

Chapter 1

New and continuing matters

1.1 The committee comments on the following bill and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Bill

Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments¹

Purpose	<p>This bill seeks to make amendments to the enhanced income management regime under Part 3AA of the <i>Social Security (Administration) Act 1999</i>, including by directing all new participants to the Part 3AA regime and closing entry to the income management regime under part 3B; and offering participants subject to the income management regime under Part 3B the choice to transition to the Part 3AA regime.</p> <p>The related instruments firstly set out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts and specifies the kinds of businesses in relation to which transactions involving BasicsCard bank accounts may be declined, and secondly specify the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment recipients and as a declared voluntary income management area²</p>
Portfolio	Social services
Introduced	House of Representatives, 9 March 2023
Rights	Social security; private life; adequate standard of living equality and non-discrimination; rights of the child

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management Reform) Bill 2023, *Report 4 of 2023*; [2023] AUPJCHR 30.

2 The related instruments are Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] and Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190].

The enhanced income management regime

1.2 By way of background, the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* introduced the enhanced income management regime under Part 3AA of the *Social Security (Administration) Act 1999* (the Act). This Act also compulsorily transitioned former Cashless Debit Card (CDC) participants in the Northern Territory and Cape York region to this new enhanced income management regime (which took effect on 6 March 2023).³ The enhanced income management regime provides participants with access to a BasicsCard bank account, which is accompanied by a debit card (known as a SmartCard).⁴ A SmartCard will operate like a standard Visa debit card and participants will be able to purchase goods and services online and use mainstream banking functions including BPAY, and is said to be a 'superior banking product' to the existing BasicsCard.⁵

1.3 This bill seeks to expand access to the enhanced income management regime by introducing eligibility criteria for both compulsory and voluntary participation in the regime. These criteria largely mirror the existing eligibility criteria under Part 3B of the Act (which sets up the original income management regime), meaning that persons who may become subject to the enhanced income management regime are the same as those who are, or would be, subject to income management under Part 3B of the Act.⁶ This bill also seeks to introduce additional eligibility criteria in relation to disengaged youth and long-term welfare payment recipients who reside within a state, a territory or an area other than the Northern Territory as specified by the minister by legislative instrument.⁷ In particular, a

3 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

4 Section 123SU of the *Social Security (Administration) Act 1999* provides that the Secretary may, by legislative instrument, determine a kind of bank account to be maintained by a person who is subject to the enhanced income management regime. Section 7 of the *Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023* [F2023L00189] provides that a BasicsCard bank account established with Indue or Traditional Credit Union is the kind of bank account to be maintained by a person subject to the enhanced income management regime. The terms and conditions relating to the use of the BasicsCard bank account are set out in Schedule 4 of the Determination.

5 Explanatory statement, pp. 1, 4–5.

6 Schedule 1, item 17 remakes the eligibility criteria in relation to child protection, referrals by recognised state and territory authorities and vulnerable welfare payment recipients. Item 1 sets out all persons who may become subject to the enhanced income management regime.

7 Schedule 1, item 32, new section 123SDA. Section 123SD of the *Social Security (Administration) Act 1999* sets out eligibility criteria relating to persons who are disengaged youth and long-term welfare payment recipients whose usual place of residence is within the Northern Territory.

person would be subject to the enhanced income management regime if, among other things, they meet the criteria relating to disengaged youth or long-term welfare payment recipient, they usually reside within a specified place and they are not subject to the enhanced income management regime under any other eligibility criteria, such as because they are a vulnerable welfare payment recipient or a child protection officer requires the person to be income managed.⁸ In addition, the bill would direct all new entrants to income management to the enhanced income management regime and close entry to the old income management regime under Part 3B of the Act; as well as offer participants subject to income management under Part 3B the choice to voluntarily transition to the enhanced income management regime.⁹

1.4 The bill would also specify the portions of welfare payments that are to be 'qualified' (the amount that may be spent on non-excluded goods and services) and 'unqualified' (the amount that may be spent at the person's discretion).¹⁰ The portions specified in this bill appear to mirror the 'deductible portions' set out under Part 3B of the Act.¹¹ The qualified portions for welfare payments vary between 100 per cent and 50 percent depending on the type of welfare payment, unless another percentage is determined by the minister.¹² Restrictions on the use of the qualified portion of a person's welfare payment are set out in a related instrument.¹³ In particular, the instrument declares the kinds of businesses in relation to which transactions involving a BasicsCard bank account (that is, a bank account subject to the enhanced income management regime) may be declined by a financial institution.¹⁴ The instrument also sets out the terms and conditions relating to the

8 Schedule 1, item 32, new section 123SDA. This eligibility criteria mirrors sections 123UCB and 123UCC, which sets out the eligibility criteria for disengaged youth and long-term welfare payment recipients in relation to the income management regime under Part 3B of the *Social Security (Administration) Act 1999*.

9 Schedule 1 expands access to the enhanced income management regime and schedule 2 closes the income management regime under Part 3B to new entrants.

10 Scheduled 1, items 49–51.

11 Division 5 of Part 3B of the *Social Security (Administration) Act 1999* specifies the 'deductible portion' of welfare payments, that is, the amount that must be deducted from the welfare payment to be credited to the person's income management account.

12 Each welfare payment attracts a different portioning and whether a welfare payment is paid by instalments or as a lump sum will change the percentage that is qualified and unqualified.

13 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189].

14 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedules 1–3. Schedule 1 declares the kinds of businesses by description, schedule 2 declares the kinds of businesses by merchant category and schedule 3 declares businesses by Australian and New Zealand Standard Industrial Classification codes.

establishment, ongoing maintenance and closure of BasicsCard bank accounts.¹⁵ For example, cash cannot be withdrawn from a BasicsCard bank account and money cannot be used to purchase excluded goods and services or cash-like products (such as gift cards or vouchers). Limitations may also be placed on amounts that a person can spend and transfer out of their account.

1.5 Further, the bill would allow for the disclosure of information, including personal information, between relevant authorities for the purposes of the operation of the enhanced income management regime.¹⁶ For example, new section 123STA would allow a child protection officer to give the secretary information about a person who is subject to the enhanced income management regime or about a person who the child protection officer is considering requiring to be income managed.¹⁷

1.6 In addition, the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 continues the operation of voluntary income management arrangements under Part 3B of the Act and specifies the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment recipients.¹⁸ This means that if a person's usual place of residence is the Ngaanyatjarra Lands and they meet the other eligibility criteria relating to vulnerable welfare payment recipients, then they will be subject to the income management regime under Part 3B of the Act. This bill would give such persons the choice to transition to the enhanced income management regime under Part 3AA of the Act.¹⁹

15 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedule 4.

