights that shame and stigma are caused by a much wider range of issues associated with being a CDC participant. These issues are not addressed in the HR Compatibility Statement.

### **Justifications of limitation on rights**

104. As set out in the Law Council's *Policy Statement on Human Rights and the Legal Profession*, which reflects the international law position, certain human rights are absolute and no limitation upon them is permissible. For all other rights, limitations may be imposed provided that certain standards are met. Some rights have express limitation clauses setting out when rights may be limited, while others have implied

---

<sup>140</sup> ICESCR, art 11(1).

<sup>141</sup> ICESCR, art 4 recognises that, in the enjoyment of ICESCR rights, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

<sup>142</sup> Eg, Committee on Economic, Social and Cultural Rights (**CESCR**), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000).

<sup>143</sup> ICCPR, art 17.

<sup>144</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary* (2013), 3<sup>rd</sup> ed, Oxford, 534.

<sup>145</sup> Eg, Marston et al, 106-110.

<sup>146</sup> EM, 30.



limitations, and some treaties contain a general limitation clause. The Australian Government bears the onus of clearly demonstrating that any restriction is justified.

105. In general, the Law Council endorses the approach of the Parliamentary Joint Committee on Human Rights (**PJCHR**), which raises three questions for consideration:

- 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.<sup>147</sup>

106. With respect to such questions, the Attorney-General's Department's guidance for policy and lawmakers relevantly asks:

- 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 being 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?<sup>148</sup>

#### **Is the limitation aimed at achieving a legitimate objective?**

107. The Law Council considers that the objects of the CDC, as reframed and narrowed under the Bill, are generally legitimate. These are:

- reducing payments available to be spent on alcoholic beverages, gambling and illegal drugs;
- supporting program participants and voluntary participants with their budgetary strategies; and
- encouraging socially responsible behaviour.<sup>149</sup>

108. It notes that the third objective is, however, loosely framed and difficult to measure.

109. Other justifications raised by the Australian Government in favour of the Bill include:

- reducing hardship and deprivation;<sup>150</sup>
- improving living conditions for the children of welfare recipients (due to increased payments available for eg, food, clothing and other goods such as toys)<sup>151</sup> in line with obligations regarding the best interests of the child;<sup>152</sup>
- reducing violence and harm related to alcohol consumption, illegal drug use and gambling;<sup>153</sup>

---

<sup>147</sup> Law Council of Australia, *Human Rights and the Legal Profession: Key principles and commitments*, May 2017, 4.

<sup>148</sup> Attorney-General's Department, '[Permissible limitations](#)' (undated).

<sup>149</sup> The Bill, item 9, amending current s 124PC.

<sup>150</sup> Parliament of Australia, *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020*, Second Reading, 8 October 2020 (The Hon Trevor Mark Evans) (**Second Reading Speech**).

<sup>151</sup> EM, 36.

<sup>152</sup> CRC, art 3.

<sup>153</sup> EM, 28.

- reducing the likelihood that participants will remain on welfare;<sup>154</sup>
- providing current NT and Cape York income support participants, who use the Basics Card, with greater choices in their purchasing;<sup>155</sup> and
- reducing red tape for businesses.<sup>156</sup>

110. These are also legitimate objectives. In particular, the Law Council considers that alcohol and drug addiction, and gambling, can have catastrophic consequences for families and their communities and require an appropriate policy response. However, it notes that overall, the Bill reduces the emphasis on the current CDC trial object of reducing violence or harm related to alcohol, drugs and gambling.<sup>157</sup>

### **Is there a rational connection between the limitation and the objective?**

111. For a restriction on rights to be permissible, the Australian Government must demonstrate that there is a 'rational connection' between the restriction and the objective to be achieved. In other words, as noted by the PJCHR:

*...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.*<sup>158</sup>

112. The Law Council considers that the Australian Government has not clearly demonstrated this connection. For example, the Bill does not directly target people who abuse alcohol, illegal drugs and gambling, or engage in socially responsible behaviour. Rather (with the exception of Cape York), it applies blanket criteria to cohorts of welfare recipients. 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. 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.<sup>159</sup> The Bill also assumes that the full cohorts to which it applies have difficulty managing their money.

