

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment, Workforce, Skills, Small and Family  
Business

***Social Security (Administration) Act 1999; Social Security Legislation Amendment  
(Streamlined Participation Requirements and Other Measures) Act 2022***

***Social Security (Streamlined Participation Requirements Transitional Arrangements)  
Instrument 2022***

### **AUTHORITY**

The *Social Security (Streamlined Participation Requirements Transitional Arrangements) Instrument 2022* (the 'Transitional Instrument') is made under subsection 42AR(1) of the *Social Security (Administration) Act 1999* (the 'Administration Act'), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*; and item 160 of Schedule 1 to the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022* (the 'Streamlined Participation Requirements Act').

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), 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.

### **PURPOSE AND OPERATION**

The Transitional Instrument provides for transitional matters in relation to three current legislative instruments. It does not change the practical operation of any of the instruments.

First, the Transitional Instrument makes clear that the *Social Security (Parenting payment participation requirements - Class of Persons) Instrument 2021* (the 'Class of Persons Instrument') continues to operate as it currently operates despite amendments to the social security law made by the Streamlined Participation Requirements Act.

The Class of Persons Instrument specifies a class of persons who may be given participation requirements in order to receive parenting payment. The Transitional Instrument makes no change to the class of persons who may be given participation requirements and no change to the Class of Persons instrument. It also makes no change to the nature or extent of the participation requirements which a person may be given, and no change to the circumstances in which a person may or will be exempt from participation requirements.

The Transitional Instrument simply makes clear that amendments made by the Streamlined Participation Requirements Act (outlined below), which themselves involve no change in policy, do not affect the operation of the Class of Persons Instrument.

The amendments made by the Streamlined Participation Requirements Act are, relevantly, that:

- instead of describing mutual obligation requirements for parenting payment recipients who have such requirements as "participation requirements", they are

now described as employment pathway plan requirements. For all participation payments, including parenting payment, employment pathway plan requirements now include, consistent with longstanding practice, what was formerly known as the activity test, i.e. the requirement to actively seek and to be willing to accept and undertake suitable paid work in Australia. The phrase “activity test” was removed as it was redundant;

- qualification criteria for parenting payment now specifies satisfaction of employment pathway plan requirements, instead of meeting participation requirements, and satisfying the Employment Secretary of willingness to actively seek and to accept and undertake suitable paid work in Australia, or else to have an exemption from the employment pathway plan requirements and satisfy the Employment Secretary that but for the circumstances resulting in the exemption the person would be willing to actively seek and to accept and undertake suitable paid work in Australia; and
- provisions concerning the availability of exemptions to employment pathway plan requirements have been consolidated into a single set of provisions to avoid duplication, which includes a new general provision to the effect that a person may not be required to satisfy employment pathway plan requirements where circumstances exist that make it unreasonable to expect the person to do so. The new single set of provisions also replicates many of the pre-existing exemption provisions. The changes to the exemption provisions were not designed to increase or decrease the circumstances in which exemptions will be granted and nor is any change to policy or practice envisaged because of the amendments.

Second, the Transitional Instrument makes clear that the Streamlined Participation Requirements Act does not affect the operation of the *Social Security (Declared Program Participant) Determination 2018* (the ‘Declared Program Participant Determination’).

The effect of the Declared Program Participant Determination is that participants in the Community Development Program are not subject to the Targeted Compliance Framework (‘TCF’) in Division 3AA of Part 3 of the Administration Act) and are instead subject to the compliance framework in Division 3A of Part 3 of the Administration Act. The Transitional Instrument makes clear that this will continue to be the case and makes no change to the Declared Program Participant Determination.

Third, the Transitional Instrument ensures that the policy intent of the *Social Security (Administration) Non-Compliance Determination 2018 (No. 1)* (the ‘Non-Compliance Determination’) is maintained and that penalties are only applied to job seekers who are persistently non-compliant with their mutual obligation requirements.

The Non-Compliance Determination underpins the operation of the TCF. The TCF was introduced in 2018 and applies to participation payment recipients other than “declared program participants”, in practice those in the Community Development Program as noted above. Participation payment recipients are recipients of: jobseeker payment; youth allowance (other); parenting payment where the recipient has mutual obligation requirements; and special benefit (nominated visa holders).

The intent of the TCF is to encourage job seekers to comply with their mutual obligation requirements and, where they have missed a requirement, to re-engage with their requirements.

The purpose of the Transitional Instrument is to update the Non-Compliance Determination so that it reflects amendments to the social security law by the Streamlined Participation Requirements Act. Relevantly, these are:

- the amendments outlined above in connection with the Class of Persons Instrument; and
- amending the TCF provisions to remove the language mandating compliance action and replacing it with language which specifies compliance action ‘may’ be taken, rather than ‘must’. This resulted in a slight re-organisation of some TCF provisions and changes to subsection or paragraph numbers, which now need to be reflected in the Non-Compliance Determination.

As outlined in the explanatory statement for the Non-Compliance Determination, which is at Attachment A to the Statement of Compatibility with Human Rights for the Transitional Instrument, under the TCF, job seekers begin in what is administratively known as the “green zone”, and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a reasonable excuse, this results in the accrual of a demerit and their income support payment may be suspended. The suspension is usually lifted with back-pay when the person re-engages.

