

Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Bills

Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments²

<p>Purpose</p>	<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</p>
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1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management Reform) Bill 2023, *Report 5 of 2023*; [2023] AUPJCHR 46.

	recipients and as a declared voluntary income management area. ³
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

2.3 The committee requested a response from the minister in relation to the bill in [Report 4 of 2023](#).⁴

The enhanced income management regime

2.4 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).⁵ 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).⁶ 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.⁷

3 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].

4 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 9–25.

5 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.

6 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.

7 Explanatory statement, pp. 1, 4–5.

2.5 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.⁸ 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.⁹ In particular, a 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.¹⁰ 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.¹¹

2.6 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).¹² The portions specified in this bill appear to mirror the 'deductible portions' set out under

8 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.

9 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.

10 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*.

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

12 Scheduled 1, items 49–51.

Part 3B of the Act.¹³ 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.¹⁴ Restrictions on the use of the qualified portion of a person's welfare payment are set out in a related instrument.¹⁵ 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.¹⁶ The instrument also sets out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts.¹⁷ 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.

2.7 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.¹⁸ 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.¹⁹

2.8 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

13 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.

14 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.

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

16 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.

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

18 Schedule 1, item 68.

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

criteria relating to vulnerable welfare payment recipients.²⁰ 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.²¹

Summary of initial assessment

Preliminary international human rights legal advice

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

2.9 As the committee has previously reported, measures relating to mandatory income management engage numerous human rights.²² 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.²³ 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,²⁴

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

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

22 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.

23 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.

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

social security²⁵ and equality and non-discrimination.²⁶ 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 'qualified' portion of their welfare payment, these same human rights are engaged and limited.

2.10 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.²⁷ 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,²⁸ and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.²⁹ 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.

2.11 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

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

26 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.

27 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.

28 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.

29 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.

storing, use and sharing of such information.³⁰ It also includes the right to control the dissemination of information about one's private life.

2.12 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.³¹ The committee has previously noted that were persons subject to mandatory income 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.³² 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.³³ 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.³⁴

2.13 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.³⁵ 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

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

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

32 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.

33 Statement of compatibility, p. 3.

34 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).

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

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.³⁶

2.14 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.³⁷ 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.³⁸ 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.³⁹ In particular, the measure relating to the Ngaanyatjarra Lands would disproportionately impact Aboriginal and Torres

36 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).

37 *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].

38 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).

39 Statement of compatibility, p. 2. See also Social Security (Administration) (Declinable 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.⁴⁰

2.15 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,⁴¹ the measure would engage the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵ This obligation requires legislative, administrative and judicial bodies and institutions to systematically

40 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.

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

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

43 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.

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

45 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.⁴⁶

2.16 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.

Committee's initial view

2.17 The committee considered further information was required to assess the compatibility of the measures contained in the bill and related instruments with multiple human rights, and as such sought 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;⁴⁷
- (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;⁴⁸
- (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;

46 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].

47 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.

48 Schedule 1, item 32.

- (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.

2.18 The full initial analysis is set out in [Report 4 of 2023](#).⁴⁹

Minister's response⁵⁰

2.19 The minister advised:

(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;

The Government is working with communities on the future of income management and what it looks like for them. Any decisions about the future of income management will be based on genuine consultation with a wide range of stakeholders, including First Nations leaders, women's groups, service providers, communities, people receiving welfare payments, and our state and territory government counterparts.

During consultation on the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* (the Repeal Act) many communities and stakeholders raised the limitations of the BasicsCard, citing that it is out of date and no longer meets their needs. The *Social Security (Administration) Amendment (Income Management Reform) Bill 2023* (the Bill) will provide individuals subject to the enhanced income management regime (enhanced IM) access to modern banking technology to ensure the program is more in tune with their needs until consultation on the long-term future of the programs is complete.

(b) in relation to the eligibility criteria relating to disengaged youth and long-term welfare payment recipients, what other geographical

49 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 9–25.

50 The minister's response to the committee's inquiries was received on 18 April 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

areas are intended to be specified by the minister by legislative instrument;

The purpose of this Bill is to expand access to enhanced IM, and its associated improved technology, by mirroring the structure and content of income management (IM) in Part 3B of the *Social Security (Administration) Act 1999* (the Administration Act).

Proposed section 123SDA, which would allow for the operation of the disengaged youth and long-term welfare payment recipient measures in areas other than the Northern Territory reflects the current operation of IM under Part 3B. The Government does not intend to make a legislative instrument extending these measures beyond the Northern Territory, where they currently operate under IM and enhanced IM.

As stated above, there is no intent to change how and where enhanced IM and IM operate until meaningful consultation has occurred with affected individuals, communities and experts.

(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;

This Bill does not impose any further risk to accessing goods than those already prevalent in remote communities. This Bill enables participants to shop at a wider range of merchants, including online merchants, to ensure they have better access to goods and services.

In most cases, merchants will be able to accept the SmartCard without taking any action and there will be no impact on the individual or the merchant. Merchants are categorised into three groups for the purpose of the SmartCard:

- Restricted Merchants - Merchants who primarily sell restricted items (bottle shops, TABs, casinos, cigar stores); the SmartCard is not accepted at these stores. This is done by using a Merchant Category Code or Merchant ID and is managed by the card issuer.
- Unrestricted Merchants - Those which do not sell any restricted items. These merchants will be able to accept the Smartcard without taking any action.
- Mixed Merchants - which sell both restricted and unrestricted items.

