



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
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3 December 2020

Senator the Hon Anne Ruston  
Minister for Families and Social Services  
Parliament House  
CANBERRA ACT 2600

Via email: [Senator.Ruston@aph.gov.au](mailto:Senator.Ruston@aph.gov.au)

CC: [dlos@dss.gov.au](mailto:dlos@dss.gov.au)

Dear Minister,

**Social Security (Administration) — various instruments [F2020L01221]  
[F2020L01223] [F2020L01224] [F2020L01225] [F2020L01226]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and the committee seeks your advice in relation to these matters.

***Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The committee notes that these five instruments provide for a range of matters in relation to income management measures, including:

- determining that the Northern Territory is a 'declared voluntary income management area' for the purposes of Part 3B of the *Social Security (Administration) Act 1999* (the Act) [F2020L01221];
- specifying classes of persons to be exempt welfare payment recipients for the purposes of section 123UGB of the Act [F2020L01223];
- determining the Northern Territory as a 'declared child protection State or Territory' for the purposes of Part 3B of the Act [F2020L01224];
- setting out the decision-making principles which the Secretary must comply with when considering whether a person should be exempt from income management

under the disengaged youth and long-term welfare payment recipient income management measures [F2020L01225]; and

- setting out the deductible portion of certain welfare payments of a voluntary participant of income management [F2020L01226].

The committee generally considers that significant matters, such as income management measures applying to welfare payment recipients, particularly the circumstances in which recipients may be subject to or exempt from income management, are more appropriately enacted via primary legislation. Where significant matters are nevertheless left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be provided. In this regard, the committee notes that no explanation has been provided as to why it is necessary and appropriate to leave these significant matters to delegated legislation.

**The committee therefore requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, for these significant income management measures.**

#### ***Compliance with Legislation Act 2003—consultation***

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirements in paragraph 15J(2)(d) and (e) of the *Legislation Act 2003*, which provide that the explanatory statement to an instrument must describe the nature of any consultation that was undertaken in relation to the instrument, or, if no consultation was undertaken, explain why no consultation was undertaken.

In addition, Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument were adequately consulted in relation to it.

The explanatory statements to each of the five instruments provide an identical description of the consultation that was undertaken. The explanatory statements explain that consultation was undertaken with Services Australia, the National Indigenous Australians Agency and the Northern Territory Government on the operation of the 2010 version of each instrument which is being replaced. The explanatory statements also explain that the department engaged with communities and stakeholders in the Northern Territory on the transition from income management to the cashless debit card, including community visits and stakeholder groups. This engagement involved discussions about current income management policy.

The description does not specifically address whether consultation was undertaken on the specific measures in each instrument prior to the instrument being made.

**The committee therefore requests your advice as to whether persons likely to be affected by the specific measures in each instrument, such as welfare recipients on income management or peak organisations representing their interests, were consulted in relation to the specific measures, and if not, why not.**

### ***Broad discretionary power***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

The Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 [F2020L01225] provides for decision-making principles that the secretary must comply with when deciding whether an individual shows signs of financial vulnerability for the purposes of paragraph 123UGD(1)(d) the Act.

Where an instrument provides for a person to exercise discretionary powers in relation to decisions which affect an individual, the committee expects those discretionary powers to be sufficiently defined. In this instance, the committee considers that the decision-making principles in Part 2 of the instrument are broadly framed and therefore do not adequately constrain the secretary's broad power to determine whether a welfare payment recipient is financially vulnerable.

**The committee therefore requests your advice as to whether any further limits apply, in legislation or policy, to constrain the scope of the secretary's broad power to determine whether a welfare payment recipient is financially vulnerable for the purposes of paragraph 123UGD(1)(d) of the Act.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 December 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**Senator the Hon Anne Ruston**

**Minister for Families and Social Services  
Senator for South Australia  
Manager of Government Business in the Senate**

Ref: MC20-018265

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear  Senator Fierravanti-Wells

Thank you for your letter of 3 December 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice on a number of matters regarding five Income Management instruments made on 25 September 2020.