The job seeker will then be in the “warning zone” where each additional failure without a valid reason will incur another demerit as well as payment suspension if the job seeker does not re-engage. (While in the warning zone, the job seeker’s payment is back-paid after re-engagement, and individual demerits expire 6 active months after they are accrued.)

A small minority of job seekers are persistently and deliberately non-compliant and therefore need a strong incentive to comply. As outlined in the explanatory statement for the Non-Compliance Determination at Attachment A to the Statement of Compatibility with Human Rights for the Transitional Instrument, once a job seeker has incurred sufficient demerits to place them in what is administratively known as the “penalty zone”, additional mutual obligation failures without a reasonable excuse will result in a determination that a person has ‘persistently committed mutual obligation failures’. This results in escalating penalties. Unless the job seeker has a reasonable excuse, the job seeker in the penalty zone will lose 50 per cent of their fortnightly payment for their first mutual obligation failure in the penalty zone, 100 per cent for their second mutual obligation failure and payment cancellation for four weeks for their third such failure.

In practice, these arrangements have proven very effective at deterring non-compliance before it occurs. As at February 2022, only 0.8 per cent of job seekers were in the penalty zone, the vast majority of whom had had no penalties applied. Further, in the year following the implementation of the TCF, there was a 90 per cent reduction in financial penalties compared to the previous framework, and attendance at appointments increased from 71 to 75 per cent. Academic research also shows that the Targeted Compliance Framework is effective at encouraging job seekers to comply with their requirements before they are penalised, as intended.

The Non-Compliance Determination sets out criteria for assessing when a job seeker is persistently non-compliant, and so when penalties apply for committing mutual obligation failures.

This will usually be where the person commits a mutual obligation failure after the job seeker previously accrued five demerits within a period referred to in the Non-Compliance Determination as “6 active months”. A job seeker may also be considered to have persistently committed mutual obligation failures where they have previously accrued 2, 3 or 4 demerits in 6 active months and where one of those demerits relates to a failure to attend a job interview, act on a job referral, or for acting in a manner such that an offer of employment would not be made, recognising the seriousness of these failures.

Job seekers remain in the penalty zone for a period referred to in the Non-Compliance Determination as “3 active months”.

The Non-Compliance Determination defines “3 active months” and “6 active months” by defining the usual concepts of 3 months and 6 months – 3 active months and 6 active months will correspond to 91 or 182 days respectively plus the days in any periods in which certain circumstances apply to them, up to a limit of 12 months. These circumstances include, for example, periods when the job seeker is exempt from mutual obligation requirements or has had their fortnightly payment instalment reduced or cancelled due to non-compliance. For example, if a persistently non-compliant job seeker was exempt for five days, their period of 3 active months in the penalty zone would increase from 91 days to 96 days.

The reason for this definition is that the policy intent is that job seekers with a history of persistent non-compliance demonstrate that they are meeting their requirements. Periods of time in a person’s servicing during which they are exempt from mutual obligation requirements or serving a reduced payment or non-payment period for non-compliance are not considered to be demonstrating compliance. Again, this policy operates effectively to deter further non-compliance. As at June 2021, of the 3,568 people in the penalty zone, 3,066 had incurred no penalties.

The Transitional Instrument does not change these arrangements. However, because the definitions of 3 active months and 6 active months refer to terminology or provisions which have been amended or repealed by the Streamlined Participation Requirements Act, it is necessary to update some aspects of the Non-Compliance Determination. In doing so, the Transitional Instrument also makes minor technical amendments to the Non-Compliance Determination to make it easier to read.

None of the changes by the Transitional Instrument to the Non-Compliance Determination affect the operation of the Non-Compliance Determination.

## **REGULATORY IMPACT**

The Office of Best Practice Regulation has confirmed the Transitional Instrument is unlikely to have a more than minor regulatory impact, and therefore the preparation of a Regulation Impact Statement is not required (reference number - OBPR22-02093).

## **COMMENCEMENT**

The Transitional Instrument will commence immediately after the commencement of Schedule 1 of the Streamlined Participation Requirements Act, which will be the seventh day after that Act receives the Royal Assent.

## **CONSULTATION**

The Transitional Instrument does not change operation or policy, but reflects new provisions as a result of amendments made by Schedules 1 and 3 of the Streamlined Participation Requirements Act, on which extensive consultation was undertaken.

The Department of Education, Skills and Employment briefed the following organisations about the Streamlined Participation Requirements Act:

- Australian Council of Social Service;
- Australian Human Rights Commission;
- National Employment Services Association;
- Jobs Australia;
- AMES Australia;
- The Australian Labor Party;
- Anglicare Australia;
- St Vincent de Paul Society;
- Economic Justice Australia;
- The Antipoverty Centre;
- People With Disability Australia; and
- National Council of Single Mothers and their Children Incorporated.

Briefings were also offered to the Australian Unemployed Workers' Union and the Salvation Army.

In addition, the provisions of the Streamlined Participation Requirements Act were subject to a Senate Inquiry, with 15 submissions, and public hearings.

**Minister for Employment, Workforce, Skills, Small and Family Business**  
**SOCIAL SECURITY (STREAMLINED PARTICIPATION REQUIREMENTS TRANSITIONAL ARRANGEMENTS) INSTRUMENT 2022**

**EXPLANATION OF PROVISIONS**

**Section 1: Name**

1. This is a formal provision indicating the name of the instrument as the *Social Security (Streamlined Participation Requirements Transitional Arrangements) Instrument 2022*.