The SmartCard is also supported by Product Level Blocking (PLB), which removes the manual effort away from merchants and automatically blocks the purchase of excluded goods and services when the SmartCard is used to pay in a mixed merchant setting.

To deploy PLB, the merchant must have an integrated point of sale whereby the EFTPOS terminal is linked to the register so it can identify

when the SmartCard is used to make a purchase. In the event a business does not have access to this technology or is not willing to upgrade, Services Australia will work with the business to provide a Mixed Merchant Agreement (MMA).

The MMA is an agreement between the two entities that the business will uphold the intent of the Government's policy by manually preventing the sale of excluded goods and services. This ensures enhanced IM participants can continue to access essential goods, regardless of the technology available to merchants.

(d) how mandatory participation in the enhanced income management regime is effective to achieve the stated objectives;

As outlined above, the purpose of the Bill is to expand access to the improved technology associated with enhanced IM. It does not change the policy settings behind the IM regime. The Government is committed to consulting with affected communities on the future of IM and it will not make changes to the operation of IM until meaningful consultation has occurred.

The Bill provides existing and new enhanced IM participants with modern technology whilst that consultation occurs.

(e) whether there are recent evaluations of the mandatory income management regime under Part 3B and/or Part 3AA;

The enhanced IM regime commenced in the Northern Territory, Cape York and Doomadgee region on 6 March 2023 and, as such, has not yet been subject to evaluation. Following the passage of the Repeal Bill, the Government committed to conducting an evaluation of the transition to the enhanced IM measure, and work is underway to ensure we deliver on that commitment.

The IM regime under Part 3B of the Act has been subject to a number of evaluations. The findings of these evaluations are available from the Department of Social Services' [website](#).

The Government is committed to reforming IM and listening to the needs of communities. We did this when we abolished the Cashless Debit Card and introduced enhanced IM and we will continue to do so.

(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;

This Bill was developed based on consultation with First Nations peoples, community members and their leaders, service providers and other stakeholders who called for a measured approach to reforming IM. This includes feedback provided during the Senate Community Affairs Legislation Committee inquiry into the Repeal Bill.

(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;

Both IM and enhanced IM will continue to operate in the existing 12 locations across Australia, and in the Northern Territory, in their current form until the Government has undertaken further consultation on the future of IM.

As outlined above, enhanced IM replicates the policy settings underpinning IM, but provides access to improved technology. It is not appropriate for the regime itself to sunset as this could have a range of unintended consequences if appropriate transitional legislation is not passed prior to the sunset date. To demonstrate the Government's commitment to ongoing and meaningful consultation on the future of IM, the legislative instruments that will operationalise enhanced IM will be self-repealing after a set period of time.

These instruments will be made concurrently with commencement of the Bill and will be subject to parliamentary scrutiny and disallowance.

(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;

The objective of the Bill is to expand access to modern banking technology to individuals currently subject to IM and to individuals who will become subject to enhanced IM in the future. The Bill does this by inserting new measures into Part 3AA of the Administration Act that mirror the measures and eligibility criteria for IM in Part 3B. This ensures accessibility to modern technology while further consultation is undertaken on the future of IM.

All individuals who become subject to IM and enhanced IM do so on the basis of their individual circumstances. While an individual's usual place of residence is relevant, it is only one of a number of criteria that must be satisfied.

(i) what other safeguards would operate to assist proportionality

As noted in the report, this Bill establishes a number of safeguards. All individuals who become subject to IM and enhanced IM do so on the basis of individual circumstances. If those circumstances change, they may exit IM or enhanced IM. Enhanced IM also significantly expands access to shopping outlets and mainstream banking functions, and the Secretary is able to vary the percentage of qualified portions of a person's welfare payment in certain circumstances that may affect an individual's ability to access money in their BasicsCard bank account.

The Government considers that the Bill, together with relevant legislative instruments provide sufficient safeguards at this time. We will continue to listen and respond to the needs of communities as we progress on the reform of Income Management, including identifying any other appropriate safeguard options.

(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.

The Government is committed to reforming IM across Australia and is working with communities, individuals and key stakeholders and experts to consider the best way forward. Consultation is central to everything the Government does and we will not make a decision on the future of income management until extensive and meaningful consultation has occurred.

We will continue to listen to a wide range of stakeholders to inform the future of IM and deliver a range of supports that communities can use when and how it best suits them.

Concluding comments

International human rights legal advice

Legitimate objective and rational connection

2.20 The minister reiterated that the objective of the bill is to expand access to the enhanced income management regime and its associated improved technology. The minister stated that the bill does this by inserting new measures into Part 3AA of the Act that mirror the measures and eligibility criteria for income management in Part 3B of the Act. In this way, the bill does not change the policy settings underpinning the income management regime but rather replicates these settings in Part 3AA of the Act. As noted in the preliminary analysis, by replicating existing measures relating to income management in the enhanced income management regime, the bill and related legislative instruments would effectively remake the law relating to income management and possibly expand 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.

2.21 The preliminary analysis noted that while 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, 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 the broader objective of making income management voluntary in the future. On this point, the minister stated that the government is working with communities on the future of income management and any decisions about its future will be based on genuine consultation with a wide range of stakeholders. The minister noted that the bill addresses previous concerns raised about the limitations of the BasicsCard by

expanding access to modern banking technology. In this way, the minister stated that the bill will help to ensure the income management regime is more in tune with the needs of participants until consultation on the long-term future of the regime is complete.