16 Schedule 1, item 68.

17 Schedule 1, item 68, new section 123STA.

18 Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190]

19 Schedule 1, item 17, new section 123SCL.

Preliminary international human rights legal advice

Rights to social security, private life, adequate standard of living and equality and non-discrimination and rights of the child

1.7 As the committee has previously reported, measures relating to mandatory income management engage numerous human rights.²⁰ The committee has found that, to the extent that income management ensures a portion of an individual's welfare payment is available to cover essential goods and services, the income management regime could have the potential to promote rights, including the right to an adequate standard of living and the rights of the child.²¹ However, the committee has also found that mandatory income management in Australia engages and limits a number of other human rights, including the rights to a private life,²² social security²³ and equality and non-discrimination.²⁴ Insofar as this bill and related instruments extend measures relating to income management under Part 3B to the enhanced income management regime under Part 3AA, including by introducing eligibility criteria for mandatory participation in the enhanced income management regime and restricting the way a person subject to this regime can spend the

20 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

21 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child. The statement of compatibility states that the bill promotes the right to an adequate standard of living by restricting individuals from spending a significant portion of their welfare payment to purchase excluded goods and services, such as alcohol, gambling products, pornography and tobacco, which ensures individuals will have sufficient funds available to meet their basic needs such as rent, food and household bills: p. 4. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 3.

22 International Covenant on Civil and Political Rights, article 17.

23 International Covenant on Economic, Social and Cultural Rights, article 9.

24 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected by the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 5.

'qualified' portion of their welfare payment, these same human rights are engaged and limited.

1.8 In particular, by subjecting an individual to mandatory income management under the Part 3AA regime and restricting how they may spend a portion of their social security payment (including, in some cases, portioning 100 per cent of a person's welfare payment as 'qualified'), the measure limits the rights to social security and a private life insofar as it interferes with an individual's freedom and autonomy to organise and make decisions about their private and family life, including making their own decisions about the way in which they use their social security payments.²⁵ The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion,²⁶ and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.²⁷ The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.9 Further, authorising the disclosure of personal information between relevant authorities, the consequences of which may be to subject a person to compulsory income management, would also limit the right to informational privacy, which includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information.²⁸ It also includes the right to control the dissemination of information about one's private life.

1.10 The measure may also engage and limit the right to an adequate standard of living. This right is often engaged simultaneously with the right to social security and requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.²⁹ The committee has previously noted that were persons subject to mandatory income

25 The bill's statement of compatibility acknowledges the rights to social security and privacy are engaged: pp. 4–5. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, pp. 3–4.

26 The Parliamentary Joint Committee on Human Rights has previously stated that the income management regime fails to promote social inclusion, but rather stigmatises individuals, and as such, limits the enjoyment of the right to social security, an adequate standard of living and privacy: [2016 Review of Strong Futures measures](#) (16 March 2016) p. 47.

27 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible.

28 International Covenant on Civil and Political Rights, article 17.

29 International Covenant on Economic, Social and Cultural Rights, article 11.

management to experience difficulties in accessing and meeting their basic needs, such as food, clothing and housing, the right to an adequate standard of living may be engaged and limited.³⁰ The enhanced income management regime contains some safeguards that may mitigate the risk that individuals subject to income management under this regime may experience difficulties accessing and meeting their basic needs. In particular, participants will have access to a new SmartCard that can be used at over one million outlets across Australia and provides banking functions including 'tap and pay' payments, online shopping and BPAY.³¹ The bill would also allow the secretary to vary the percentage of qualified and unqualified portions of a person's welfare payment if a person is unable to access their BasicsCard bank account as a direct result of a technological fault or malfunction with the card or account; a natural disaster; or a national emergency.³²

1.11 However, it is not clear whether allowing any transaction with a specified kind of business to be declined by a financial institution could have an adverse impact on the ability of people in remote communities to access certain goods and services. The statement of compatibility notes that businesses that offer excluded goods and services can still be used by people subject to the enhanced income management regime if the business has systems to prevent the sale of excluded products or services to holders of an enhanced BasicsCard account.³³ However, if, for example, the only grocery store in a remote town did not have adequate systems in place to prevent the sale of excluded products such that transactions made at the store were able to be declined, it is not clear how a participant subject to income management could purchase groceries, noting that online grocery shopping may not be available in remote communities. If listing such businesses did prevent participants from being able to effectively access essential goods, this could have implications for the realisation of their right to an adequate standard of living.³⁴

30 See *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–5.

31 Statement of compatibility, p. 3.

32 Schedule 1, item 51, new subsections 123SLA(7)–(8), 123SLD(7)–(8), 123SLG(7)–(8), 123SLJ(7)–(8). See also *Social Security (Administration) Act 1999*, subsections 123SJ(4)–(5), 123SM(3)–(4), 123SP(3)–(4).

33 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p.3.

34 This Parliamentary Joint Committee on Human Rights raised this issue in its consideration of the *Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021* [F2021L01473], [Report 14 of 2021](#) (24 November 2021).

1.12 The measures also engage the right to equality and non-discrimination insofar as they would have a disproportionate impact on certain groups of people based on their protected attributes. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.³⁵ The eligibility criteria set out in the bill include a criterion relating to a person's usual place of residence and, in the case of disengaged youth, a criterion relating to age. In this way, the measures would treat participants differently based on the protected attributes of place of residence within a state and age.³⁶ Further, due to the large number of Aboriginal and Torres Strait Islander persons participating in mandatory income management, the measures would have a disproportionate impact on this group, as acknowledged in the accompanying statements of compatibility.³⁷ In particular, the measure relating to the Ngaanyatjarra Lands would disproportionately impact Aboriginal and Torres

35 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

36 Age and place of residence have been recognised as constituting an 'other status' for the purposes of the right to equality and non-discrimination. Regarding age, see *Schmitz-De-Jong v Netherlands*, UN Human Rights Committee Communication No. 855/1999 (2001). Regarding place of residence, see *Lindgren et al v Sweden*, UN Human Rights Committee Communications Nos. 298/1988 and 299/1988 (1991).

