

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Human Services

Social Security (Administration) Act 1999

*Social Security (Administration) (Trial Area — East Kimberley) Amendment
Determination 2016*

Purpose

This Amending Determination is made by the Minister for Human Services under subsection 124PG(1) of the *Social Security (Administration) Act 1999* (the Act).

Section 124PG of the Act sets out who will be participants in the debit card trial (the Trial) under Part 3D of the Act. Subsection 124PG(1) of the Act empowers the Minister to determine, by legislative instrument, whether a particular trigger payment is to apply both in respect of a particular class of person and in relation to a particular trial area, or simply in relation to a particular trial area. The *Social Security (Administration) (Trial Area – East Kimberley) Determination 2016* (the 2016 Determination) declares East Kimberley as a trial area from 26 April 2016 with effect for a period of 6 months, because the Determination ceases on the date 6 months from its commencement under section 3.

In accordance with subsection 124PG(1) of the Act, this Amending Determination amends the 2016 Determination to delay the cessation of the Determination until 25 April 2017, which is 12 months from commencement of the 2016 Determination. This will extend the Trial in East Kimberley until 25 April 2017.

Background

The Trial established by Part 3D of the Act tests the concept of cashless welfare arrangements by disbursing a percentage of particular welfare payments to a welfare restricted bank account, accessed solely by a debit card which does not allow cash withdrawals.

The Trial tests whether significantly reducing access to discretionary cash, by placing a significant proportion of a person's welfare payments into a restricted bank account, can reduce the habitual abuse and associated community level harm resulting from alcohol, gambling and drugs. It will also test whether cashless welfare arrangements are more effective when community bodies are involved.

The Trial has been conducted in two locations, selected on the basis of community support, high levels of welfare dependence and where gambling, alcohol and/or drug abuse are causing unacceptable levels of harm within the community. East Kimberley is one of these locations.

It will not be appropriate for some persons to be trial participants, because their particular circumstances may make certain aspects of the cashless debit card impractical. Persons who live outside the trial area during term time for the purposes

of completing their course of study may find it impractical to use a cashless debit card outside the trial area. For example, they will not have access to the same support services as trial participants who live within the trial area. Such students will not be within the class of trial participants.

Age pension recipients will not be trial participants unless they volunteer to be subject to the Trial. Age pension is not a trigger payment for the Trial (under the definition of 'trigger payment' in section 124PD of the Act). Persons nearing pension age, such that they will generally be transferred from their current welfare payment to age pension during the proposed course of the Trial (12 months from 26 April 2016) and would cease to be trial participants, will not be within the class of trial participants.

Some welfare recipients are subject to income management under Part 3B of the Act. Persons whose usual place of residence is in East Kimberley may be subject to income management under the child protection measure of income management (section 123UC of the Act). Such persons will not be trial participants while they remain subject to this measure of income management.

Similarly, a person who was formerly a resident of the Northern Territory may be subject to income management under the disengaged youth or long-term welfare payment recipient measures (under section 123UCB or 123UCC of the Act). Such persons may remain subject to income management for 13 weeks despite their usual place of residence ceasing to be within a specified income management area. Such persons who take up residence in the trial area will not be trial participants while they remain subject to income management.

Similarly, a person who was formerly a resident of Queensland may be subject to income management under the Queensland Family Responsibilities Commission measure of income management (section 123UF of the Act). If such a person relocates to the trial area, they will not be a trial participant while they remain subject to income management.

For some persons, being a trial participant may seriously risk the person's mental, physical or emotional wellbeing. Where an officer of the Department of Social Services (who is a delegate of the Secretary) is satisfied that being a trial participant is seriously risking a person's mental, physical or emotional wellbeing, the officer may make an administrative decision resulting in that person no longer falling within the class of persons who are trial participants. Officers do not need to conduct an investigation into the mental, physical or emotional wellbeing of every prospective trial participant or trial participant. It is only where officers are made aware of specific facts which indicate that an individual's trial participation may seriously risk that person's mental, physical or emotional wellbeing that they need to consider making the administrative decision resulting in that person no longer falling within the class of persons who are trial participants.

Officers will consider making this determination once they are made aware of facts which indicate that being a trial participant may seriously risk a person's mental, physical or emotional wellbeing. Where an officer is satisfied that being a trial participant would seriously risk that person's mental, physical or emotional wellbeing at the beginning of the Trial and makes a determination to this effect, the person will

not be a trial participant from the commencement of the Trial while that condition is met. If the serious risk to the person is only brought to an officer's attention during the course of the Trial, the determination may be made, resulting in the person not being a trial participant while that condition is met.