**Section 2: Commencement**

2. This section includes a table setting out the commencement of the Transitional Instrument. The Transitional Instrument will commence immediately after the commencement of Schedule 1 to the Streamlined Participation Requirements Act, which will be the seventh day after that Act receives the Royal Assent.

**Section 3: Authority**

3. This section provides that the Transitional Instrument is made under subsection 42AR(1) of the *Social Security (Administration) Act 1999* and item 160 of Schedule 1 of the Streamlined Participation Requirements Act.

**Section 4: Schedules**

4. This section provides that each instrument in the Schedule is amended or repealed as set out in the Schedule.

**Section 5: Definitions**

5. This section defines terms used in the Transitional Instrument.

**Section 6: Continued operation of instrument made under subsection 500(2) of the Social Security Act 1991**

6. This section provides that despite the amendment of paragraph 500(1)(ca) of the *Social Security Act 1991* ('the Social Security Act') made by Schedule 1 to the Amending Act, an instrument in force under subsection 500(2) of the Social Security Act immediately before the commencement day continues in force (and may be dealt with) on and after that day.

**Section 7: Continued operation of instrument made under subsection 28C(1) of the Social Security Act**

7. This section provides that the amendments to the social security law by the Streamlined Participation Requirements Act do not affect the validity or operation of an instrument made under subsection 28C(1) of the Social Security Act that was in force immediately before the commencement of the Transitional Instrument. In effect, this section provides that those amendments do not affect the validity or operation of the Declared Program Participant Instrument.

## Schedule 1 - Amendments

### ***Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)***

#### **Items 1 and 2**

8. Items 1 and 2 amend the definition of **3 active months** and **6 active months** to make reference to periods during which the person is not required to satisfy the employment pathway plan requirements due to exemptions which apply to them under section 40L, 40M, 40N, 40P or 40Q as inserted into the Administration Act by the Streamlined Participation Requirements Act. The changes to the exemption provisions by that Act were not designed to increase or decrease the circumstances in which exemptions will be granted and nor is any change to policy or practice envisaged because of the amendments. Similarly, the Transitional Instrument does not change existing arrangements, however because the definitions of 3 active months and 6 active months refer to terminology or provisions which have been amended or repealed by the Streamlined Participation Requirements Act, it is necessary to update these aspects of the Non-Compliance Determination.

#### **Items 3 to 6**

9. Items 3 to 6 amend section 6 of the *Social Security (Non-Compliance) Determination 2018 (No.1)* ('the Non-Compliance Determination') as a consequence of amendments made by Schedule 3 to the Streamlined Participation Requirements Act. Also, some subsections in section 6 have been redrafted to make them easier to read or clearer.
10. Schedule 3 of the Streamlined Participation Requirements Act amended the TCF in Division 3AA of Part 3 of the Administration Act, removing the language mandating compliance action in certain circumstances and replacing it with language which specifies that compliance action 'may' be taken, rather than 'must' be taken. This better supports the current policy, which will continue, that job seekers who have a reasonable excuse for any missed requirements should not experience payment suspensions or penalties.
11. Section 6 sets out by how much an instalment of the person's participation payment is to be reduced under paragraphs 42AN(3)(a) or (b) of the Administration Act if the Secretary makes a determination under paragraph 42AF(2)(c) of the Administration Act that their payment is to be reduced.
12. Section 6 is made for the purposes of subsection 42AN(4) of the Administration Act, which provides that the Secretary must determine which of paragraphs 42AN(2)(a) or (b) applies in accordance with an instrument made under subsection 42AR(1), i.e. in accordance with the Non-Compliance Determination.
13. Paragraph 42AN(2)(a) refers to a reduction of half the instalment and paragraph 42AN(2)(b) refers to a reduction of the whole of the instalment that would otherwise have been payable for the period.

14. Item 3 repeals subsection 6(1) in the Non-Compliance Determination and replaces it with a new subsection 6(1). The new subsection 6(1) has the same effect as the current subsection 6(1) but has been redrafted to make it easier to read.
15. The effect of subsection 6(1) continues to be that, subject to the subsequent subsections, a person's participation payment must be reduced by an amount equal to half their payment if the Secretary determines that their participation payment is to be reduced as they have committed a mutual obligation failure without a reasonable excuse while in the penalty zone.
16. Item 4 repeals subsection 6(2) in the Non-Compliance Determination and replaces it with a new subsection 6(2) which has the same effect and which includes some additional words to clarify its operation. Both the repealed subsection 6(2) and its replacement set out the circumstances where the Secretary must reduce the instalment of the person's by the amount specified in paragraph 42AN(3)(b) of the Administration Act, i.e. the whole of the instalment.
17. Subsection 6(2) means that if the Secretary determines that an instalment of the person's payment is to be reduced and in the 3 active months prior to the relevant failure, an instalment of the person's participation payment has been reduced by half of the instalment - and that reduction was the last reduction determination made under paragraph 42AF(2)(c) in relation to the person, then despite subsection 6(1) of the Determination, the Secretary must determine that an instalment of the person's payment is to be reduced by the whole of the amount.
18. The effect of this is that if a person commits a mutual obligation failure without a reasonable excuse while in the penalty zone, and they have already had their payment reduced by half an instalment amount less than 3 active months ago because of a determination under paragraph 42AF(2)(c), their payment will be reduced by an amount equal to the whole amount of the payment. In short, this means that where a person commits a second mutual obligation failure without a reasonable excuse in the penalty zone, their payment must be reduced by an amount equal to the whole amount of the payment.
19. Item 5 repeals subsection 6(3). Subsection 6(3) set out when the Secretary was required to determine that a person's participation payment is cancelled for the purposes of paragraph 42AF(2)(d) of the Administration Act. Prior to the amendments made by Schedule 3 of the Streamlined Participation Requirements Act, subsection 42AF(2) in effect meant that where the Secretary is satisfied that a person has persistently committed mutual obligation failures without a reasonable excuse for a relevant failure, the Secretary must, in accordance with the Non-Compliance Determination, cancel their payment under paragraph 42AF(2)(d), which refers to cancellation.
20. Subsection 6(3) in effect meant that where a person committed a third mutual obligation failure without reasonable excuse in the penalty zone, their payment had to be cancelled. In that case, a four week post-cancellation non-payment period would apply.