113. While all of these assumptions will certainly be true for *some* CDC and income management participants, the Hidden Costs Study found that:

- the majority of survey participants reported that they had no trouble managing their own money before being placed on income management (67 per cent). Those on the card versus not on income management considered themselves equally strong in terms of their financial behaviour;<sup>160</sup> and
- most participants reported that they did not have a problem with alcohol (87 per cent), or gambling (91 per cent) prior to being put on the cards.<sup>161</sup>

114. While these are self-reported findings, the authors note that they provide tentative support for Australian and international research which demonstrates that welfare populations are generally not overrepresented in terms of use and reliance upon

---

<sup>154</sup> Second Reading Speech.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> PJCHR, *Guidance Note 1: Drafting Statement of Compatibility* (2014).

<sup>159</sup> Elise Kelin, 'The Cashless Debit Card causes social and economic harm – so why trial it again?' *The Conversation* (online), 30 March 2017, citing Kimberley Development Commission *An analysis of the 2011 Census for key population metrics or Aboriginal employment, education and housing* (2014).

<sup>160</sup> Marston et al, Hidden Costs Study, 8.

<sup>161</sup> Ibid, 9.

alcohol and recreational drugs.<sup>162</sup> Recent surveys have shown that those receiving social security generally spend *less* on alcohol, as a proportion of total household expenditure, than those not receiving social security.<sup>163</sup>

115. Despite longstanding income management being in place in the NT, and CDC trials being established since 2016, as highlighted above ('Lack of Evidence base') the Law Council is concerned that there is insufficient evidence demonstrating that they are effective in achieving their objectives of supporting budgeting strategies, reducing harms associated with alcohol, drugs or gambling, reducing welfare dependence, or promoting more socially responsible behaviour.
116. As noted above, the validity of the ORIMA evaluation put forward to support the CDC has been queried by academics and the ANAO, while using the FES baseline study, without its follow-on evaluations being available, is questionable.
117. The report by Bray et al regarding NT income management was also unable to find any substantive evidence of the program achieving significant change relative to its key objectives, including changing peoples' behaviour.<sup>164</sup>
118. There is also evidence which suggests that income support management, including the CDC trials so far, may undermine the Bill's objectives, by:
  - hindering rather than helping with management of participants' financial affairs, and reducing their sense of autonomy, wellbeing and overall locus of control;
  - frustrating existing budgeting strategies which include cheaper or second-hand purchasing;
  - creating individual and family tensions due to the inability to put cash towards positive purchases, stress and anxiety flowing from difficulties using the CDC, and the associated shame and stigma;
  - potentially leading to harmful situations in which bills cannot be paid and people are subject to additional charges or are even evicted as a result; and
  - makes people more dependent on the welfare system.<sup>165</sup>
119. Media reports also raise concerns that the CDC may be 'actively making many people's lives worse', including for family violence victims, for whom lack of access to ready cash makes it difficult to flee their partners.<sup>166</sup>
120. The Law Council therefore does not consider that the Australian Government has demonstrated the rational connection between the CDC and the stated goals and that the limitations posed by the CDC (or compulsory income management generally) will in fact lead to a reduction of the problems they are seeking to alleviate.

---

<sup>162</sup> Ibid, 9, citing eg Grant and Dawson 1996; Schmidt and McCarty 2000 Jayakody, Danziger and Pollack 2000; Zabkiewics and Schmidt 2007; ABS 2017; Australian Institute of Health and Welfare 2017; Bielefeld 2018b.

<sup>163</sup> Ibid, 9, citing ABS 2017, Bielefeld 2018b.

<sup>164</sup> Bray et al, NT Income Management Evaluation.

<sup>165</sup> Marston et al, Hidden Costs Study; Bray et al, NT Income Management Evaluation.