The Minister for Human Services has been appointed to also administer the Department of Social Services, and so pursuant to section 19A of the *Acts Interpretation Act 1901* has the powers of the 'Minister' under Part 3D of the Act.

Effect of determination

The Amending Determination is a legislative instrument.

Commencement

The Amending Determination commences on the day after it is registered with the Federal Register of Legislation.

Consultation

The Government has undertaken an extensive consultation process leading up to implementation of the Trial. The Government, including officials from the Department of Social Services and Department of the Prime Minister and Cabinet, has undertaken comprehensive engagement with people in East Kimberley.

Those consulted include potential trial participants, Aboriginal leaders, family violence service providers, family support services, education providers, health providers, rehabilitation service providers, police, local government, state government agencies, and the Department of Human Services local staff. The consultation format has included one-on-one meetings and group roundtables.

Consultations have covered a number of issues including seeking advice from community members about the identification of local and cultural protocol and preferred entry points for community discussion. Topics of discussion included:

- key Trial objectives;
- parameters (including percentages and trial boundaries);
- the anticipated benefits of the Trial in terms of community safety/wellbeing for vulnerable people;
- the identification of gaps and possible support services;
- the role and formation of a community body;
- the evaluation; and
- differences between the Trial and income management

Consultations continued in East Kimberley after the tabling of the 2016 Determination and have extended through to implementation of the Trial and beyond to ensure the community is prepared and has all necessary information and support for the Trial and its extension to twelve months.

Further consultation with the Department of Premier and Cabinet and the Department of Human Services have informed the development of this Amendment Determination and the extension of the Trial.

Regulation Impact Statement (RIS)

This Determination is not regulatory in nature, will have minimal impact on business activity and will have no, or minimal, compliance costs or competition impact.

Explanation of the provisions

Section 1 states the name of the Amendment Determination.

Section 2 provides for commencement of the Amendment Determination. The instrument will be repealed on the day after its commencement by section 48A of the *Legislation Act 2003*, as the only effect of the instrument is to amend another legislative instrument.

Section 3 provides that Schedule 1 amends the 2016 Determination.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make any instrument of a legislative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Schedule 1 to the Amendment Determination sets out the amendment to the 2016 Determination.

Item [1] omits the phrase “This Determination ceases on the date 6 months from its commencement” and substitutes “This Determination ceases on 25 April 2017”. This amendment is necessary to extend the duration of the Trial in East Kimberley to 12 months.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

*Social Security (Administration) (Trial Area — East Kimberley) Amendment
Determination 2016*

This Amendment Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The debit card trial (the Trial) established by Part 3D of the Act tests the concept of cashless welfare arrangements by disbursing a percentage of particular welfare payments to a welfare restricted bank account, accessed solely by a debit card which does not allow cash withdrawals. This Amendment Determination extends the Trial in East Kimberley for a further six months.

The Trial tests whether significantly reducing access to discretionary cash, by placing a significant proportion of a person's welfare payments into a restricted bank account, can reduce the habitual abuse and associated community level harm resulting from alcohol, gambling and drugs. It will also test whether cashless welfare arrangements are more effective when community bodies are involved.

The Trial has been conducted in two locations, selected on the basis of community support, high levels of welfare dependence and where gambling, alcohol and/or drug abuse are causing unacceptable levels of harm within the community. East Kimberley is one of these locations.

It will not be appropriate for some persons to be trial participants, because their particular circumstances may make certain aspects of the cashless debit card impractical. Persons who live outside the trial area during term time for the purposes of completing their course of study may find it impractical to use a cashless debit card outside the trial area. For example, they will not have access to the same support services as trial participants who live within the trial area. Such students will not be within the class of trial participants.

Age pension recipients will not be trial participants unless they volunteer to be subject to the Trial. Age pension is not a trigger payment for the Trial (under the definition of 'trigger payment' in section 124PD of the Act). Persons nearing pension age, such that they will generally be transferred from their current welfare payment to age pension during the proposed course of the Trial (12 months from 26 April 2016) and would cease to be trial participants, will not be within the class of trial participants.

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(section 123UC of the Act). Such persons will not be trial participants while they remain subject to this measure of income management.