2.22 The minister's response indicates that consultation will continue, and the income management regime will not change until consultation has occurred. It therefore appears that, depending on the outcome of consultation, there is a possibility that the regime may not be made voluntary in the future, as previously indicated by the minister.⁵¹ As such, it is not evident that expanding access to the enhanced income management regime, which in effect will extend mandatory income management into the foreseeable future, is, for the purposes of international human rights law, necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. While facilitating the transition to a regime that provides participants with access to superior technology and improved banking functions is, in itself, an important aim, it remains unclear why this transition must occur on a mandatory basis (or why legislation is required to improve this technology).

2.23 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. As noted in the preliminary analysis, 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.⁵² Based on earlier evaluations of the income management regime, the

51 It is noted that the minister made previous statements to this committee regarding the government's intention to make income management voluntary in the future. 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. 48.

52 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.

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.⁵³

2.24 As to whether there are more recent evaluations available, the minister advised that there are no evaluations of the enhanced income management regime but that work is underway to evaluate it, and otherwise referred to past evaluations of the income management regime under Part 3B of the Act, many of which have been considered by this committee.⁵⁴ Without more recent evaluations and noting earlier evaluations of mandatory income management were inconclusive regarding its effectiveness, it is not possible to conclude that the enhanced income management regime, which will continue to subject persons to mandatory income management, would be effective to achieve the stated objectives.

Proportionality

2.25 The preliminary analysis noted that there appears to be little flexibility to consider the merits of an individual case in deciding whether to compulsorily subject a person to the enhanced income management regime and questions arise as to whether this approach is sufficiently individualised. The minister stated that all individuals who become subject to income management under both Part 3B and Part 3A do so on the basis of individual circumstances. If those circumstances change, they may exit income management. However, while some eligibility criteria may involve consideration of individual circumstances, such as with respect to persons subject to the enhanced income management regime on the basis of an individual referral by a state or territory child protection officer,⁵⁵ most 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 specified welfare payment (such as youth allowance or jobseeker)⁵⁶ for at least 13 weeks during the 26-week period ending immediately

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

54 The minister referred to the income management and Cashless Debit Card evaluations available on the Department of Social Services [website](#). Many of these evaluations were considered by the Parliamentary Joint Committee on Human Rights in its [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102.

55 Schedule 1, item 17, proposed subsection 123SCA(1).

56 Category C welfare payment, defined as: youth allowance; jobseeker payment; special benefit; pension PP (single); or benefit PP (partnered). See *Social Security A(Administration) Act 1999*, section 123SB definition of 'Category C'.

before the test time, and is not exempt, will be subject to the enhanced income management regime.⁵⁷ These criteria relating to disengaged youth do not allow for consideration of individual circumstances, such as whether an individual has a demonstrated need for assistance in managing their income or a history of using harmful products such that intervention is appropriate. Concerns therefore remain that the eligibility criteria applicable to the enhanced income management regime are insufficiently individualised.

2.26 The preliminary analysis noted that the general exemptions that apply to the income management regime, such as the ability to exempt certain welfare payment recipients,⁵⁸ may operate as a safeguard. The value of this safeguard will depend on how it operates in practice, including the nature and scope of any future legislative instruments that specify a class of persons who are to be exempt from income management.⁵⁹ As to the existence of other safeguards, the minister advised that individuals will be subject to income management based on individual circumstances. However, as noted above, many individuals are subject to compulsory income management without consideration of their individual circumstances and as such, this does not assist with proportionality.

2.27 Other safeguards identified by the minister were the secretary's ability to vary the percentage of the qualified portion of a person's welfare payment in certain circumstances, such as where a person is unable to access their BasicsCard bank account because of a technological fault or malfunction,⁶⁰ as well as the fact that the enhanced income management regime offers access to a greater number of businesses and outlets. While these safeguards may assist to ensure that any limitation on the right to an adequate standard of living is proportionate, questions were raised in the preliminary analysis as to 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 and thus realise their right to an adequate standard of living. The minister advised that the bill does not impose any further risk to accessing goods than those already prevalent in remote communities. The minister stated that the SmartCard is supported by Product Level Blocking, which automatically blocks the

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

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

59 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.

60 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).

purchase of excluded goods and services when the SmartCard is used to pay in a mixed merchant setting, that is, a merchant that sells both restricted and unrestricted items. Where the business does not have the technology to support Product Level Blocking, the minister stated that Services Australia will work with the business to provide a Mixed Merchant Agreement, that is, an agreement that the business will uphold the intent of the government's policy by manually preventing the sale of excluded goods and services. The minister stated that this ensures enhanced income management participants can continue to access essential goods, regardless of the technology available to businesses. The availability of mixed merchant agreements may mitigate the risk of participants in remote areas being unable to purchase basic goods because of technological limitations of the relevant business.

2.28 Another potential safeguard is community consultation. Further information was sought from the minister to assess the adequacy of the consultation undertaken to date. The minister advised that the bill was developed based on consultation with First Nations peoples, community members and their leaders, service providers and other stakeholders. The minister stated that these stakeholders called for a measured approach to reforming income management. The minister advised that consultation will continue and that a decision regarding the future of income management will not be made until extensive and meaningful consultation has occurred. It is evident that consultation regarding the bill generally has occurred, and there is an intention for further consultation to be undertaken, which is an important element of the requirement for free, prior and informed consent, which is a part of the right to self-determination.⁶¹ However, it remains unclear 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, noting that it is these aspects of the bill which most significantly limit the rights of participants.