<sup>166</sup> Gabriella Marchant, 'Cashless welfare card recipients denied exit from trial claim unfair treatment', ABC News (online), 21 August 2020.

## Is the limitation proportionate to that objective?

### *Obligation to consider less restrictive alternatives*

121. The Law Council is concerned that less restrictive measures are not being canvassed as an alternative to permanently entrenching the CDC, and transitioning NT and Cape York income management cohorts onto it.
122. For example, as noted, such funding may be better spent on programs and services which address the complex underlying needs of many income support recipients. This would encompass better access to diagnosis, health, mental health, housing, youth engagement, financial literacy, employment and family support services, which are needed in many remote locations.
123. Should some form of income management be retained, there is also the option of making it voluntary, rather than compulsory. Independent research suggests it may be most effective in this context. Bray et al, for instance, found that, with respect to the NT:

*While data for the population on Voluntary Income Management is also ambiguous, some indicators suggest this measure may have been associated with some benefits for this group. This is not the case for those on Compulsory Income Management.*<sup>167</sup>

124. Marston et al's findings also suggest that there is sufficient support among participants and community stakeholders for exploring ways to implement a voluntary-only scheme, dovetailed with wrap-around social services and financial capability education and training. They consider that this would be 'far less polarising and problematic' than compulsory income management.<sup>168</sup>

### *Blanket limitation or sufficient flexibility to treat different cases differently*

125. The CDC, and the NT income management scheme which is being transitioned onto the CDC under the Bill, are based on blanket criteria. For example, for a Ceduna participant, a person becomes a CDC participant if they are living in Ceduna, and are receiving a social security benefit<sup>169</sup> or certain social security pensions, and have not reached pension age.<sup>170</sup> There is no requirement, as noted, that the person is mismanaging their money, or engaging in harmful behaviour associated with alcohol, drugs or gambling.
126. The Law Council acknowledges that it is possible for individuals to apply for an exit determination, which may be granted if the person can demonstrate reasonable and responsible management of their affairs.<sup>171</sup> However, it is for the Australia Government to justify any restriction on rights and therefore the Department must demonstrate that a person should be subject to restrictions, instead requiring the person to demonstrate why they should not be so subject.
127. The Law Council is also aware of reports that individuals find it very difficult to obtain such exits. Recently reported government data shows that of nearly 1,200

---

<sup>167</sup> Bray et al, NT Income Management Evaluation, 18.

<sup>168</sup> Maston et al, 15.

<sup>169</sup> Other than a mature age allowance: the Act, s 124PD.

<sup>170</sup> The Act, s 124PG(1). A number of other factors must not apply – eg the person is not covered by certain determinations, and must not have certain payment nominees.

<sup>171</sup> The Act, s 124PHB.

applications to exit the CDC trial, just 220 had been approved.<sup>172</sup> The same data showed that of applications from Western Australia's Goldfields site, the proportion of Indigenous people who were rejected for exit was double the proportion of those approved. There are also substantial reported delays in resolving many trial participants' applications.<sup>173</sup>

128. As noted above, the Bill inserts a new power to enable the Minister, via legislative instrument, to determine decision-making principles for the current exit criteria.<sup>174</sup> This may be intended to alleviate such problems. However, it is unclear how these principles will be framed, and it is not possible to say whether they may be fair, appropriate or may in fact further reduce participants' likelihood of exits from the scheme in valid circumstances. While the instrument will be subject to disallowance, the Law Council considers that this is an insufficient safeguard given the volume of such instruments before Parliament.<sup>175</sup>
129. As such, the Law Council does not consider that the CDC provides for sufficient flexibility to treat different cases differently.