The Committee has requested advice on why the matters set out under these instruments were made by primary legislation. The use of delegated legislation is appropriate in this instance, as these instruments give the flexibility to administer the delivery of Income Management under the social security law as efficiently as possible.

Following passage of the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 on 10 December 2020, Income Management participants in the Northern Territory can choose to transition from Income Management to the Cashless Debit Card (CDC).

As four of the five Income Management instruments relate to Income Management in the Northern Territory, the number of people affected by these instruments will reduce once the transition onto the CDC commences in the Northern Territory. CDC is highly prescriptive under Part 3D of the *Social Security (Administration) Act 1999* (the Administration Act) in relation to participant criteria, program locations and the other matters that Income Management participants are subject to under the Income Management instruments. While the fifth instrument relates to arrangements for the broader Income Management volunteer population (the *Social Security (Administration) (Deductible portion — section 123XPA) Specification 2020*), the vast majority of these volunteers reside in the Northern Territory and will also be given an option to transition to the CDC.

During the transition, the instruments are crucial to minimising disruption to vulnerable welfare recipients and voluntary Income Management participants. The instruments will continue to apply if some participants do not elect to transition.

Prior to the CDC legislated sunset date of 31 December 2022, the Australian Government will review the Income Management provisions to consider whether changes are required to the legislation, including assessing whether matters covered in delegated legislation should be incorporated in the Administration Act.

The Committee has also requested advice on consultation undertaken. My department consulted with the Northern Territory Government, Services Australia and the National Indigenous Australians Agency on the instruments and through this consultation, it was determined that the instruments were operating effectively.

The department currently holds a number of forums with Services Australia, the National Indigenous Australians Agency and other agencies that can provide feedback from staff who regularly engage with Income Management participants and stakeholders in areas that Income Management operates. These forums ensure that any issues with existing or future policy can be raised and any necessary action can be identified and implemented with a whole of government focus.

In addition to the regular forums, the department has undertaken an extensive engagement process in the Northern Territory and Cape York with Income Management participants. As outlined in the explanatory statements to the instruments, my department engaged extensively with communities and stakeholders in the Northern Territory in 2019 and 2020, on the proposed transition from Income Management to the CDC. This included 74 community visits and 92 meetings with stakeholders and local organisations. As part of this engagement, my department discussed current Income Management policy settings with community members and stakeholders.

Additionally, the department consulted with Services Australia and the National Indigenous Australians Agency on draft versions of all five instruments, as well as Northern Territory Government Territory Families in relation to the *Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020* and *Social Security (Administration) (Declared voluntary income management area – Northern Territory) Determination 2020*. No concerns were raised with existing policy as reflected in the draft instruments.

In relation to concerns raised by the Committee regarding the Secretary's powers under the *Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020*, subsection 123UGD(5) of the Administration Act requires the Secretary to comply with any decision-making principles set out in a legislative instrument made by the relevant Minister. This instrument currently applies for exemption requests from Northern Territory Income Management participants.

Considering the complex nature of financial vulnerability, the instrument provides the Secretary with flexibility to consider a person's individual circumstances when making a determination to exempt a person from Income Management. Consultation with stakeholders identified that the current instrument was operating effectively, but subsection 123UGD(5) enables further instruments to be made if it is identified that current arrangements are not effective.

This instrument will not apply to Income Management participants who choose to transition to the CDC in the Northern Territory. In those circumstances, CDC participants will have access to the exit and exemption provisions under Part 3D of the Administration Act.

I trust this information addresses the concerns raised by the Committee.

Yours sincerely

Anne Ruston

18/12/2020



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22 January 2021

Senator the Hon Anne Ruston  
Minister for Families and Social Services  
Parliament House  
CANBERRA ACT 2600

Via email: [Senator.Ruston@aph.gov.au](mailto:Senator.Ruston@aph.gov.au)

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Dear Minister,

**Social Security (Administration) — various instruments [F2020L01221] [F2020L01223] [F2020L01224] [F2020L01225] [F2020L01226]**

Thank you for your response of 18 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 22 January 2021. On the basis of your advice, the committee has concluded its examination of the instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**