21. However the amendments made by Schedule 3 of the Streamlined Participation Requirements Act necessitate the repeal of subsection 6(3) because, relevantly, those amendments mean that where mutual obligation failures persistently occur without reasonable excuse the Secretary may, not must, cancel their payment and may do so without recourse to the Non-Compliance Determination.
22. Going forward, in practice, the Secretary will only make a cancellation decision where in the past 3 active months the person has had their payment instalment reduced by the whole amount in accordance with subsection 6(2) and then commits a further mutual obligation failure without a reasonable excuse.
23. While the amendments by the Streamlined Participation Requirements Act mean that the Secretary is no longer required to determine cancellation in accordance with the Non-Compliance Determination, it remains Government policy to only cancel payment after a third mutual obligation failure without reasonable excuse in the past three active months.
24. In other words, the repeal of subsection 6(3) does not adversely impact the rights of jobseekers. On the contrary, it is being repealed in accordance with changes to the TCF by Schedule 3 of the Streamlined Participation Requirements Act which enhance the rights of job seekers by providing additional flexibility for the Secretary not to cancel job seekers' payment.
25. Item 6 repeals subsection 6(4) of the Non-Compliance Determination and substitutes a new subsection 6(4). The only differences are that the new subsection 6(4) has been re-cast it to make it easier to read and does not contain a reference to subsection 6(3), which is being repealed as noted above.
26. Subsection 6(4) provided, and will continue to do so, a special rule for when a person previously received a participation payment that was cancelled under paragraph 42AF(2)(d) of the Administration Act, and where the relevant failure is the first mutual obligation failure without a reasonable excuse in the 3 active months since that cancellation.
27. In those circumstances, if the Secretary determines the person's participation payment is to be reduced under paragraph 42AF(2)(c), the Secretary must determine that an instalment of a person's participation payment is to be reduced by the amount specified in paragraph 42AN(3)(a) of the Administration Act, i.e. by half the instalment. The rule in subsection 6(4) of the Determination applies regardless of subsection (2).
28. The reason there is a special rule is in these circumstances is to ensure that a person's payment is not cancelled again after the first mutual obligation failure without a reasonable excuse that a person commits after they return to payment. The Transitional Instrument continues this special rule.

29. The rule in subsection 6(2) will apply in relation to subsequent mutual obligation failures without a reasonable excuse that the person commits after they return to payment.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### *Social Security (Streamlined Participation Requirements Transitional Arrangements) Instrument 2022*

The *Social Security (Streamlines Participation Requirements Transitional Arrangements) Instrument 2022* (the ‘Transitional Instrument’) 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 Transitional Instrument**

The Transitional Instrument provides for transitional matters in relation to three current legislative instruments. It does not change the practical operation of any of the instruments.

These instruments, discussed below, are the:

- *Social Security (Parenting payment participation requirements - class of persons) Instrument 2021* (‘Class of Persons Instrument’);
- *Social Security (Declared Program Participant) Determination 2018* (‘Declared Program Participant Determination’); and
- *Social Security (Administration) Non-Compliance Determination 2018 (No. 1)* (‘Non-Compliance Determination’).

First, the Transitional Instrument makes clear that the Class of Persons Instrument continues to operate as it currently operates despite amendments to the social security law made by the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022* (the ‘Streamlined Participation Requirements Act’).

The Class of Persons Instrument specifies a class of person who may be given participation requirements in order to receive parenting payment. The Transitional Instrument makes no change to the class of persons who may be given participation requirements and no change to the Class of Persons instrument. It also makes no change to the nature or extent of the participation requirements which a person may be given, and no change to the circumstances in which a person may or will be exempt from participation requirements.

The Transitional Instrument simply makes clear that amendments made by the Streamlined Participation Requirements Act (outlined below), which themselves involve no change in policy, do not affect the operation of the Class of Persons Instrument.