### *Safeguards*

130. In terms of safeguards, it is also concerned that 'many income management participants had experienced a significant decline in their mental health and wellbeing as a result of the challenges they faced navigating their lives on the cards'.<sup>176</sup> As noted above, the wellbeing exemption enables the Secretary to exclude a person as a participant if satisfied it would pose a serious risk to their mental, physical or emotional wellbeing.<sup>177</sup> However, this is a subjective threshold, rather than a more objective test.<sup>178</sup> The Secretary is also not required to inquire into whether a person being a trial participant would pose such a serious risk.<sup>179</sup>
131. Moreover, the Bill newly enables a wellbeing exemption to be revoked, based on a process triggered by request by a State or Territory officer or employee who considers that it is necessary for the person to remain on the program for medical or safety reasons relating to the person or their dependents.<sup>180</sup> As noted, the officer is not required to have any particular expertise, including about the participant's health. The Secretary's revocation decision also involves a subjective threshold of satisfaction, and there is no requirement that the participant be notified or provided a right to respond prior to this decision.
132. Accordingly, there may be circumstances in which an erroneous notification occurs, and/or important information concerning the individual's current state of health is not brought to the Secretary's attention. Consequently, a person in particularly fragile circumstances may be placed on the CDC, with detrimental outcomes.
133. Together, the Bill's amendments to exit determinations and wellbeing exemptions mean that it will be harder for people to get off, and stay off, the CDC.

---

<sup>172</sup> Gabriella Marchant, 'Cashless welfare card recipients denied exit from trial claim unfair treatment', ABC News (online), 31 August 2020.

<sup>173</sup> Ibid.

<sup>174</sup> The Bill, Item 37 (new subsections 124PHB(7A) and (7B)).

<sup>175</sup> This is considerable, having significantly increased and now consistently averaging between 1500 and 2000 instruments a year: Odgers Australian Senate Practice, Ch 15.

<sup>176</sup> Including CDC participants: Marston et al, 'Hidden Costs Study', 10.

<sup>177</sup> The Act, s 124PHA(1).

<sup>178</sup> Eg, 'satisfied on reasonable grounds'.

<sup>179</sup> The Act, s 124PHA(2).

<sup>180</sup> The Bill, item 32 (new 124PHA(3)).

134. Other issues in terms of safeguards include:

- the extent to which the Secretary's existing power to vary a restricted portion of a payment to zero per cent (eg where a person is unable to use it due to technological malfunction, or in cases involving severe financial hardship) is being utilised is unclear. This is relevant to the above discussion regarding common technological problems with the CDC;
- under the Bill, the review of the program is no longer subject to independent, rigorous evaluation. This not only undermines the Australian Government's ability to know whether it is effective. It will also be less aware of any significant risks which are presenting to key cohorts or in particular areas;
- the preservation of existing quarantine rates for participants transitioning from income management to the CDC under the Bill.<sup>181</sup> As noted, there is a Ministerial power to vary these rates for NT participants (or cohorts), via notifiable instrument, to up to 80 per cent;<sup>182</sup> and
- the Law Council is acutely aware of the lack of legal assistance services available in many rural, regional and remote communities. In particular, it has previously highlighted the chronic lack of legal assistance services which deal with social security law – a complex area - and the lack of funding for Aboriginal community-controlled legal services, which are commonly overwhelmed with criminal law matters, to provide civil law advice.<sup>183</sup> This is likely to affect the ability of participants - including people with literacy, digital and language barriers - to access legislative safeguards, such as exit determinations or wellbeing exemptions, in practice.

## Interaction with Racial Discrimination Act

135. As discussed above, the RDA was enacted in part to give effect to Australia's obligations under ICERD.<sup>184</sup>

### Section 10

136. Section 10 of the RDA provides for a general right to equality before the law:

*(1) If, by reason of, a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.*

*(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.*

137. As discussed above, Article 5 specifically refers, but is not limited to economic, social and cultural rights, including the right to social security.<sup>185</sup> Courts have held that

---

<sup>181</sup> The Bill, item 84.

<sup>182</sup> The Bill, item 87 (proposed subsections 124PJ(2A) and 124PJ(2B)).