37 Statement of compatibility, p. 2. See also Social Security (Administration) (Declineable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 2.

Strait Islander peoples, noting that the majority of the population residing in this area are Aboriginal people.³⁸

1.13 Further, noting that 'disengaged youth' (which includes children aged between 15 and 17 years) are a class of participants who are to be subject to the enhanced income management regime,³⁹ the measure would engage the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.⁴⁰ Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.⁴¹ For the reasons outlined above, the rights of a child to social security, privacy and equality and non-discrimination would be engaged and limited by subjecting disengaged youth to mandatory income management.⁴² Additionally, noting the eligibility criteria relating to disengaged youth do not provide for an individual assessment of those participants who would be subject to the enhanced income management regime, the measure would appear to raise issues regarding Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.⁴³ This obligation requires legislative, administrative and judicial bodies and institutions to systematically

38 For the purposes of the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], the Ngaanyatjarra Lands includes the shire of Ngaanyatjarraku in Western Australia and the remote community known as Kiwirrkurra Community located within the shire of East Pilbara in Western Australia: Explanatory statement, p. 1. According to the 2021 Census, there are 171 Aboriginal and/or Torres Strait Islander people living in [Kiwirrkurra](#) and 1,147 Aboriginal and/or Torres Strait Islander people living in the [Ngaanyatjarraku](#) Local Government Area (which represents 84.5 per cent of the total population). The [Ngaanyatjarra Lands School](#) also states that approximately 2,000 Aboriginal people live in eleven communities that comprise the Ngaanyatjarra Lands. Notwithstanding this, the accompanying statement of compatibility does not acknowledge that the right to equality and non-discrimination is limited, stating that the determination does not discriminate on the basis of race because anyone who resides in the Ngaanyatjarra Lands (regardless of race) will be eligible for the continuation of income management: p. 3.

39 Schedule 1, item 32, new subsection 123SDA(1).

40 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

41 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

42 Convention on the Rights of the Child, articles 2, 16 and 26.

43 Convention on the Rights of the Child, article 3(1).

consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.⁴⁴

1.14 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

Legitimate objective and rational connection

1.15 The stated objective of the bill is to reform the income management regime in order to facilitate a seamless transition to the enhanced income management regime which engages superior technology.⁴⁵ The statement of compatibility states that reforming the income management regime will offer self-determination for communities and choice and protection for vulnerable people.⁴⁶ The stated objectives of the enhanced income management regime more generally and the related instruments are to minimise access to goods and services that contribute to social harm and adverse behaviour and to restrict the purchase of excluded goods so participants prioritise expenditure on essential expenses such as rent, food and utilities.⁴⁷

1.16 The stated objective of facilitating the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card that offers superior technology and improved banking functions, is capable of constituting a legitimate objective for the purposes of international human rights law. This is particularly so if the new SmartCard improves participants' access to businesses and outlets and reduces the stigma associated with the BasicsCard (that is, the debit card used under the Part 3B income management regime).⁴⁸ However, it is noted that in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime. Thus, in effect, the legislation remakes the law relating to income management and possibly expands its scope. The general objective of the enhanced income management regime as a whole therefore needs to be scrutinised as well as the specific stated objective relating to the bill and instruments.

44 UN Committee on the Rights of the Child, *General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

45 Statement of compatibility, pp. 2, 4.

46 Statement of compatibility, p. 5.

47 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 4; Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], explanatory statement, p. 4.

48 Statement of compatibility, pp. 3–5.

1.17 The general objective of the enhanced income management regime—to combat social harms caused by the use of harmful products—is capable of constituting a legitimate objective for the purposes of international human rights law. However, noting previous statements made by the minister to this committee regarding the government's intention to make income management voluntary in the future, it is not clear how expanding access to the enhanced income management regime and extending eligibility criteria for mandatory participation in this regime is consistent with this broader objective.⁴⁹ Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. It is noted that previous evaluations of mandatory income management, including the cashless debit card program, were inconclusive regarding its effectiveness, and whether it has caused or contributed to other harms.⁵⁰ Based on earlier evaluations of the income management regime specifically, the committee found in 2016 that the compulsory income management regime does not appear to be an effective approach to addressing issues of budgeting skills and ensuring that an adequate amount of income support payments is spent on priority needs. It noted that while the income management regime may have some benefit for persons who voluntarily participated in the regime, it has limited effectiveness for the vast majority of people who are compelled to participate.⁵¹ There do not appear to be more recent evaluations of the income management regime and the explanatory materials accompanying the bill and related instruments do not address this point.⁵² It is

49 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

50 A summary of the evaluations of the Cashless Debit Card program is set out in Parliamentary Joint Committee on Human Rights, [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102. Studies have been conducted examining other specific elements of the cashless welfare trial, including its effects on: Indigenous mobility; homelessness; and perceptions of shame attached with use of the card. See, *Australian Journal of Social Issues*, vol. 55, no. 1, 2020. In particular: Eve Vincent et al, '“Moved on”? An exploratory study of the Cashless Debit Card and Indigenous mobility', pp. 27–39; Shelley Bielefeld et al, 'Compulsory income management: Combatting or compounding the underlying causes of homelessness?', pp. 61–72; Cameo Dalley, 'The “White Card” is grey: Surveillance, endurance and the Cashless Debit Card', pp. 51–60; and Elizabeth Watt, 'Is the BasicsCard “shaming” Aboriginal people? Exploring the differing responses to welfare quarantining in Cape York', pp. 40–50. See also Luke Greenacre et al, 'Income Management of Government payments on Welfare: The Australian Cashless Debit Card', *Australian Social Work* (2020) pp. 1–14.

51 Parliamentary Joint Committee on Human Rights, [2016 Review of Strong Futures measures](#) (16 March 2016), p. 52.

52 Department of Social Services, [Income Management and Cashless Debit Card Evaluations](#) (23 January 2023).

therefore unclear whether the enhanced income management regime, which will continue to subject persons to mandatory income management, would be effective to achieve the stated objectives.