2.29 A further consideration is the extent of any interference with human rights, noting that the greater the interference the less likely the measure is to be proportionate. The preliminary analysis noted that 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

61 See United Nations Declaration on the Rights of Indigenous Peoples, article 19. While this Declaration is not one of the international texts listed as those which this committee is to consider when examining legislation for compatibility with human rights (see *Human Rights (Parliamentary Scrutiny) Act 2011*), it provides context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. As such, 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.

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.⁶²

2.30 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 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.⁶³

2.31 The length of time that compulsory income management may be in force is also relevant in considering the extent of any interference with rights. The minister advised that both income management and enhanced income management will continue to operate in the existing 12 locations across Australia and in the Northern Territory in their current form until the government has undertaken further consultation on the future of income management. The minister stated that it is not appropriate for the enhanced income management regime to sunset as this could have a range of unintended consequences if appropriate transitional legislation is not passed prior to the sunset date.

2.32 The minister stated that to demonstrate the government's commitment to ongoing and meaningful consultation on the future of income management, the legislative instruments that will operationalise enhanced income management will be self-repealing after a set period of time, although the minister does not indicate what this set period of time will be. The legislative instrument that operationalises key aspects of the enhanced income management regime, including the kind of bank account to be maintained by a person subject to the regime, the terms and conditions of that bank account and the kinds of businesses in relation to which transactions may be declined, is currently due to sunset in ten years, on 1 April 2033 and there is no earlier self-repealing date specified.⁶⁴ If this sunset date is indicative of the potential length of time in which the enhanced income management regime may operate, the resulting interference with rights is likely to be significant.

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

63 Statement of compatibility, p. 5.

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

2.33 The potential interference with rights may also be greater if the enhanced income management regime is expanded to other geographical areas. The minister stated that while proposed section 123SDA (the eligibility criteria relating to disengaged youth and long-term welfare payment recipients) would allow the minister to specify areas other than the Northern Territory to which the enhanced income management regime may apply, the government does not intend to make a legislative instrument extending these measures beyond the Northern Territory. In terms of the impact on rights, not extending the measures beyond the Northern Territory is welcome. However, it is noted that a statement of intention not to exercise this discretionary power offers little safeguard value, as the power to expand the regime remains in the legislation itself, and were there to be a change of minister or government, a different approach may be taken.

2.34 Finally, it is necessary to consider whether any less rights restrictive alternatives could achieve the same stated objective. The preliminary analysis noted that 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 subjecting individuals to the regime on the basis of individual circumstances. On this point, the minister stated that all individuals are subjected to income management based on individual circumstances and that an individual's usual place of residence is relevant but only one criterion that must be satisfied. As noted above, however, concerns remain that the eligibility criteria are not sufficiently individualised. It therefore appears that there may be less rights restrictive ways to achieve the stated objective, such as voluntary participation in the regime, incorporating individualised assessments in the eligibility criteria and making mandatory participation in the regime a time-limited measure.

2.35 In conclusion, while the general objective underpinning the enhanced income management regime—to combat social harms caused by the use of harmful products—is capable of constituting a legitimate objective, it is not evident that the specific objective of expanding access to this regime, which in effect extends mandatory income management into the foreseeable future, is necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. It is also not clear that the measure would be effective to achieve the general objective of combatting social harms, noting that earlier evaluations of mandatory income management were inconclusive regarding its effectiveness. As to proportionality, while there are some safeguards accompanying the legislation, it is not clear these are sufficient. There is also insufficient flexibility to consider individual circumstances, the interference with human rights is potentially significant and there appear to be less rights restrictive ways of achieving the stated objective. As such, the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. With respect to the right to an adequate standard of living, the availability of mixed merchant agreements appears to mitigate the risk that this right would be disproportionately limited.

Committee view

2.36 The committee thanks the minister for this response. 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).

2.37 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. 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).

2.38 For many years the committee has raised concerns regarding the compatibility of compulsory income management with multiple human rights.⁶⁵ Insofar as the enhanced income management regime would replicate existing measures relating to income management under Part 3B, 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

65 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.

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.

2.39 The committee notes that while the general objective of the enhanced income management regime is important, that is, to combat social harms caused by the use of harmful products, it is not clear that expanding access to this regime, which in effect extends mandatory income management into the foreseeable future, is, for the purposes of international human rights law, a necessary measure that addresses a pressing and substantial concern. The committee considers that, in the absence of adequate safeguards and sufficient flexibility to consider individual circumstances, as well as the potentially significant interference with human rights that may result from compulsory participation in the enhanced income management regime, the legislation risks impermissibly limiting the rights to social security, privacy, equality and non-discrimination and the rights of the child. With respect to the right to an adequate standard of living, the committee considers that the availability of mixed merchant agreements would appear to mitigate the risk that this right would be disproportionately limited.

2.40 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Legislative instruments

Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712]¹

Purpose	This legislative instrument amends the Australian Immunisation Rule 2015 to make it mandatory for all vaccination providers to report vaccinations of a person with Japanese encephalitis vaccines to the Australian Immunisation Register
Portfolio	Health and Aged Care
Introduced	<i>Australian Immunisation Register Act 2015</i>
Authorising legislation	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023).
Rights	Health; privacy

2.41 The committee requested a response from the minister in relation to the instrument in [Report 2 of 2023](#).²

Expansion of requirement to report vaccine information

2.42 This legislative instrument makes amendments to require that all registered vaccination providers must report the administration of a relevant vaccine for the Japanese encephalitis virus (JEV) to the Australian Immunisation Register (AIR). Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.³

2.43 Vaccination providers must report: the person's Medicare number (if applicable), name, contact details, date of birth, and gender; the provider number, name and contact details of the person who administered the vaccines; and the brand name, dose number and batch number, and date of administration.⁴

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712], *Report 5 of 2023*; [2023] AUPJCHR 47.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2023* (8 March 2023), pp. 34-37.