<sup>183</sup> Law Council of Australia, *Justice Project – Final Report* (2018), People who are Economically Disadvantaged Chapter, and Aboriginal and Torres Strait Islander Peoples Chapter.

<sup>184</sup> RDA, Preamble.

<sup>185</sup> ICERD, art 5(e)(iv).

Article 5 is not an exhaustive list of the human rights and fundamental freedoms protected.<sup>186</sup>

138. Section 10 is 'concerned with the operation and effect of laws'<sup>187</sup> rather than with proscribing the acts or conduct of individuals. It is not necessary to show that an infringement of rights was based on, or by reason of, race. The relevant question is whether an individual, because of the operation and effect of the law, does not enjoy a right to the same extent as others not of that race.<sup>188</sup> In *Maloney v The Queen*<sup>189</sup> (*Maloney*) French CJ stated:

*An important feature of section 10 is that it does not require that the law to which it applies makes a distinction expressly based on race. The section is directed to the discriminatory operation and effect of the legislation. It provides a mechanism to overcome the effects of Commonwealth, State or Territory legislation to which it applies.*<sup>190</sup>

139. Section 10 does not require that a particular provision only affect members of a particular group and no others, nor that all members of a particular group are affected.<sup>191</sup>
140. The Full Court in *Bropho v Western Australia*<sup>192</sup> held that, in applying section 10, it was necessary to recognise that some rights were not absolute in their nature, and accordingly 'no invalid diminution of property rights occur where the state acts in order to achieve a legitimate and non-discriminatory public goal'.<sup>193</sup>
141. However, this line of reasoning was overruled by *Maloney*, which unanimously held that there was no basis to read down the scope of section 10 so that it did not apply to laws which imposed a reasonable or legitimate restriction on relevant human rights. The only exemption to section 10 is for laws that constitute special measures (discussed below).<sup>194</sup>
142. *Maloney* considered Queensland liquor regulations restricting the nature and quantity of liquor which people on Palm Island, could have in their possession. Palm Island was an overwhelmingly Indigenous community.<sup>195</sup> As noted by Gageler J, 'geography was used as a proxy for race'.<sup>196</sup>
143. In a 5:1 majority, the Court held that the provisions were inconsistent with section 10 because they interfered with Ms Maloney's right to own property under Article 5(d)(v) of the ICERD. While the majority in *Maloney* held that the Queensland provisions were inconsistent with section 10, the Court also unanimously held that the provisions were not invalidated as they were a special measure. This is discussed below.

---

<sup>186</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ), 101 (Mason J) and 126 (Brennan J).

<sup>187</sup> *Mabo v Queensland* (1988) 166 CLR 186, 230 (Deane J).

<sup>188</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2016), 30.

<sup>189</sup> (2013) 252 CLR 168 (*Maloney*).

<sup>190</sup> *Maloney*, 179 [11] (French CJ).

<sup>191</sup> *Maloney*, [78]-[80] (Hayne J), [200] (Bell J), [302] [363] (Gageler J).

<sup>192</sup> (2008) 169 FCR 59 (*Bropho*).

<sup>193</sup> *Bropho*, 84-84 [83].

<sup>194</sup> *Maloney*, 191 [38]-[39] (French CJ), 206 [84]-[85] (Hayne J), 213 [112] (Crennan J), 232 [166] (Kiefel J), 241 [197] (Bell J), 286 [310], 297-298 [345]-[348] (Gageler J).

<sup>195</sup> *Maloney*, 138 [362] (Gageler J).

<sup>196</sup> *Ibid.*

144. To engage section 10, the question is whether, by reason of a law of the Commonwealth, persons of a particular race etc enjoy a race to a more limited extent than persons of another race.
145. Having regard to the impacts outlined above for CDC participants, including common practical difficulties associated with using the CDC, additional financial costs and the frustration and shame caused, is at least arguable that for an Indigenous person:
- receiving a working age payment in the East Kimberley (where 82 per cent of CDC participants are Indigenous), or
  - a NT welfare recipient under the current Income Management Scheme (for which 83 per cent of participants are Indigenous) who is transitioned to the CDC under the Bill;
- the CDC significantly interferes with the ability to enjoy the right to social security (and other rights) in practice compared to a non-Indigenous person receiving a similar payment in an area which is not subject to the CDC. That is, they enjoy the rights to a more limited extent.
146. As such, it seems that section 10 may be engaged by the CDC.