Proportionality

1.18 A key aspect of whether any limitation on rights can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether the measure provides sufficient flexibility to treat different cases differently. The bill provides that a person must participate in the enhanced income management regime if they meet certain eligibility criteria. The criteria do not provide for an individualised assessment, rather participation is broadly based on geographical location and the type of social security payment received. For example, a young person aged between 15 and 25 years of age who resides in a specified place, receives a category C welfare payment for at least 13 weeks during the 26-week period ending immediately before the test time, and is not exempt, will be subject to the enhanced income management regime.⁵³ There appears to be little flexibility to consider the merits of an individual case and questions arise as to whether this approach is sufficiently individualised.

1.19 Another consideration is whether the measure is accompanied by sufficient safeguards. The statement of compatibility states that there are a number of general safeguards accompanying the bill, including providing individuals currently subject to income management with the choice to transition to the enhanced income management regime.⁵⁴ The statement of compatibility states that the bill offers individuals with access to modern technology and an improved customer experience compared to the regime under Part 3B.⁵⁵ However, this choice is not afforded to new participants and does not change the fact that participants are compelled to participate in income management more generally. It is therefore not clear that this would operate as an effective safeguard in practice.

1.20 The general exemptions that apply to the income management regime may operate as a safeguard. For example, a person may not be subject to the enhanced income management regime if they are an 'exempt welfare payment recipient'. The secretary may determine that a person is an 'exempt welfare payment recipient' if they are included in a class of persons specified in a legislative instrument by the minister.⁵⁶ The value of this safeguard will depend on how it operates in practice,

53 Schedule 1, item 32, new subsection 123SDA(1).

54 Statement of compatibility, p. 2.

55 Statement of compatibility, p. 2.

56 Schedule 1, item 32, new section 123SDB.

including the nature and scope of any future legislative instruments that specify a class of persons who are to be exempt from income management.⁵⁷

1.21 The statement of compatibility also refers to community consultations, which may assist with proportionality. It states that extensive consultations have been undertaken and continue with First Nations communities and other stakeholders about the enhanced income management regime and the future of income management more broadly.⁵⁸ The explanatory materials accompanying the related instruments also state that community consultation has occurred, including on the issue of whether the technology supporting the income management regime is fit for purpose.⁵⁹ While it appears that general consultations have occurred regarding the technology around the new card, and there is an intention for further consultation to be undertaken, it is not clear whether, and to what extent, affected communities and individuals were consulted about those aspects of the bill which relate to mandatory participation in the enhanced income management regime.

1.22 As the committee has previously reported, for consultation to be an effective safeguard, it must be a two-way deliberative process of dialogue in advance of a decision to progress the measure.⁶⁰ This is particularly the case where Aboriginal and Torres Strait Islander people are affected by the decision. Article 19 of the United Nations (UN) Declaration on the Rights of Indigenous Peoples provides that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁶¹ The right of indigenous peoples to be consulted about measures which impact on them is a

57 It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns about the adequacy and effectiveness of exemptions in the context of the Cashless Debit Card program and the income management regime. See Parliamentary Joint Committee on Human Rights, [Report 1 of 2021](#) (3 February 2021) pp. 98–102; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 54–56.

58 Statement of compatibility, p. 3.

59 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], explanatory statement, p. 3; Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], explanatory statement, pp. 3–4.

60 See Parliamentary Joint Committee on Human Rights, [Report 1 of 2021](#) (3 February 2021) pp. 95–98.

61 While the UN Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' that this committee considers under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of indigenous peoples, and as such is relevant to this analysis.

critical component of free, prior and informed consent.⁶² Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'.⁶³

1.23 It is not clear, based on the information in the explanatory materials, whether the consultation process associated with the bill and related instruments contained the constituent elements of free, prior and informed consent for the purposes of international human rights law. For instance, it is not clear whether communities and individuals affected had the opportunity to genuinely influence the outcome of the decision-making processes affecting them or whether consent was achieved prior to introducing the measures.⁶⁴ The ability to genuinely influence the decision-making process is a fundamental component of good faith consultation and important for realising article 19 of the UN Declaration on the Rights of Indigenous Peoples.⁶⁵

1.24 A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. Compulsory income management, including under the enhanced income management regime, represents a significant interference with a person's autonomy and private and family life. The regime imposes stringent conditions on the provision of income support payments, including what goods or services a person may purchase and where, as well as to whom a person may transfer money. In relation to participants who are subject to the regime due to receiving a written notice by a child protection officer or because they have failed to ensure that their child is enrolled at school or there is an unsatisfactory school attendance situation, 100 per cent of their welfare payment would be qualified (unless a lower percentage is determined by the minister by legislative instrument), meaning there may be no amount available to be used at the person's discretion.⁶⁶

1.25 Regarding the sharing of personal information for the purposes of the operation of the enhanced income management regime, the resulting interference with privacy is significant because the consequences of this information sharing may

62 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [14].

63 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [20].

64 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]–[16].

65 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46]–[47]; UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]. See also

66 Schedule 1, item 51, new sections 123SLA and 123SLD.

be compulsory income management. While these information sharing provisions would be subject to the secrecy provisions in the Act, it is not clear that this safeguard would ameliorate these adverse effects.⁶⁷

1.26 Finally, it is necessary to consider whether any less rights restrictive alternatives could achieve the same stated objective. It is not clear why the bill extends compulsory participation in the enhanced income management regime rather than introducing voluntary participation, or at a minimum, only subjects individuals to the regime on the basis of individual circumstances. These options would appear to be a less rights restrictive way of achieving the stated objective.

Committee view

1.27 The committee notes that the bill and related instruments seek to facilitate the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card (known as a SmartCard) that offers superior technology and improved banking functions. The committee considers this aspect of the legislation to be a positive measure, noting that the new SmartCard will improve participants' access to businesses, including access to over one million outlets across Australia, and may reduce the stigma associated with the existing BasicsCard (that is, the debit card used under the Part 3B income management regime).

1.28 However, the committee also notes that in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime. Thus, in effect, the legislation remakes the law relating to income management and possibly expands its scope. The committee therefore needs to scrutinise the enhanced income management regime more broadly (and not just the specific measures relating to improving the technology of the BasicsCard bank account and accompanying debit card).

67 Statement of compatibility, p. 5.

1.29 For many years the committee has raised concerns regarding the compatibility of compulsory income management with multiple human rights.⁶⁸ By extending measures relating to income management under Part 3B to the enhanced income management regime under Part 3AA, these same human rights are engaged and limited by the bill and related instruments. In particular, by subjecting an individual to mandatory income management and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security and a private life, and possibly the right to an adequate standard of living. By authorising the sharing of personal information between relevant authorities for the purposes of the operation of the enhanced income management regime, the right to informational privacy is also engaged and limited. Due to the disproportionate impact on certain groups with protected attributes, including Aboriginal and Torres Strait Islander peoples and children, the measures engage and limit the right to equality and non-discrimination and the rights of the child.