Similarly, a person who was formerly a resident of the Northern Territory may be subject to income management under the disengaged youth or long-term welfare payment recipient measures (under section 123UCB or 123UCC of the Act). Such persons may remain subject to income management for 13 weeks despite their usual place of residence ceasing to be within a specified income management area. Such persons who take up residence in the trial area will not be trial participants while they remain subject to income management.

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For some persons, being a trial participant may seriously risk the person's mental, physical or emotional wellbeing. Where an officer of the Department of Social Services (who is a delegate of the Secretary) is satisfied that being a trial participant is seriously risking a person's mental, physical or emotional wellbeing, the officer may make an administrative decision resulting in that person no longer falling within the class of persons who are trial participants. Officers do not need to conduct an investigation into the mental, physical or emotional wellbeing of every prospective trial participant or trial participant. It is only where officers are made aware of specific facts which indicate that an individual's trial participation may seriously risk that person's mental, physical or emotional wellbeing that they need to consider making the administrative decision resulting in that person no longer falling within the class of persons who are trial participants.

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Human rights implications

Objectives

The Objectives of Part 3D of the Act and this Amendment Determination are to:

- (a) reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; and
 - (b) determine whether such a reduction decreases violence or harm in the Region;
- and

- (c) determine whether such arrangements are more effective when community bodies are involved; and
- (d) encourage socially responsible behaviour.

In other words, the debit card has the objectives of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.¹

In East Kimberley, there is clear evidence of the harm caused by alcohol. For example, in terms of East Kimberley, according to Western Australia (WA) Police data in 2013-14 there were 1,456 offences against the person for every 100,000 people. The Kimberley region had offence rates against the person 4.5 times that of overall WA figures. In 2012-13, there were 100 reported incidents of family violence per 1,000 people in the Kimberley, as compared to the next highest of rate of family violence which was 43 per 1,000 people.²

General Safeguards

A number of general safeguards that help to protect human rights have been incorporated into the Trial. First, the roll-out of the Trial in trial areas has been subject to an extensive consultation process.

The second safeguard is the power of community bodies to vary the percentage of funds that a person has restricted, subject to that person's agreement (as provided for under section 124PK of the Act). This will provide an ongoing mechanism to ensure that there is flexibility to treat individual cases differently.

A third safeguard lies in the Trial being subject to an independent, comprehensive evaluation that will consider the impacts of limiting the amount of welfare funds that may contribute to community-level harm. The evaluation will use both quantitative and qualitative information to explore perceived and measurable social changes in trial communities.

Finally, subsection 124PF(1) of the Act specifies that the Trial will commence on 1 February 2016 and end on 30 June 2018. The clause acts as an appropriate and effective safeguard as Parliament must amend the legislation to continue the Trial beyond 2018.

¹ *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, Explanatory Memorandum, Statement of Compatibility, p. 4.

² Western Australia Department of Child Protection and Family Support, *Western Australia's Family & Domestic Violence Prevention Strategy to 2022, Achievement Report to 2013* (2013).

The right to a private life

Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* sets out the right to a private life. It prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

The Trial seeks to achieve the legitimate objectives of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.

In order to achieve these objectives, the Trial will place 80 per cent of restrictable payments received by a person on a trigger payment into a restricted bank account. Funds held in this bank account will not be able to be withdrawn as cash, or to be spent on alcohol or gambling products. There is a clear, rational connection between these objectives and the restrictions on the right to a private life – the restrictions on the purchase of alcohol, illegal drugs and gambling products by trial participants in the trial area are designed to reduce alcohol fuelled violence and harm, and to encourage socially responsible behaviour.

This Amendment Determination extends the Trial in East Kimberley for a further six months and in doing so contributes to continuing to limit how, and at what businesses, trial participants can spend their welfare payment. It does this by ensuring that transactions performed at businesses that sell certain products, including alcoholic beverages, gambling or gift cards that could provide access to cash, alcoholic beverages or gambling, are declined. In doing so, this Amendment Determination engages the right to a private life. This limitation on a person's right to a private life is reasonable and proportionate given the extensive harm caused by alcohol and gambling in the trial areas (as discussed above). The limitations are also directly related to minimising such harms given they are placed on the execution of transactions at businesses that sell those certain products.