The amendments made by the Streamlined Participation Requirements Act are, relevantly, that:

- instead of describing mutual obligation requirements for parenting payment recipients who have such requirements as “participation requirements”, they are now described as employment pathway plan requirements. For all participation payments, including parenting payment, employment pathway plan requirements now include, consistent with longstanding practice, what was formerly known as the activity test, i.e. the requirement to actively seek and to be willing to accept and

undertake suitable paid work in Australia. The phrase “activity test” was removed as it was redundant;

- qualification criteria for parenting payment now specifies satisfaction of employment pathway plan requirements, instead of meeting participation requirements, and satisfying the Employment Secretary of willingness to actively seek and to accept and undertake suitable paid work in Australia, or else to have an exemption from the employment pathway plan requirements and satisfy the Employment Secretary that but for the circumstances resulting in the exemption the person would be willing to actively seek and to accept and undertake suitable paid work in Australia; and
- provisions concerning the availability of exemptions to employment pathway plan requirements have been consolidated into a single set of provisions to avoid duplication, which includes a new general provision to the effect that a person may not be required to satisfy employment pathway plan requirements where circumstances exist that make it unreasonable to expect the person to do so. The new single set of provisions also replicates many of the pre-existing exemption provisions. The changes to the exemption provisions were not designed to increase or decrease the circumstances in which exemptions will be granted and nor is any change to policy or practice envisaged because of the amendments.

Second, the Transitional Instrument makes clear that the Streamlined Participation Requirements Act does not affect the operation of the Declared Program Participant Determination.

The effect of the Declared Program Participant Determination is that participants in the Community Development Program are not subject to the Targeted Compliance Framework (‘TCF’) in Division 3AA of Part 3 of the *Social Security (Administration) Act 1999* (the ‘Administration Act’) and are instead subject to the compliance framework in Division 3A of Part 3 of the Administration Act. The Transitional Instrument makes clear that this will continue to be the case and makes no change to the Declared Program Participant Determination.

Third, the Transitional Instrument ensures that the policy intent of the Non-Compliance Determination is maintained and that penalties are only applied to job seekers who are persistently non-compliant with their mutual obligation requirements.

The Non-Compliance Determination underpins the operation of the TCF. The TCF was introduced in 2018 and applies to participation payment recipients other than “declared program participants”, in practice those in the Community Development Program as noted above. Participation payment recipients are recipients of: jobseeker payment; youth allowance (other); parenting payment where the recipient has mutual obligation requirements; and special benefit (nominated visa holders).

The intent of the TCF is to encourage job seekers to comply with their mutual obligation requirements and, where they have missed a requirement, to re-engage with their requirements.

The purpose of the Transitional Instrument is to update the Non-Compliance Determination so that it reflects amendments to the social security law by the Streamlined Participation Requirements Act. Relevantly, these amendments are:

- the amendments outlined above in connection with the Class of Persons Instrument; and
- amending the TCF provisions to remove the language mandating compliance action and replacing it with language which specifies compliance action ‘may’ be taken, rather than ‘must’. This resulted in a slight re-organisation of some TCF provisions and changes to subsection or paragraph numbers, which now need to be reflected in the Non-Compliance Determination.

As outlined in the explanatory statement for the Non-Compliance Determination, which is at Attachment A to this Statement of Compatibility of Human Rights, under the TCF, job seekers begin in what is administratively known as the “green zone”, and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a reasonable excuse, this results in the accrual of a demerit and their income support payment may be suspended. The suspension is usually lifted with back-pay when the person re-engages.

The job seeker will then be in the “warning zone” where each additional failure without a valid reason will incur another demerit as well as payment suspension if the job seeker does not re-engage. (While in the warning zone, the job seeker’s payment is back-paid after re-engagement, and individual demerits expire 6 active months after they are accrued.)

A small minority of job seekers are persistently and deliberately non-compliant and therefore need a strong incentive to comply. As outlined in the explanatory statement for the Non-Compliance Determination at Attachment A, once a job seeker has incurred sufficient demerits to place them in what is administratively known as the “penalty zone”, additional mutual obligation failures without a reasonable excuse will result in a determination that a person has ‘persistently committed mutual obligation failures’. This results in escalating penalties. Unless the job seeker has a reasonable excuse, the job seeker in the penalty zone will lose 50 per cent of their fortnightly payment for their first mutual obligation failure in the penalty zone, 100 per cent for their second mutual obligation failure and payment cancellation for four weeks for their third such failure.

In practice, these arrangements have proven very effective at deterring non-compliance before it occurs. As at February 2022, only 0.8 per cent of job seekers were in the penalty zone, the vast majority of whom had had no penalties applied. Further, in the year following the implementation of the TCF, there was a 90 per cent reduction in financial penalties compared to the previous framework, and attendance at appointments increased from 71 to 75 per cent. Academic research also shows that the Targeted Compliance Framework is effective at encouraging job seekers to comply with their requirements before they are penalised, as intended.

The Non-Compliance Determination sets out criteria for assessing when a job seeker is persistently non-compliant, and so when penalties apply for committing mutual obligation failures.

This will usually be where the person commits a mutual obligation failure after the job seeker previously accrued five demerits within a period referred to in the Non-Compliance Determination as “6 active months”. A job seeker may also be considered to have persistently committed mutual obligation failures where they have previously accrued 2, 3 or 4 demerits in 6 active months and where one of those demerits relates to a failure to attend a job interview, act on a job referral, or for acting in a manner such that an offer of employment would not be made, recognising the seriousness of these failures.

Job seekers remain in the penalty zone for a period referred to in the Non-Compliance Determination as “3 active months”.

The Non-Compliance Determination defines “3 active months” and “6 active months” by expanding the usual concepts of 3 months and 6 months – 3 active months and 6 active months will correspond to 91 or 182 days respectively plus the days in any periods in which certain circumstances apply to them, up to a limit of 12 months. These circumstances include, for example, periods when the job seeker is exempt from mutual obligation requirements or has had their fortnightly payment instalment reduced or cancelled due to non-compliance. For example, if a persistently non-compliant job seeker was exempt for five days, their period of 3 active months in the penalty zone would increase from 91 days to 96 days.