1.30 The committee considers further information is required to assess the compatibility of the measures contained in the bill and related instruments with multiple human rights, and as such seeks the minister's advice in relation to:

- (a) whether, as previously indicated, the government intends to eventually introduce a voluntary income management regime and, if so, how extending compulsory participation in the enhanced income management regime is consistent with this broader intention;⁶⁹
- (b) in relation to the eligibility criteria relating to disengaged youth and long-term welfare payment recipients, what other geographical areas are intended to be specified by the minister by legislative instrument;⁷⁰

68 See, e.g. Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, [Thirty-first report of the 44th Parliament](#) (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

69 The minister previously advised the committee that the government intends to ultimately transition to a voluntary regime. See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

70 Schedule 1, item 32.

- (c) whether there is a risk that people in remote communities may experience difficulties accessing essential goods, particularly in situations where local businesses may not have adequate systems in place to prevent the sale of excluded products such that transactions made at these stores are able to be declined;
- (d) how mandatory participation in the enhanced income management regime is effective to achieve the stated objectives;
- (e) whether there are recent evaluations of the mandatory income management regime under Part 3B and/or Part 3AA;
- (f) the nature of the consultation that was undertaken with affected communities and individuals regarding those aspects of the bill that relate to compulsory participation in the enhanced income management regime, and the outcomes of such consultation;
- (g) noting that consultation is intended to continue regarding the future of mandatory income management, why the bill does not include a sunset date or other provision to ensure that mandatory participation in the regime is time-limited;
- (h) whether consideration was given to less rights restrictive ways to achieve the stated objective, including voluntary participation or only subjecting individuals to the regime based on individual circumstances;
- (i) what other safeguards would operate to assist proportionality; and
- (j) whether participants who will be compulsorily subjected to the enhanced income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.

Legislative instruments

Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023 [F2023L00093]¹

Purpose	This legislative instrument designates the Republic of Nauru as a regional processing country
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	This instrument is exempt from disallowance under section 42 of the <i>Legislation Act 2003</i>
Rights	Non-refoulement; torture or cruel, inhuman or degrading treatment or punishment; effective remedy; rights of the child; equality and non-discrimination

Designation of Nauru as a regional processing country

1.31 This legislative instrument designates Nauru as a regional processing country, pursuant to subsection 198AB(1) of the *Migration Act 1958* (Migration Act). The effect of this designation is to enable the operation of section 198AD of the Migration Act, which requires that an officer must, as soon as reasonably practicable, remove an unauthorised maritime arrival from Australia and take them to a regional processing country.² The term 'unauthorised maritime arrival' includes a range of persons, including a person who entered Australia by sea without a valid visa.³ Consequently, this legislative instrument has the effect of permitting the removal of unauthorised maritime arrivals from Australia to Nauru.

1.32 Nauru was previously designated as a regional processing country for the purposes of the Migration Act from 1 September 2012 to 1 October 2022, at which

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023, *Report 4 of 2023*; [2023] AUPJCHR 31.
 - 2 *Migration Act 1958*, section 198AD. The minister has a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. See, *Migration Act 1958*, section 198AE.
 - 3 It also includes a child born of a person who is themselves an unauthorised maritime arrival and persons who entered Australia by sea after being rescued at sea. See, *Migration Act 1958*, section 5AA.

time the relevant legislative instrument sunsetted.⁴ This legislative instrument commenced on 7 February 2023 and will sunset on 1 April 2033.

Preliminary international human rights legal advice

Multiple rights

1.33 By designating Nauru as a regional processing country, and thereby enlivening the operation of section 198AD of the Migration Act in relation to Nauru, this measure has the effect of enabling the removal of any future unauthorised maritime arrivals from Australia to Nauru.⁵ This legislative instrument therefore engages and limits several human rights. Set out below is a consideration of the key rights engaged.⁶

1.34 Although this measure provides for the removal of persons from Australia to a foreign jurisdiction, questions of whether Australia's human rights obligations apply extra-territorially do not arise.⁷ This is because Australia's obligations are enlivened at the time a person arrives in Australian territory, at which time the power under section 198AD can be used, and this instrument enables the transfer of the person to Nauru.

1.35 It is noted that prior to the commencement of this legislative instrument there was a gap of 127 days during which time Nauru was not designated as a regional processing country for the purposes of the Migration Act. It would appear that the absence of a designation in this period was not relevant to persons already

4 Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012 [F2012L01851].

5 It is noted that Papua New Guinea is also designated as a regional processing country, although this designation is due to sunset on 1 April 2023. See, Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012 [F2012L02003].

6 Including the right to non-refoulement, the prohibition against torture and ill-treatment and the right to an effective remedy. In addition, noting the historical and contemporaneous concerns raised regarding the sufficiency of healthcare and other services in Nauru, the measure may also engage the right to health, and the right to an adequate standard of living. In addition, the measure may engage the right to protection of the family, if it may cause family members to be involuntarily separated.

7 The extraterritorial application of Australia's human rights obligations has previously been considered by this committee. See, Parliamentary Joint Committee on Human Rights, [Examination of the Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012 and related legislation](#) (19 June 2013), pp. 30–37.

in Nauru, or persons temporarily in Australia for medical or other services,⁸ as the re-designation of Nauru impacts only on the rights of any future 'unauthorised maritime arrivals' to Australia who will be transferred to Nauru.⁹

1.36 No statement of compatibility with human rights is required as this legislative instrument is exempt from disallowance.¹⁰ As such, no analysis of the compatibility of this measure with human rights is available.