3 *Australian Immunisation Register Act 2015*, subsections 10A(5) and 10B(3).

4 Australian Immunisation Register Rule 2015, section 9.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health and privacy

2.44 By adding a new vaccination that must be registered on the AIR, and thereby increasing the ability for the government to enhance the monitoring of vaccine-preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.⁵ It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).⁶

2.45 However, in requiring vaccination providers to provide personal information about individuals who receive JEV vaccinations, the measure also appears to limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.⁷ The right to privacy also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Committee's initial view

2.46 The committee considered that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee noted that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is a risk that the existing broad ministerial discretion to disclose personal information to 'any person' and for any purpose if it is considered to be 'in the public interest' to do so, does not sufficiently safeguard the right to privacy.

5 International Covenant on Economic, Social and Cultural Rights, article 12(1).

6 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

7 International Covenant on Civil and Political Rights, article 17. International human rights law also recognises the right of children to be free from arbitrary or unlawful interferences with their privacy. See, Convention on the Rights of the Child, article 16.

2.47 The committee sought the minister's response to its previous recommendation that to better respect the right to privacy, subsection 22(3) of the *Australian Immunisation Register Act 2015* be amended to provide that:

- (a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';
- (b) specific, and limited, purposes for disclosure are set out in the legislation; and
- (c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.

2.48 The full initial analysis is set out in [Report 2 of 2023](#).

Minister's response⁸

2.49 The minister advised:

The 2022 amendment to the Australian Immunisation Register Rules 2015 (AIR Rules) require recognised vaccination providers to report the administration of Japanese Encephalitis Virus (JEV) vaccines to the Australia Immunisation Register (AIR). This is an extension of current mandatory reporting requirements for COVID-19, influenza and National Immunisation Program vaccines.

Mandatory reporting of vaccinations for JEV administered in Australia will improve reporting of vaccinations to the AIR and ensure the AIR contains a complete and accurate dataset of vaccination information to better inform program delivery and respond to disease outbreaks.

Section 22 of AIR Act concerns 'protected information', which includes personal information obtained under, or in accordance with, the AIR Act. Section 22 of the AIR Act regulates how information may be collected, recorded, disclosed, or otherwise used. Section 23 of the AIR Act makes it an offence, punishable by imprisonment and/or penalty units, to obtain, make a record of, disclose or otherwise use protected information unless it is authorised under Section 22.

The changes to the AIR Rules do not impact or change the protections afforded to individuals under the above provisions. This instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Additionally, I, as Minister, (or my delegate) may only authorise the disclosure of protected information in response to a disclosure request

8 The minister's response to the committee's inquiries was received on 31 March 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

where I am satisfied it is in the public interest. All disclosure requests are considered in line with the secrecy provisions in Part 4 of the AIR Act and other under relevant legislation such as the *Privacy Act 1988*, specifically balancing the purpose of the disclosure against the privacy impact of disclosure on the affected individual.

I am satisfied that privacy protections in the AIR Act and AIR Rules are appropriate, and at this time I do not consider it necessary to specify classes of persons, or purposes, to which the disclosure should relate.

Concluding comments

International human rights legal advice

2.50 As stated in the initial analysis, the AIR Act includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.⁹ It is not clear why it is necessary for the AIR Act to include this broad discretionary power enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'.

2.51 As set out in earlier analyses of related legislation,¹⁰ empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. As a matter of law this empowers the minister or delegate to, at any time, disclose personal information regarding a person's vaccination status to any person for any purpose, if the minister considers it to be in the public interest to do so.

2.52 The minister advised that the changes in this legislative instrument do not impact or change the protections afforded to individuals under the AIR Act. However, expanding the type of vaccinations required to be reported to the AIR, and thereby collecting more personal information means this power may now be exercised with respect to a larger volume of information. This therefore makes it necessary to consider whether existing safeguards in the legislation adequately protects the right to privacy.

2.53 The minister advised that he, or his delegate, will only authorise the disclosure of protected information when satisfied it is in the public interest. The minister further advised that all disclosure requests are considered in line with the secrecy provisions in the AIR Act and other under relevant legislation such as the

9 *Australian Immunisation Register Act 2015*, subsection 22(3).

10 Parliamentary Joint Committee on Human Rights, [Thirty-Second Report of the 44th Parliament](#) (1 December 2015) p. 53; and [Report 4 of 2021](#) (31 May 2021), and [Report 10 of 2021](#) (25 August 2021) p. 31–35.

Privacy Act 1988, specifically balancing the purpose of the disclosure against the privacy impact of disclosure on the affected individual. However, it is noted that the ministerial power to disclose protected information in the public interest does not require the minister, or their delegate, to balance the purpose of the disclosure against the privacy impact on the individual. Further, the other secrecy provisions in the AIR Act do not apply should the minister choose to exercise their broad discretionary power under section 22 of the AIR Act. Finally, other privacy protections such as in the *Privacy Act 1988* do not apply when other legislation, such as the AIR Act, specifically enables the disclosure of such information. As such, all protected information under the AIR Act, which includes the personal information of all those who receive certain vaccinations, may be disclosed to any person, for any purpose, as long as the minister, or their delegate considers this to be in the public interest.