The right to social security

Article 9 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* recognises 'the right of everyone to social security, including social insurance'. The United Nations Committee of Economic, Social and Cultural Rights (the UN Committee) has stated that implementing this right requires a country, within its maximum available resources, to provide 'a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic form of education'.

The Trial will not detract from the eligibility of a person to receive welfare nor reduce the amount of a person's welfare entitlement. Instead, the Trial restricts the ability of trial participants from spending money on alcohol, gambling and illegal drugs. The UN Committee has stated that the right to social security encompasses the right to access and maintain benefits 'in cash or in kind'. In other words, the Trial does not detract from situations in which someone has the right to social security, such as unemployment and workplace injury, and family and child support; it simply supports a person further once they have achieved their right to receive social security.

The exemptions to the classes of persons who are trial participants recognise and promote this right as they are all designed to ensure individuals, who could not fully participate in the Trial due to location, the fact they are subject to income management measures, are nearing pension age, or have payment nominees receive welfare payments in the routine manner and are not subject to any restrictions on how they spend their welfare payments.

The right to an adequate standard of living

Article 11(1) of the *ICESCR* states that everyone has the right to 'an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions' and that 'appropriate steps' be taken to 'ensure realisation of this right'. Further to this, article 11(2) of the *ICESCR* states that 'measures, including specific programmes,' should be taken in 'recognising the fundamental right of everyone to be free from hunger'.

This Amendment Determination extends the Trial in East Kimberley for a further six months and in doing so contributes to continuing to limit how, and at what businesses, trial participants can spend their welfare payment. This promotes the right to an adequate standard of living. It will mean that people will be able to use restricted funds to access any goods, with the exception of alcohol and gambling products, with the aim of reducing abuse of these goods and the associated harm and violence. This Amendment Determination will not have the effect of restricting access to essential needs required to maintain an adequate standard of living. Access to some discretionary cash will continue to be available, ensuring that people can still participate in cash economies to purchase items which contribute to an adequate standard of living.

The rights of equality and non-discrimination

The rights of equality and non-discrimination are provided for in several of the seven core international human rights treaties to which Australia is a party, most relevantly the *ICCPR* and the *Convention on the Elimination of All Forms of Racial Discrimination* (the *CERD*). In particular, article 5 of the *CERD* requires parties 'to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law', notably in the enjoyment of 'the right to...social security and social services' (article 5(e)(iv)).

Discrimination is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on a prohibited ground for discrimination such as race. However, the UN Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant’.

The rights to equality and non-discrimination are not directly limited by this Amendment Determination. This is because, as set out in this Amendment Determination, anyone who is a trial participant will be subject to the same restrictions on how and at what businesses they can spend their welfare payment. This Amendment Determination is not targeted at people of a particular race, gender or cultural characteristic, but to trial participants and voluntary trial participants.

While this Amendment Determination does not directly limit the rights to equality and non-discrimination, it may indirectly limit these rights. In East Kimberley, Indigenous people make up a substantial majority of the total income support payment population who are trial participants and who will be affected by this Amendment Determination.

It is acknowledged that Indigenous Australians comprise a large proportion of those who will be affected by this Amendment Determination. However, the trial area has been chosen as a location based on objective criteria, such as ‘high levels of welfare dependence and community harm, as well as the outcomes of comprehensive consultation with prospective communities.’³ These criteria clearly relate to the legitimate objectives of this Amendment Determination. In turn, this Amendment Determination affects only those in the trial region and those who volunteer for the Trial. Therefore, there is a rational connection between any limitation on the right to social security and the objectives of this Amendment Determination.

Finally, given the objectives of the Act and this Amendment Determination, as well as the scale of unacceptable harm in the trial area as discussed above, any limitation on the right to equality and non-discrimination is reasonable and proportionate.

The right to self-determination

Article 1 of the *ICESCR* states that ‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

It may appear that the right to self-determination is engaged by this Amendment Determination. However, any such engagement of this right is reasonable and proportionate given the extensive harm caused by alcohol and gambling in the trial area (again, as discussed above). Any limitation of this right is also directly related to limiting such harm, given the restrictions in this Amendment Determination being placed on the execution of transactions at businesses that sell certain products including alcoholic beverages, gambling or gift cards.

³ *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, Explanatory Memorandum, Statement of Compatibility, p. 3.

Conclusion

This Amendment Determination is compatible with human rights. An extension of the Trial will advance the protection of human rights by ensuring that income support payments are spent in the best interests of welfare payment recipients and their dependents. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.