The reason for this definition is that the policy intent is that job seekers with a history of persistent non-compliance demonstrate that they are meeting their requirements, periods of time in a person’s servicing during which they are exempt from mutual obligation requirements or serving a reduced payment or non-payment period for non-compliance are not considered to be demonstrating compliance. Again this policy operates effectively to deter further non-compliance. As at June 2021, of the 3,568 people in the penalty zone, 3,066 had incurred no penalties.

The Transitional Instrument does not change these arrangements, however because the definitions of 3 active months and 6 active months refer to terminology or provisions which have been amended or repealed by the Streamlined Participation Requirements Act, it is necessary to update some aspects of the Non-Compliance Determination. In doing, so the Transitional Instrument also makes minor technical amendments to the Non-Compliance Determination to make it easier to read.

None of the changes by the Transitional Instrument to the Non-Compliance Determination affect the operation of the Non-Compliance Determination.

### **Human rights implications**

Schedule 1 of the Transitional Instrument, relating to the Non-Compliance Determination, engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’); and
- the right of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (‘CRC’) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR; and

- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC.

Sections 6 and 7 of the Transitional Instrument, which relate to the Class of Persons Instrument and Declared Program Participants Instrument, provide for the continued operation, in the same way, of those instruments and have no human rights implications beyond that.

The Statements of Compatibility with Human Rights for the Class of Persons Instrument and the Declared Program Participants Instrument, which confirm that those instruments are compatible with human rights, are at Attachments B and C to this Statement of Compatibility with Human Rights respectively.

### **The right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family**

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires State Parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11, and the obligation in Article 10 to provide protection and assistance to the family. Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions. Article 27 of the CRC also recognises the right of the child to an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

Article 10(1) of the ICESCR recognises that 'the widest possible protection and assistance should be accorded to the family', particularly for its establishment, and 'while it is responsible for the care and education of dependent children'. The Committee on Economic, Social and Cultural Rights (CESCR) has noted that the provision of family benefits by way of cash payments and services is crucial for the realisation of the rights under Articles 9 and 10, thereby acknowledging that Article 10(1) may require provision of financial assistance (this may require the provision of family benefits as a measure of assistance).

Article 4 of the ICESCR provides that countries may only subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The CESCR has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitations are available; and where such limitations are permitted, they should be of limited duration and subject to review.

The purpose of the Non-Compliance Determination, which the Transitional Instrument amends, is to specify the circumstances in which the Secretary is to determine when a person has persistently committed mutual obligation failures and that a person's payment is to be reduced. For information on how the determination more broadly is consistent with human rights, refer to the Statement of Compatibility with Human Rights for the Non-Compliance Determination (part of the explanatory statement at Attachment A).

The majority of the changes in the Transitional Instrument to the Non-Compliance Instrument are a consequence of Schedule 3 of the Streamlined Participation Requirements Act. This Act amended the Targeted Compliance Framework, removing the language mandating compliance action and replacing it with language which specifies compliance action 'may' be taken, rather than 'must'. This better supports the policy that job seekers who have a valid reason for any missed requirements should not experience payment suspensions or penalties.

These changes to the TCF in the Streamlined Participation Requirements Act and reflected in the Transitional Instrument, therefore promote the right to social security and through that the right to an adequate standard of living.

Other changes in response to the Streamlined Participation Requirements Act do not change the operation of the Non-Compliance Instrument, and merely reflect the new set of exemption provisions as a result of the Streamlined Participation Requirements Act. The Streamlined Participation Requirements Act consolidated the exemptions to employment pathway plan requirements into a single set of provisions to avoid duplication, which includes a new general provision to the effect that a person may not be required to satisfy employment pathway plan requirements where circumstances exist that make it unreasonable to expect the person to do so. The new single set of provisions also replicates many of the pre-existing exemption provisions. The changes to the exemption provisions were not designed to increase or decrease the circumstances in which exemptions will be granted and nor is any change to policy or practice envisaged because of the amendments.

Accordingly, they have no human rights implications.

### ***Conclusion***

The Transitional Instrument is compatible with human rights because it largely does not change the operation of the legislative instruments for which it effects transitional arrangements, and to the extent that it does it promotes human rights.



## **EXPLANATORY STATEMENT**

### ***Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)***

#### **Summary**

The *Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)* (the Determination) is made by the Minister for Jobs and Innovation under subsection 42AR(1) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to determine the circumstances in which the Secretary:

- must, or must not, be satisfied that a person subject to participation requirements has persistently committed mutual obligation failures for the purposes of paragraph 42AF(2)(a) of the Act;
- must make a determination that an instalment of a person's participation payment is to be reduced under paragraph 42AF(2)(c) (and by how much under subsection 42AN(4)); and
- must make a determination that a person's participation payment is cancelled under paragraph 42AF(2)(d).

This Determination underpins the operation of the new Targeted Compliance Framework set out in Division 3AA of Part 3 of the Act.

#### **Background**

The targeted job seeker compliance framework will apply to participation payment recipients other than 'declared program participants' from 1 July 2018. Participation payment recipients are recipients of: Newstart allowance; youth allowance (other); parenting payment (where the recipient is subject to participation requirements); and special benefit (Nominated Visa Holder).