### Special measures

147. Section 8(1) of the RDA provides that Part II, including subsection 10, do not apply to the application of special measures to which paragraph 4 of Article 1 of the Convention applies.<sup>197</sup>
148. In the High Court decision of *Gerhardy v Brown*,<sup>198</sup> Brennan identified four indicia for a measure to fall within subsection 8(1):
- the special measure must confer a benefit on some or all members of a class;
  - membership of this class must be based on race, colour, descent or national or ethnic origin;
  - the special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
  - the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.<sup>199</sup>
149. These criteria were generally affirmed by the High Court in *Maloney*.<sup>200</sup>
150. *Maloney* considered Queensland legislative restrictions on the nature and quantity of liquor which people on Palm Island, an Indigenous community, could have in their possession. In a 5:1 majority, the Court held that the provisions were inconsistent with section 10 because they interfered with Ms Maloney's right to own property under Article 5(d)(v) of the ICERD.
151. While the majority in *Maloney* held that the Queensland provisions were inconsistent with section 10, the Court also unanimously held that the provisions were not invalidated as they were a special measure designed to protect Palm Island's

---

<sup>197</sup> Except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

<sup>198</sup> (1985) 159 CLR 70 (**Gerhardy**).

<sup>199</sup> *Gerhardy*, 133 (Brennan J).

<sup>200</sup> Eg, *Maloney*, 35 [88] (Hayne J).



residents from the effects of alcohol abuse and associated violence.<sup>201</sup> They agreed that extrinsic evidence of severe alcohol abuse on Palm Island and that the relevant provisions were targeted at those circumstances, and the adequate advancement of the community.<sup>202</sup> The Law Council is aware that there has been criticism of the *Maloney* decision (and *Gerhardy*) with respect to its interpretation of international law.<sup>203</sup> It is, however, authoritative for domestic law purposes.

152. The Court in *Maloney* also unanimously held that neither prior consultation with the affected group nor the consent of the affected group to the special measure was a strict legal requirement.<sup>204</sup> However, French CJ considered that consultation is likely to be 'essential to the practical implementation of a measure.'<sup>205</sup> This was particularly so, where the measure involved the imposition on the affected community of a restriction of some aspect of the freedoms otherwise enjoyed by its members. In the absence of genuine consultation with those affected, it considered that it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve.<sup>206</sup> In that case, French CJ considered that there had been consultation, although there was a division of opinion in the community regarding the measures which should be undertaken.<sup>207</sup>
153. The Court also considered whether the law, to be a special measure, needed to be 'proportionate' to a legitimate end. On this question, there was a significant divergence of opinions:
- Hayne J held that while there is no requirement of proportionality, it could be relevant for determining the adequacy of the provision;<sup>208</sup>
  - Crennan J,<sup>209</sup> Kiefel J<sup>210</sup> and Gageler J<sup>211</sup> agreed in separate judgments that the test was one of reasonable necessity;
  - French CJ and Bell J<sup>212</sup> understood the requirement for proportionality as similar to the 'reasonably appropriate and adapted' test found in other jurisprudence.
154. While there was no consistency among the separate judgments, the relevant Queensland provisions were unanimously held to be lawful special measures under section 8 of the RDA. In the course of the judgment, it was noted that the determination of whether a law is a special measure is to be left to Parliament, while it is the role of the Court to determine whether the sole purpose of the legislation was for securing adequate advancement of the community.<sup>213</sup>

---

<sup>201</sup> Eg, *Maloney*, 194 [46] (French CJ).

<sup>202</sup> *Maloney*, [46] (French CJ), [108] (Hayne J), [139] (Crennan J), [178] (Kiefel J), [249] (Bell J), [370]–[376] (Gageler J).