Right to non-refoulement; prohibition against torture and cruel, inhuman or degrading treatment; and right to an effective remedy

1.37 Providing for the removal of unauthorised maritime arrivals from Australia to Nauru engages Australia's non-refoulement obligations and the prohibition against torture. Australia is obliged not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.¹¹ Australia is prohibited from expelling, returning (refouling) or extraditing a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations under the International Covenant on Civil and Political Rights,¹² including a risk of being subjected to torture.¹³ States parties are obliged to apply the principle

8 At 1 February 2023 there were 66 such persons on Nauru. See, Senate Standing Committee on Legal and Constitutional Affairs, *Senate Estimates*, Monday 13 February 2023, p. 29. Persons transferred to Nauru appear to be granted legal status in Nauru pursuant to the memorandum of understanding between Australia and Nauru. See, Department of Foreign Affairs and Trade, [Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru](#). The Department of Home Affairs advises that such persons are permitted to remain in the country 'pending their departure' and are permitted to work and operate businesses. See, [Regional processing and resettlement](#).

9 The Department of Home Affairs has advised that no person was transferred to Nauru in the period of time during which Nauru was not designated. See, Senate Standing Committee on Legal and Constitutional Affairs, *Senate Estimates*, Monday 13 February 2023, p. 37.

10 See *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

11 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. It does not appear that this measure would engage the prohibition on the expulsion of aliens without due process, as this right protects persons who are *lawfully* present in a country (according to the State's own laws). See, International Covenant on Civil and Political Rights article 13, and *General Comment 15 The position of aliens under the covenant* at [9].

12 See, *GT v Australia*, UN Human Rights Committee (2007) at [8.1];

13 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also, UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018); and UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

of non-refoulement in good faith.¹⁴ Australia's non-refoulement obligations, and the obligation not to subject a person to torture or other cruel treatment are absolute. They may never be subject to any permissible limitations.

1.38 Numerous concerns have been raised in relation to the conditions and services provided to persons who have been transferred to Nauru in the past,¹⁵ raising concerns about the effect of this measure on these rights. International human rights bodies have stated that the policy of offshore refugee processing is itself inconsistent with Australia's non-refoulement obligations and the prohibition against torture.¹⁶ In 2017, in relation to the conditions on Nauru, the UN Special Rapporteur stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards'.¹⁷

1.39 As the removal of persons from Australia to Nauru pursuant to this measure may result in a violation of their human rights, this measure also appears to engage the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the ICCPR.¹⁸ The obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and

14 States 'may not pass laws or regulations, engage in policies or practices, or conclude agreements with other States or non-State actors that would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement that they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control'. See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018 (A/HRC/37/50) at [42] and 10 April 2014 (A/HRC/25/60) at [40–58].

15 See, most recently, submissions made to the following inquiry: Senate Standing Committees on Legal and Constitutional Affairs, [Migration Amendment \(Evacuation to Safety\) Bill 2023](#) (7 March 2023).

16 See, most recently, UN Committee Against Torture, *Concluding observations on the sixth report of Australia*, (5 December 2022) CAT/C/AUS/CO/6 at [29].

17 See, UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

18 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005). States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

impartial review of decisions to deport or remove a person.¹⁹ Jurisprudence from bodies recognised as authoritative in specialised fields of law makes clear that there is a strict requirement for 'effective review' of non-refoulement decisions.²⁰ They also state that the purpose of an effective review is to 'avoid irreparable harm' to the individual.²¹ Section 198AE of the Migration Act provides the minister with a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. However, such a discretionary safeguard is unlikely to be sufficient for the purposes of international human rights law, particularly where the rights in question are absolute and may never be permissibly limited. It is unclear when and how such a discretion may be utilised. It is also unclear what other procedural mechanisms, if any, persons subject to removal to Nauru could access to challenge that removal, particularly prior to their removal from Australia.

Rights of the child

1.40 Because section 198AD of the Migration Act establishes a requirement that all unauthorised maritime arrivals be sent to a regional processing country, this instrument may result in the expulsion of children from Australia to Nauru where they have arrived in Australia by boat without a valid visa.²² Children are subject to the operation of section 198AD as a matter of law, and have historically been sent to Nauru on this basis. As such, the measure engages and is likely to limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.²³ Their rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any

19 International Covenant on Civil and Political Rights, article 2.

20 See *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, [Thirty-sixth report of the 44th Parliament](#) (16 March 2016) pp. 182-183.

21 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9].

22 While there are no children currently on Nauru, children have historically been transferred there, see Australian Human Rights Commission, [Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia \(Department of Home Affairs\)](#) [2018] AusHRC 128, Report into the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum.

23 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

grounds.²⁴ Of particular relevance to this measure is that in all actions concerning children the best interests of the child are required to be a primary consideration. The UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child...²⁵

1.41 In the migration context, the UN Committee on the Rights of the Child has further stated that unaccompanied children are to be provided with special protection and assistance, and that child asylum seekers are to receive appropriate protection and humanitarian assistance.²⁶ In particular, it has stated that a determination of what is in the best interests of the child (where a child is displaced) requires 'a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs'.²⁷

1.42 Noting the power to send all unauthorised maritime arrivals to Nauru, it is unclear whether and how the measure is consistent with the rights of the child, particularly Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions.

Right to equality and non-discrimination

1.43 Only persons who meet the definition of an 'unauthorised maritime arrival' in section 5AA of the Migration Act (relevantly, having arrived in Australia by sea), are liable to removal to a regional processing country. As such, the re-designation of Nauru in this measure would only impact on persons who arrive in Australia by sea without a valid visa (and not people who arrive with a valid visa and subsequently claim asylum, or who otherwise arrive in Australia by plane). As such, while Australia

24 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

25 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). In this General comment, the UN Committee further stated that 'Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

26 UN Convention on the Rights of the Child, articles 3(1), 20 and 22. See also UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [26–27].

27 UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [20].

is permitted to create laws regulating who it will admit to its territory, this measure may have a discriminatory impact on some non-citizens, and so engage the right to equality and non-discrimination.

1.44 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.²⁸ Prohibited grounds of discrimination include discrimination based on nationality and national origin.²⁹ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).³⁰ Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.³¹ Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.³² Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.³³

1.45 There appears to be a risk that in applying this measure only to persons who arrive in Australian territory by sea without a valid visa, the measure may have a disproportionate impact on persons of certain nationalities, and therefore indirectly

28 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

29 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) at [10–11].

30 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

31 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

32 *D.H. and Others v the Czech Republic*, European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

33 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

discriminate against them on that basis. A recent statistical comparison of all persons who claim asylum onshore having arrived with a valid visa, compared to those who arrive in Australia by boat without a valid visa, does not appear to be readily available. However, relevantly, of all refugee lodgements made in the Administrative Appeals Tribunal in the 2022–23 financial year to date, 52 per cent of refugee lodgements by persons not classified as unauthorised maritime arrivals (totalling 3,410 lodgements) were from Chinese and Malaysian citizens, whereas over 60 per cent of those from unauthorised maritime arrivals (totalling 14 lodgements) related to Iran, Sri Lanka and Afghanistan.³⁴ This raises the question of whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination.