In the first phase of this new framework, job seekers will begin in what is administratively known the 'green zone,' and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a valid reason, this will result in income support payment suspension until re-engagement (at which point payment is back-paid) and accrual of a demerit. They will then be in the 'warning zone', where each additional failure without a valid reason will incur another demerit, as well as payment suspension. This arrangement recognises that the vast majority of job seekers are genuine in their efforts to meet their requirements.

A small minority of job seekers however are persistently and deliberately non-compliant, and need a strong incentive to change their behaviour. For this reason, under the targeted compliance framework, financial penalties of increasing amounts will apply to those who are assessed as having persistently committed mutual obligation failures. This determination sets out the criteria for this assessment.

After five demerits within six active months these job seekers will enter what is administratively known as the 'penalty zone'. Job seekers who fail to attend a job interview, fail to act on a job opportunity or act in a manner such that an offer of employment would not be offered to them may enter the penalty zone more quickly, recognising the seriousness of these failures.

In the penalty zone, additional mutual obligation failures without reasonable excuse will result in escalating penalties, beginning with loss of 50 per cent of their fortnightly payment for their first mutual obligation failure without reasonable excuse, 100 per cent for their second mutual obligation failure and payment cancellation for four weeks for their third.

However, to ensure that genuine job seekers who are simply having difficulty meeting their requirements do not enter the penalty zone, their employment services provider will be required to assess their capability and requirements generally after their third demerit. The Department of Human Services will also assess the appropriateness of job seekers' requirements, usually after the person's fifth demerit (or earlier, if the failure is a failure to attend a job interview, or act on a job referral, or if they act in a manner such that an offer of employment would not be made). One of the effects of the Determination is that a person must undergo such an assessment, and that assessment must find that the person's requirements are appropriate for them, before the Secretary may be satisfied that the person has persistently committed mutual obligation failures.

In either assessment, if a person is found to be unable to meet their requirements because of some underlying capability issue, those requirements will be adjusted and they will return to the green zone with their demerits reset to zero.

If a job seeker does enter the penalty zone, they will still have a strong incentive to change their behaviour. If they meet their requirements for a period of three 'active months', they will also return to the green zone with zero demerits. As the policy intent is for these job seekers with a history of persistent non-compliance to demonstrate that they are meeting their requirements, if a person is exempt from their requirements, or in a non-payment period due to non-compliance (rather than because they are supporting themselves), such periods would not be considered as demonstrating compliance. For this reason, these periods are generally excluded from the calculation of 'active months'.

## **Operation of the provisions**

### **Section 1 – Name of Determination**

This section provides that the name of the Determination is the *Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)*.

### **Section 2 – Commencement**

This section provides a table setting out the commencement of the Determination. The Determination will commence on 1 July 2018. This is the same date as Division 3AA of Part 3 of the Act will commence.

### **Section 3 – Authority**

This section provides that the Determination is made under subsection 42AR(1) of the Act.

The Determination is made before the commencement of subsection 42AR(1) of the Act in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*.

### **Section 4 – Definitions**

**Section 4** defines terms used in the Determination. The **note** to section 4 alerts the reader to the fact that words and phrases used in the Determination that are defined in the Act or the *Social Security Act 1991* (the 1991 Act), have the meaning given by those Acts.

The definitions of **3 active months** and **6 active months** expand the usual concept of 3 months and 6 months. For **3 active months**, paragraph (1) of the definition provides that this means the shorter of: 91 consecutive days plus any days equal to the number of days a person spends in certain periods during those 91 days; and twelve months. These periods are:

- periods where a person is exempt or relieved from the activity test in certain circumstances;
- a one week period for each occasion a person has had an instalment of their participation payment reduced by the amount specified in paragraph 42AN(3)(a) (that is, an amount equal to half of the instalment that would otherwise have been payable);
- a two week period for each occasion a person has had an instalment of their participation payment reduced by the amount specified in paragraph 42AN(3)(b) (that is, an amount equal to the whole of the instalment that would otherwise have been payable);
- a post-cancellation non-payment period under subsection 42AP(5). Post-cancellation non-payment periods are either 4 or 6 weeks long, depending on the circumstances; and
- the time between a person's referral to the Human Services Department for an assessment regarding the suitability of their employment pathway plan, and the completion of that assessment.

Paragraph (2) of the definition of **3 active months** clarifies that if two or more of the periods mentioned above overlap, the number of days that overlap will only count once when calculating the days equal to the number of days the person spends in those periods.

The effect of the definition of **3 active months** is that the relevant periods mentioned above will be added on to 91 days, so **3 active months** will be more than 3 months for some people. However, **3 active months** cannot be more than 12 months.

Similarly, in relation to the definition of **6 active months**, this is the shorter of: 182 consecutive days plus periods equal to the periods mentioned above that occur within those 182 days; and 12 months. This means that **6 active months** will be more than 6 months for some people, but cannot be more than 12 months. In the event two or more of the periods mentioned above overlap, the number of days in the overlap will only be counted once when calculating the days equal to the number of days the person spends in those periods.