<sup>203</sup> PJCHR, *Stronger Futures in the Northern Territory Act 2012 and related legislation: Specific human rights* [2013] AUPJCHR 322 (26 June 2013), 21-31.

<sup>204</sup> *Maloney*, [24]–[25] (French CJ), [91] (Hayne J), [129], [131] (Crennan J), [186] (Kiefel J), [236]–[240] (Bell J), [357] (Gageler J). This diverges from the CERD Committee's interpretation of special measures under Article 1(4): CERD Committee, 'General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Discrimination', [18].

<sup>205</sup> *Ibid.*, [25].

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> [102].

<sup>209</sup> [130].

<sup>210</sup> [180]–[182].

<sup>211</sup> [358].

<sup>212</sup> [20]–[21], [46] (French CJ), [243]–[249] (Bell J).

<sup>213</sup> (French CJ), [375] (Gageler J).

155. Based on this overview, it may be queried whether the CDC (including as amended by the Bill) could be characterised a special measure for the purposes of subsection 8(1) of the RDA. Based on Brennan J's indicia:
- It may be accepted as directed towards protecting Indigenous persons and communities from alcohol, drug addiction and gambling and associated violence and harm, as well as supporting their budgeting strategies;
  - However, the protection given to beneficiaries is not based on a person's race, but based on objective criteria, regardless of race. The CDC is explicitly characterised as 'not targeted at people of a particular race, but to welfare recipients who meet particular criteria',<sup>214</sup>
  - It arguably cannot be characterised as a measure for the 'sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms'. For example, one of the CDC's objects is encouraging socially responsible behaviour. This may be viewed as an objective which primarily benefits others in the community. While important, it may not be sufficiently linked to achieving beneficiaries' human rights and freedoms; and
  - It is not clear that the protection given to the beneficiaries by the CDC is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.
156. While, as discussed, the *Maloney* court was somewhat divided on questions of proportionality, it may also be doubtful whether the CDC is sufficiently targeted and linked to the problems it is seeking to address as to be considered proportionate, reasonably necessary or reasonably appropriate and adapted to its purposes. As discussed above, there is evidence that many participants targeted by the scheme may not have alcohol, drug or gambling addictions, or prior difficulties managing their budgets. There is also evidence that the CDC may lead to greater harm than good – for example, by frustrating budgeting or cheaper purchasing strategies, or technical glitches leading to unpaid bills, and causing health and wellbeing detriments.
157. While, as noted, the Court held that neither consultation nor consent of the affected group to a special measure was a strict legal requirement,<sup>215</sup> having regard to French CJ's findings, it may also be arguable that there has been an absence of genuine consultation which may lead to a conclusion that the Bill is not reasonably capable of being appropriate and adapted for its sole purpose. As noted, many of the parameters regarding prior CDC trial consultations have now fundamentally changed, undermining their relevance, as the Bill substantially alters and confines the CDC's purposes, and makes it permanent.
158. *Maloney* does make it clear that the courts are likely to afford Parliament a significant degree of latitude regarding what constitutes a special measure. However, there are also significant doubts whether the CDC (including as amended by the Bill) would be so characterised. In particular, there may be doubts whether it is directed towards

---

<sup>214</sup> HR Compatibility Statement, EM, 33. Nor in the explanatory memorandum accompanying the original CDC trial's introduction into Parliament: Parliament of the Commonwealth of Australia, *Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015*.

<sup>215</sup> *Maloney*, [24]–[25] (French CJ), [91] (Hayne J), [129], [131] (Crennan J), [186] (Kiefel J), [236]–[240] (Bell J), [357] (Gageler J). This diverges from the CERD Committee's interpretation of special measures under article 1(4): CERD Committee, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Discrimination*, UN Doc CEDAW/C/GC/32 (14 November 2014) 7 [18].

advancing persons of a particular race, or is for the sole purpose of securing their advancement in equally enjoying human rights.