Committee view

1.46 The committee notes that this legislative instrument designates Nauru as a regional processing country with the effect that this enlivens the operation of section 198AD of the Migration Act, which requires that an unauthorised maritime arrival must be sent to a regional processing country as soon as practicable.

1.47 The committee considers that this measure engages and limits multiple rights. The committee notes that as this legislative instrument is exempt from disallowance no statement of compatibility with human rights is required, and so no assessment of the measure's compatibility with human rights is available.

1.48 The committee considers further information is required to assess the compatibility of this measure with human rights, and as such seeks the minister's advice in relation to:

- (a) whether and how the measure is consistent with Australia's non-refoulement obligations and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- (b) whether a person who is liable to removal to Nauru under section 198AD would have access to an effective remedy in relation to that power;
- (c) how many times the ministerial discretion under section 198AE has been exercised previously, and in what circumstances;
- (d) whether the measure is consistent with the rights of the child, and in particular with Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions, including:

34 Administrative Appeals Tribunal, Migration and Refugee Division, [Caseload Report Financial year to 28 February 2023](#).

- (i) whether Australia conducts an assessment of the best interests of the child prior to their removal to Nauru under section 198AD, and if so, what this process entails; and
 - (ii) what other protection and humanitarian assistance is provided to child unauthorised maritime arrivals;
- (e) whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination; and
- (f) why this instrument will sunset in 10 years and not a shorter period of time.

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]¹

Purpose	This legislative instrument sets out the rules that decision-makers must use when assessing a person's work-related impairment for the disability support pension under the <i>Social Security Act 1991</i>
Portfolio	Social Services
Authorising legislation	<i>Social Security Act 1991</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 6 March 2023 and in the Senate on 7 March 2023). Notice of motion to disallow must be given by 22 May 2023 in the House and by 13 June 2023 in the Senate) ²
Rights	Social security; adequate standard of living; equality and non-discrimination; rights of persons with disability

Eligibility for the Disability Support Pension

1.49 This legislative instrument sets out the rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the Disability Support Pension (DSP) under section 94 of the *Social Security Act 1991* (Social Security Act). This legislative instrument replaces, with amendments, the previous such measure.³

1.50 The instrument sets out 15 impairment tables, each of which are intended to measure the extent of the person's impairment level with respect to different bodily functions (these include, for example, visual impairment, mental health function, and communication function). The term 'impairment' refers to 'a loss of functional

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188], *Report 4 of 2023*; [2023] AUPJCHR 32.
 - 2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.
 - 3 The Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 [F2011L02716] was due to sunset on 1 April 2022. The Legislation (Deferral of Sunsetting – Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022 [F2022L00127] deferred this to 1 April 2023.

capacity affecting a person's ability to work that results from the person's condition'.⁴ The tables describe functional activities, abilities, symptoms and limitations against which a person's impairments are to be assessed in order for an impairment rating (expressed as points) to be assigned.⁵ For a person to be eligible for the DSP, the impairment must be rated at 20 points or above according to these tables.⁶

Preliminary international human rights legal advice

Rights to social security, an adequate standard of living, equality and non-discrimination, and rights of persons with disability

1.51 By setting out rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the DSP, this measure engages several human rights.

1.52 By supporting the provision of a social security payment specifically to support persons with disability, this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP.

1.53 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.⁷ The right to social security plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living.⁸ The right to an adequate standard of living requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its

4 Section 5.

5 Explanatory statement, p. 12.

6 Eligibility for DSP is assessed according to several criteria, including relevantly the requirements that the person: has a physical, intellectual or psychiatric impairment; the impairment is of 20 points or more under the Impairment Tables; and either the person has a continuing inability to work, or the Secretary is satisfied that the person is participating in the program administered by the Commonwealth known as the supported wage system. Section 94 of the *Social Security Act 1991*, which also sets out further criteria including that the person has turned 16 and meets residency requirements.

7 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

8 International Covenant on Economic, Social and Cultural Rights article 9; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008).

jurisdiction.⁹ The United Nations (UN) Convention on the Rights of Persons with Disabilities recognises the equal rights of persons with disability to live in the community with choices equal to others,¹⁰ and to enjoy an adequate standard of living.¹¹ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹²

1.54 However, in restricting which persons may be eligible for the DSP according to the work-related impairment tables set out in the instrument, the measure also limits these human rights. In this regard the statement of compatibility with human rights states:

Disability support pension is designed to support people with disability if they are unable to work for at least 15 hours per week at or above the relevant minimum wage, due to a physical, intellectual or psychiatric impairment. This means not all people with a condition will be eligible for disability support pension.¹³

1.55 Australia is obliged to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living and to social security. It also has immediate obligations to satisfy certain minimum aspects of the rights; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the rights are made available in a non-discriminatory way.¹⁴ In this regard, the UN Committee on Economic, Social and Cultural Rights has identified a 'minimum core' to the right to social security, which

9 International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*. The Committee explains that 'implementation [of the ICCPR] does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction'.

10 Convention on the Rights of Persons with Disabilities, article 19.

11 Convention on the Rights of Persons with Disabilities, article 28.

12 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. See also Convention on the Rights of Persons with Disabilities, article 5.

13 Statement of compatibility, p. 72.

14 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [40].

includes requiring that States parties ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged or marginalised individuals or groups.¹⁵ The right to equality and non-discrimination provides that differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹⁶

1.56 The UN Committee on the Rights of Persons with Disabilities has stated that states parties should define eligibility criteria and procedures for accessing support services 'in a non-discriminatory way, objectively and focused on the requirements of the person rather than on the impairment, following a human rights-compliant approach'.¹⁷ It has stated that where a state adopts specific measures to help achieve equality for persons with disability, such measures must be consistent with all principles and provisions of the Convention, and must not result in perpetuation of isolation, segregation, stereotyping, stigmatisation or otherwise discrimination against persons with disabilities.¹⁸ The UN Committee on the Rights of Persons with Disabilities has expressed concern about the existence of eligibility restrictions for the DSP, and has recommended that Australia end these eligibility restrictions to ensure that persons with disabilities have access to an adequate standard of living.¹⁹

1.57 The statement of compatibility with human rights acknowledges that the eligibility criteria may limit the rights of persons with disability to social security and an adequate standard of living where they cannot be assigned a rating (such as where their condition has not been diagnosed), or where their impairments are not severe enough to be assigned 20 points (such as where their condition has not been reasonably treated or stabilised, or, in light of available evidence, their condition and resulting impairment is not likely to persist for more than 2 years).²⁰ It states that these limitations achieve a legitimate objective in that they 'balance a person's right to social security with the resources of the community' and recognise that a person

15 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [59].