2.54 Noting this broad ministerial power to disclose protected personal information, there remains a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

Committee view

2.55 The committee thanks the minister for this response. As previously stated, the committee considers that enabling the government to enhance its monitoring of vaccination coverage of the Japanese encephalitis virus promotes the right to health. However, requiring vaccination providers to provide personal information about individuals who receive such vaccinations also limits the right to privacy.

2.56 The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is a risk that the existing broad ministerial discretion to disclose personal information to 'any person' and for any purpose if it is considered to be 'in the public interest' to do so, does not sufficiently safeguard the right to privacy. The committee also considers other privacy protections in legislation are insufficient noting that the broad discretionary ministerial power would override any such protections.

Suggested action

2.57 The committee considers, in order to better respect the right to privacy, subsection 22(3) of the *Australian Immunisation Register Act 2015* be amended to provide that:

- (a) the minister's power to disclose protected information is to a specified class of persons rather than 'a person';

- (b) specific, and limited, purposes for disclosure are set out in the legislation; and
- (c) in authorising a disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.

2.58 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]⁷⁶

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) ⁷⁷
Rights	Social security; adequate standard of living; equality and non-discrimination; rights of persons with disability

2.59 The committee requested a response from the minister in relation to this instrument in [Report 4 of 2023](#).⁷⁸

Eligibility for the Disability Support Pension

2.60 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.⁷⁹

76 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 5 of 2023*; [2023] AUPJCHR 48.

77 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

78 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (29 March 2023), pp. 35-42.

79 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.

2.61 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 capacity affecting a person's ability to work that results from the person's condition'.⁸⁰ 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.⁸¹ For a person to be eligible for the DSP, the impairment must be rated at 20 points or above according to these tables.⁸²

Summary of initial assessment

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

2.62 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.

2.63 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.

2.64 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.⁸³ The right to social security plays an important role in realising many other economic, social and cultural rights,

80 Section 5.

81 Explanatory statement, p. 12.

82 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.

83 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).

particularly the right to an adequate standard of living.⁸⁴ 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 jurisdiction.⁸⁵ 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,⁸⁶ and to enjoy an adequate standard of living.⁸⁷ 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.⁸⁸

2.65 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.⁸⁹

2.66 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

84 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).

85 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 ICESCR] 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'.

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

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

88 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.

89 Statement of compatibility, p. 72.

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.⁹⁰ In this regard, the UN Committee on Economic, Social and Cultural Rights has identified a 'minimum core' to the right to social security, which 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.⁹¹ 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.⁹²

2.67 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'.⁹³ 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.⁹⁴ 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.⁹⁵

Committee's initial view

2.68 By supporting the provision of a social security payment specifically to support persons with disability, the committee considered this measure promotes

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

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

92 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].

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

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

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

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 considered further information was required to assess the compatibility of this measure with these rights, and as such sought 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.

2.69 The full initial analysis is set out in [Report 4 of 2023](#).

Minister's response⁹⁶

2.70 The minister advised:

(a) whether in restricting access to the Disability Support Pension (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 benefit.

The Australian social security system is a non-contributory, means-tested, residence-based system, designed to provide income support to people who, for reasons such as age, unemployment or ill health, are unable to support themselves. All social security payments have eligibility requirements to target support to those most in need. DSP is not a universal basic income for people with disability. It provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition. Not all people with

96 The minister's response to the committee's inquiries was received on 18 April 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

disability are eligible for DSP, as many people with disability are able to and do work.

People who are found ineligible for DSP because they don't meet the eligibility requirements when they are assessed under the Impairment Tables may be eligible for other income support payments, such as JobSeeker Payment, with modified activity requirements.

Where recipients have additional costs, such as those associated with renting in the private market or raising children, supplementary payments such as Commonwealth Rent Assistance and Family Tax Benefit are available. Other supplementary benefits that may be payable include Pharmaceutical Allowance, Carer Allowance, Remote Area Allowance, Telephone Allowance and Mobility Allowance, as well as a concession card. Individuals may also be eligible for support through the National Disability Insurance Scheme.

(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.

To determine eligibility for the DSP, Services Australia uses the Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pensions) Determination 2023 to assess how a person's functional impairment affects their ability to work. Without this instrument in place there is no legal basis to assess and grant DSP to new applicants, as the Social Security Act 1991 (the Act) specifies one of the qualification criteria for DSP is for a person's impairment to be rated at 20 points or more under the Impairment Tables.

The 2011 Determination was due to expire by sunset on 1 April 2023 and therefore it was necessary for a new instrument to be in place to ensure there remains a legal basis to assess and grant new DSP claims.

Assessments undertaken for the purposes of determining eligibility for DSP are individual assessments against the criteria, with a level of discretion for assessors to determine eligibility. For example, there is some discretion within the Determination as to what is considered reasonable treatment, taking into account the availability and cost of available treatments.

If Services Australia makes a decision a person disagrees with, they have the right under social security law to ask for a review of the decision by an Authorised Review Officer. The review system is designed to ensure correct decisions are made in accordance with the Act. If, after this, people still have concerns about the correctness of the decision, they can seek review by the Administrative Appeals Tribunal. The Tribunal is a review body that can provide an independent new decision that substitutes for Services Australia decisions. Each of these steps in the appeal process is free of charge.