159. While, in the time available and noting the complexity of the relevant legislation and case law, the Law Council is unable to be definitive on this issue, the above discussion suggests that there is a possibility that the CDC (including as amended by the Bill) may be inconsistent with key provisions of the RDA.

### Section 9(1A)

160. While the above discussion principally focuses on section 10 of the RDA, the Law Council notes that there is also the possibility that the CDC (including as amended by the Bill) may conflict with section 9(1A) of the RDA. This prohibits indirect racial discrimination, and provides that:

*(1A) Where:*

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and*
- (b) another person does not or cannot comply with the term, condition or requirement; and*
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;*

*the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.*

161. A reference to a 'human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the ICERD.<sup>216</sup>
162. In this instance, the relevant term, condition or requirement would relate to a person becoming subject to the CDC regime by virtue of their geographic and income support recipient status.
163. The question would then be whether the term, condition or requirement was reasonable in the circumstances of the case. Due to factors already outlined above, the Law Council considers that this may be difficult to establish.

## Conclusion

164. The Law Council does not support the Bill in its current form. It is concerned that a number of features of the CDC, including as amended by the Bill, undermine human

---

<sup>216</sup> RDA, s 9(2).

dignity, a concept which is at the heart of human rights. It also also limits enjoyment of participants' human rights, including the:

- rights of equality and non-discrimination;
- right to self-determination;
- right to social security (and to an adequate standard of living); and
- prohibition on interference with privacy.

165. It also undermines the principle of free, prior and informed consent. In the Law Council's view, there is inadequate justification that the CDC is necessary, reasonable and proportionate in its limitation of these rights. Its concerns regarding the CDC also relate to compulsory income management more broadly in the NT. While it is unable to be definitive on this issue, there is also a possibility that the CDC (including as amended by the Bill) may be inconsistent with key provisions of the RDA.

166. The Law Council is also concerned that the Bill is being progressed in the absence of a full and independent evaluation of its merits, or adequate community consultation as to the CDC as amended by the Bill – including its reframed objects, permanent nature, more limited safeguards and expanded application to largely Indigenous communities. It is also concerned that there has been little regard to, or cost-benefit of, alternative options, including expanding support services which meet individuals' complex needs.

167. Should some form of income management be pursued, the Law Council considers that a less restrictive and proportionate approach to the Bill – and to the existing CDC trial and compulsory income management schemes contained in the Act – would be to ensure that:

- participation in the CDC and/or income management is based on full, free and informed individual consent (opt-in), and meaningful community consultation;
- individuals are properly assessed in relation to their suitability to participate rather than more blanket approaches being applied;
- a full suite of support programs should underpin this implementation, noting that these are lacking in many relevant rural, regional and remote communities; and
- it should be accompanied by expanded access to culturally competent legal assistance services for social security law matters in relevant communities.

168. To facilitate this, the Australian Government should work in genuine partnership with First Nations peoples and communities to reform the CDC and income management schemes, and develop a voluntary, community-led model supported by real job opportunities.

## Recommendations

- **The Bill not be passed in its current form.**
- **A full independent evaluation be conducted and made available, including a cost-benefit analysis of the existing CDC trial and income management schemes by reference to alternative measures, such as increased access to support programs to address participants' complex needs.**

- **Should some form of CDC and income management be retained, it should ensure that:**
  - **participation in the CDC and/or income management is based on full, free and informed individual consent (opt-in), and meaningful community consultation;**
  - **individuals are properly assessed in relation to their suitability to participate, rather than more blanket approaches being applied; and**
  - **a full suite of support programs should underpin its implementation, noting that these are lacking in many relevant rural, regional and remote communities; and**
  - **funding should be provided to expand access to culturally competent legal assistance services for social security law matters in such communities.**
- **To facilitate this, the Australian Government should work in genuine partnership with First Nations peoples to reform the CDC and income management schemes, and develop a voluntary, community-led model which is supported by real job opportunities.**