16 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

17 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, [71].

18 UN Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, [29].

19 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia* (2019), [51].

20 Statement of compatibility, p. 72.

who is not eligible for the DSP may access other benefits, including Medicare, the National Disability Insurance Scheme (NDIS) and other social security payments including jobseeker payment. It also states that the measure is consistent with the promotion of these rights.²¹

1.58 With respect to a legitimate objective, the International Covenant on Economic, Social and Cultural Rights establishes a specific restriction on the reasons for, and the manner in which, economic, social and cultural rights may be limited. Article 4 of this Convention establishes that States Parties may limit economic, social and cultural rights only insofar as this may be compatible with the nature of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.²² Restricting eligibility in order to balance the resources of the community may be seen to be for the purposes of promoting general welfare (if those resources were to be spent in other ways on promoting general welfare) and therefore constitute a legitimate objective. However, as noted above, Australia has an immediate obligation to satisfy certain minimum aspects of the rights to social security,²³ meaning that it is required to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.²⁴ The UN Committee on Economic, Social and Cultural Rights has stated that '[u]nder no circumstances should an individual be deprived...of the minimum essential level of benefits'.²⁵

1.59 It is not clear that denying certain persons with disability access to the DSP would meet Australia's minimum core obligations. The UN Committee on the Rights of Persons with Disability has expressed its concern that 'a significant proportion of persons with disabilities are living either near or below the poverty line'.²⁶ . In this regard, it is not clear whether the potential availability of other benefits, such as the NDIS, would be an adequate safeguard in practice, noting that a person who does not meet the eligibility criteria for the DSP may also not meet the eligibility criteria

21 Statement of compatibility, p. 72.

22 International Covenant on Economic, Social and Cultural Rights, article 4.

23 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [40].

24 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [59].

25 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78].

26 UN Committee on the Rights of Persons with Disability, Concluding observations on the combined second and third periodic reports of Australia (2019), [51].

for the NDIS as the latter similarly requires a person to have a permanent impairment that substantially reduces their functional capacity and ability to work, study and take part in social life.²⁷ Considering the potentially high costs of disability-related supports, it is not clear whether benefits such as Medicare and jobseeker payment would be sufficient to ensure persons with disability who are ineligible for the DSP are able to access the necessary social support to enjoy an adequate standard of living and live independently in the community. In terms of accessing the JobSeeker payment, it is not clear if persons with disability would always be able to meet the mutual obligations requirements (being tasks and activities to find a job) or be able to access effective longer-term exemptions from these obligations.²⁸

1.60 In order to realise the rights of persons with disabilities,²⁹ Australia has an obligation to ensure access to appropriate and affordable services, devices and other assistance for impairment-related requirements, especially for those persons with disabilities who live in poverty.³⁰

1.61 In addition, it is not clear from the statement of compatibility whether in remaking this instrument if any amendments to the eligibility criteria might constitute a backward step in relation to the realisation of these rights (for example, by reducing eligibility or taking something away which was previously available). In this regard, Australia has a duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. If it does so this must be justified, that is, the backwards step must be shown to address a legitimate objective, be effective to achieve (that is, rationally connected to) that objective, and constitute a proportionate means of achieving that objective.

1.62 The statement of compatibility further states that the measure promotes the right to equality and non-discrimination by regulating the manner in which a person's eligibility for the DSP is determined. In particular it states that it sets out what constitutes reasonable treatment for the purposes of qualifying for the DSP, such as treatment that is available at a reasonably accessible location and cost and can reliably be expected to result in significant functional improvement.³¹ However, the

27 *National Disability Insurance Scheme Act 2013*, section 24. See also NDIS, [Do you meet the disability requirements?](#) (20 June 2022).

28 Noting that based on information on the [Services Australia](#) website (as at 21 March 2023) it appears that mutual obligations may be suspended for up to 13 weeks on the basis of a medical certificate, but it is not clear if these obligations can be suspended for longer.

29 Including the right to live independently and be included in the community, to enjoy an adequate standard of living and to personal mobility. See Convention on the Rights of Persons with Disabilities, articles 19, 20 and 28.

30 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, [92].

31 Statement of compatibility, p. 73.

statement of compatibility does not recognise that the measure may limit the right to equality and non-discrimination, on the basis of the type of disability a person has, and so no analysis of its compatibility in this regard is provided. In particular, it is unclear whether the impairment tables set out would provide for differential treatment of persons with disability which is based on reasonable and objective criteria, including the appropriate assessments of individual circumstances.

Committee view

1.63 The committee notes that this legislative instrument sets out the rules that decision-makers must use when assessing a person's work-related impairment for the purposes of being eligible to receive the disability support pension (DSP).

1.64 The committee notes that this legislative instrument re-makes the previous legislative instrument providing for these matters, with some amendments. The committee notes that the previous legislative instrument was made in 2011, prior to the requirement for a statement of compatibility with human rights, meaning that this is the first opportunity for the committee to assess the compatibility of these rules with international human rights law.

1.65 By supporting the provision of a social security payment specifically to support persons with disability, the committee considers this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP. However, restricting which persons with disability may be eligible for the DSP also engages and limits these rights. The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) whether in restricting access to the DSP in the manner set out in the instrument, Australia is fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, such that when persons are ineligible for the DSP they are still provided with a minimum essential level of benefits;
- (b) whether the measure is necessary and proportionate, in particular, whether a person who does not meet the eligibility criteria can have their individual circumstances considered and so nonetheless be provided access to the DSP; and

- (c) whether any of the amendments in this measure are retrogressive (in that they constitute a backwards step) when compared with the previous legislative instrument, and if so whether this is a permissible retrogressive measure.