(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.

None of the amendments to the Impairment Tables are retrogressive. The increase in the number of descriptors a person is required to meet under Table 7 - Brain Function could be misconstrued as a backward step. This change was a result of adding a social skills descriptor to this Table to address concerns around the representation of difficulties experienced by people with neurodiverse conditions. This addition has increased the number of available descriptors to 10.

Key organisations, including medical professionals have indicated that, while this is an increase in the requirement, it is important for social skills to be reflected and appropriate for the requirement to be raised as the vast majority of people assessed under Table 7 would experience difficulties with social skills and would be able to achieve at least 2 descriptors.

Concluding comments

International human rights legal advice

2.71 In relation to 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, the minister stated that all social security payments have eligibility requirements to target support to those most in need, and that DSP is not a universal basic income for people with disability. The minister stated that DSP provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition, meaning that not all people with disability are eligible for DSP, as many people with disability are able to, and do, work. The minister stated that people who are found ineligible for DSP may be eligible for other income support payments, such as JobSeeker Payment, with modified activity requirements, and associated supplementary payments, a concession card, and potentially support through the National Disability Insurance Scheme.

2.72 As noted above, the Impairment Tables are used to determine whether a person meets an impairment threshold such that they may qualify for DSP. Each table, which corresponds with a type of condition, provides that a person may receive between zero and 30 points with respect to a condition, depending on whether the functional impact on them ranges from minimal to extreme. The threshold to be eligible for DSP is an impairment rating of 20 or more points under

the Impairment Tables. A person may meet this threshold under one single table,⁹⁷ meaning that their impairment will be classified as 'severe', and they will be regarded as having satisfied the requirement that they have a continuing inability to work.⁹⁸ A person may also satisfy this threshold through accruing points in relation to impairments assessed across multiple tables (for example, they may receive two sets of 'moderate' impairment ratings).⁹⁹ However, in these cases although they reach the requisite 20 points, their impairment will not be regarded as severe,¹⁰⁰ and so to satisfy the requirement that they have a continuing inability to work, they must also have participated in a program of support for at least 18 months (which may have occurred during the three years prior to their claim).¹⁰¹ As such, a person with complex co-morbidities who does not accrue 20 points within a single impairment table, would need to meet this additional requirement before qualifying for DSP. This means that people with different types of disability, and intersecting types of disability, may be treated differently according to this DSP eligibility criteria. As such, the assessment criteria would appear to limit the right to equality and non-discrimination on the basis of the type of disability a person is experiencing.

2.73 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

97 For example, there is found to be a severe functional impact resulting from a neurological or cognitive condition (including severe difficulties in relation to at least 2 specified matters, such as memory or comprehension, for example) under Table 7 – Brain Function, attracting 20 points.

98 *Social Security Act 1991*. Subsection 94(2) defines a 'continuing inability to work' for the purposes of qualifying for DSP.

99 For example, there may be found to be a moderate functional impact on activities using lower limbs under Table 3 – Lower Limb Function (an impairment attracting 10 points), and a moderate functional impact on activities involving mental health function (including difficulties with at least four specified matters, including interpersonal relationships, self-care and independent living, or decision-making for example) under Table 5 – Mental Health Function (also attracting 10 points). A person in these circumstances would accrue a total of 20 points.

100 A 'severe impairment' is defined in subsection 94(3B) of the *Social Security Act 1991* as an impairment of 20 points or more under the Impairment Tables, of which 20 points or more are under a single Impairment Table.

101 Section 94 of the *Social Security Act 1991* provides that a 'program of support' is designed to assist persons to prepare for, find or maintain work that is either funded (wholly or partly) by the Commonwealth, or is of a type that the Secretary considers is similar to a program that is designed to assist persons to prepare for, find or maintain work and that is funded (wholly or partly) by the Commonwealth. See also, section 12 of the instrument, which specifies how the tables are to be applied where multiple conditions are present. The Services Australia [website](#) states that these programs of support currently include ParentsNext and Workforce Australia.

means of achieving that objective.¹⁰² The minister stated that the objective behind limiting eligibility for DSP is to provide targeted assistance to those who are unable to work to fully support themselves because of their disability or medical condition. Protecting the resources of a social security system by targeting assistance to people who cannot work to support themselves likely constitutes a legitimate objective.¹⁰³ However, it is not clear that this measure is rationally connected to (that is, effective to achieve) the stated objective of targeting assistance towards those who cannot fully support themselves. This is because people with complex co-morbidities which attract 20 points through multiple impairment tables, and who are unable to support themselves through work, are also required to meet the significant additional requirement of completing a program of support for 18 months, during which time they would not be eligible for DSP. Persons in this cohort would not receive targeted assistance intended for people who cannot work to support themselves.

2.74 Further information was sought as to whether the measure is necessary and proportionate, which is relevant to an assessment of whether the differential treatment of people with different disabilities is permissible. The minister stated that assessments undertaken for the purposes of determining eligibility for DSP are individual assessments against the criteria. They stated that there is a level of discretion for assessors to determine eligibility, for example, discretion as to what is considered reasonable treatment, taking into account the availability and cost of available treatments.¹⁰⁴ However, there would not appear to be flexibility to provide someone with immediate access to DSP where they have demonstrated complex co-morbidities across a range of impairment tables even though they have not accrued 20 points within one single table. The minister stated that a person can seek internal review of a decision, and if they still have concerns about the correctness of the decision, they can seek review by the Administrative Appeals Tribunal free of charge. While the availability of review is often an important safeguard, it is noted that if a decision were made correctly in accordance with the eligibility criteria, and only limited discretion is provided to assessors in determining that eligibility, it is not clear that the availability of review would provide significant safeguard value. Noting the requirement for persons with co-morbidities to undergo an 18 month program of support before they are eligible for DSP, the points in the impairment tables in this determination may not constitute a permissible limitation on the right to equality and non-discrimination on the basis of disability.

102 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].

103 See, *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018).

104 Reasonable treatment is defined in section 8, which sets out how to apply the tables.

2.75 Further, the UN Committee on the Rights of Persons with Disabilities has cautioned that medicalised models of assessing disability are inappropriate and are not consistent with the Convention on the Rights of Persons with Disability:

Individual or medical models of disability prevent the application of the equality principle to persons with disabilities. Under the medical model of disability, persons with disabilities are not recognized as rights holders but are instead “reduced” to their impairments. Under these models, discriminatory or differential treatment against and the exclusion of persons with disabilities is seen as the norm and is legitimized by a medically driven incapacity approach to disability...The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account.¹⁰⁵

2.76 The UN Committee on the Rights of Persons with Disabilities has recommended that States parties adopt a human rights-based approach to disability rather than a medical model, and that definitions of disability make explicit reference to the barriers faced by persons with disabilities.¹⁰⁶ It has also recommended that eligibility criteria and assessments for specific social welfare benefits accord with the human rights model of disability,¹⁰⁷ and has made recommendations to Australia regarding eligibility for the NDIS in this respect.¹⁰⁸

2.77 In relation to the rights to social security and an adequate standard of living, a person who would be required to complete a program of support for 18 months, or a person who is found to be ineligible for DSP on the basis of the assessment tables in this instrument, may be eligible for the Jobseeker income support payment. However, this social welfare payment is significantly lower than DSP.¹⁰⁹ In April 2023, Australia's Interim Economic Inclusion Advisory Committee advised that the

105 UN Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, [8]–[9].

106 For example: Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of [Belgium](#)* (2014) [8]; *Concluding observations on the initial report of the [Czech Republic](#)* (2015) [8]; and *Concluding observations on the initial report of [Lithuania](#)* (2016) [5].

107 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of [the United Kingdom of Great Britain and Northern Ireland](#)* (2017) [58].

108 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of [Australia](#)* (2019) [5].

109 The current maximum basic fortnightly payment rate for a single person on DSP is \$971.50. The current maximum fortnightly payment rate for a single person with no children on Jobseeker is \$693.10.

JobSeeker payment is not sufficient for a person to meet their basic needs.¹¹⁰ As such, by restricting access to the DSP in the manner set out in the instrument, it appears there is a risk that Australia is not 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.¹¹¹

2.78 Further information was also sought as to whether any of the amendments in this legislative instrument are retrogressive when compared with the previous legislative instrument. The minister advised that none of the amendments are retrogressive. The minister noted that the increase in the number of descriptors a person is required to meet under Table 7 - Brain Function, which could be misconstrued as a backward step, was a result of adding a social skills descriptor to this Table to address concerns around the representation of difficulties experienced by people with neurodiverse conditions. The minister stated that key organisations, including medical professionals have indicated that, while this is an increase in the requirement, it is important for social skills to be reflected and appropriate for the requirement to be raised as the vast majority of people assessed under Table 7 would experience difficulties with social skills and would be able to achieve at least 2 descriptors. Given that the inclusion of additional indicators in Table 7 expands the factors that may contribute to a person's impairment assessment, it appears the instrument is not retrogressive.

Committee view

2.79 The committee thanks the minister for this response. The committee notes that by supporting the provision of a social security payment specifically to support persons with disability, this instrument (in setting out the rules for assessing eligibility for DSP) 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. However, restricting which persons with disability may be eligible for the DSP also engages and limits these rights.

2.80 The committee notes the minister's advice that DSP is not a universal basic income for people with disability, but provides targeted assistance to those who are unable to work to fully support themselves because of their disability or medical

110 Interim Economic Inclusion Advisory Committee, [2023–24 Report to the Australian Government](#). The Committee described the JobSeeker payment rate as 'seriously inadequate' when compared with pensions and other income poverty measures (p. 3).

111 There may also be a cohort of persons who are found not to be eligible for DSP because they can work for more than 15 hours a week (but who are unable to work full-time because of their disability), and will not be eligible for JobSeeker because they have part-time employment, and who do not earn sufficient money in order to have an adequate standard of living.

condition. The committee agrees that protecting the resources of a social security system by targeting assistance to people who cannot work to support themselves is a legitimate objective. However, noting the above advice, there are questions as to whether this assessment instrument is effective to achieve the stated objective of targeting assistance towards those who cannot fully support themselves – noting that those with complex co-morbidities may also need to complete a program of support for 18 months before being eligible for DSP. Therefore, in setting the Impairment Tables this instrument may not constitute a permissible limitation on the right to equality and non-discrimination based on disability. Further, noting that the JobSeeker payment is the available social security benefit for those ineligible for DSP, and noting concerns that have been raised as to whether that payment is sufficient to meet a person's basic needs, it is not clear if restricting access to the DSP in the manner set out in the instrument may result in Australia not fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living.

2.81 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Mr Josh Burns MP

Chair