The reason **3 active months** is defined in this way is that the policy intent is for people to demonstrate that they are complying with their mutual obligation requirements for 3 months following entry to the penalty zone. Where a person is temporarily exempt from requirements, or serving a penalty period, they are not demonstrating compliance. This is why the ordinary concept of '3 months' may be expanded in some circumstances. Where a person is fully meeting their mutual obligation requirements or is supporting themselves without accessing payment (except during a penalty period) this counts as demonstrating compliance.

Similarly, the reason **6 active months** is defined in this way is that job seekers must demonstrate compliance in order for their demerits to expire. Where a person is temporarily exempt from requirements, or in a cancellation period for a work refusal failure, they are not demonstrating compliance in those periods.

The Determination defines **demerit** as a record on the Employment Department's Information Technology System that the person has committed a mutual obligation failure without a valid reason. (Note that the term 'Employment Department' is defined in subsection 23(1) of the 1991 Act, and the effect of the definition is that it refers to the Department of Jobs and Small Business). Whether or not a person has a valid reason for a mutual obligation failure is assessed by the person's employment services provider at the time of, or immediately after, the failure.

The definition of **relevant failure** is the relevant failure described in subsection 42AF(1) of the Act. This is the mutual obligation failure for which compliance action must usually be taken under subsection 42AF(1), and if relevant, subsection 42AF(2).

## **Section 5 – Circumstances where a person has, and has not, persistently committed mutual obligation failures.**

**Section 5** sets out the circumstances in which the Secretary must be satisfied that a person has, or has not, persistently committed mutual obligation failures for the purposes of

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paragraph 42AF(2)(a) of the Act. If the Secretary is satisfied the person has persistently committed mutual obligation failures and does not have a reasonable excuse for the relevant failure, the Secretary must usually determine that an instalment of the person's payment is to be reduced or cancelled under paragraphs 42AF(2)(c) or (d) of the Act, respectively.

Section 5 is made for the purposes of paragraph 42AF(2)(a) of the Act.

**Subsection 5(1)** provides that the Secretary must be satisfied that a person has persistently committed mutual obligation failures if:

- the relevant failure was committed within 3 active months beginning on a day worked out under subsections 5(2) or 5(3) of the Determination (paragraph 5(1)(a)); or
- in the 3 active months prior to the relevant failure, the person has committed at least 1 mutual obligation failure without a reasonable excuse where the Secretary was satisfied that the person had persistently committed mutual obligations failures (paragraph 5(1)(b)).

The effect of paragraph 5(1)(a) is to create the 3 active month 'penalty zone'. If a person commits the relevant failure while in that penalty zone, the person's payment will be reduced or cancelled (see section 6 of the Determination).

The effect of paragraph 5(1)(b) is that once a person is found to have persistently committed mutual obligation failures, any mutual obligation failure the person commits without a reasonable excuse in the following 3 active months will result in the person being found to have persistently committed mutual obligation failures again. This means that the penalty zone will be extended by 3 active months each time the person commits a mutual obligation failure without a reasonable excuse while in the penalty zone.

**Subsection 5(2)** calculates the day, subject to subsection 5(3), the 3 active months referred to in paragraph 5(1)(a) of the Determination will start for a person who has committed a certain number of mutual obligation failures to which a demerit is attached; that is, when the penalty zone will start for these people. When the penalty zone starts will depend on whether they commit a certain number of mutual obligation failure to which a demerit is attached in a certain period, and whether they undergo a DHS assessment in that period.

The effect of subparagraph 5(2)(a)(i) and paragraph 5(2)(b) of the Determination, is that if a person commits at least 5 mutual obligation failures to which a demerit is attached in any 6 active months, and they undergo a DHS assessment in that period where DHS considers the person's job plan is suitable for them, then the penalty zone starts on the day the DHS assessment is complete.

The effect of subparagraph 5(2)(a)(ii) and paragraph 5(2)(b) is that if a person commits 2, 3 or 4 mutual obligation failures to which a demerit is attached in any 6 active months, where at least 1 of those failures was the person:

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- failing to attending a job interview; or
- failing to act on a job opportunity when requested to do so by an employment services provider; or
- intentionally acting in a manner, and it is reasonably foreseeable that acting in that manner could result in an offer of employment not being made to them

and they undergo a DHS assessment in that 6 active month period where DHS considers the person's job plan is suitable for them, then the penalty zone starts on the day the DHS assessment is complete.

The reason why a person only needs to commit 2, 3 or 4 mutual obligation failures where at least 1 is a 'job opportunity failure' – that is, one of the three failures listed above – before they enter the penalty zone is because of the seriousness of these failures which, while not as serious as outright refusal of work, call into question the job seeker's commitment to finding work. Where a job seeker commits a 'job opportunity failure' they are fast-tracked to the next assessment to determine if they are able to meet their requirements.

**Subsection 5(3)** calculates the day the 3 active months referred to in paragraph 5(1)(a) of the Determination will start for a person who has committed a certain number of mutual obligation failures to which a demerit is attached, but who has one or more of their demerits reversed after they undergo the DHS assessment. Subsection 5(3) operates despite subsection 5(2).

Subsection 5(3) sets out what happens when the circumstances set out in paragraphs 5(2)(a) and 5(2)(b) apply to a person – that is, where in any 6 active months a person commits at least:

- 5 mutual obligation failures to which a demerit is attached; or
- 2, 3 or 4 mutual obligation failures to which a demerit is attached where at least 1 is a 'job opportunity failure',

and where the person undergoes a DHS assessment in that period – but where one or more of the person's demerits is reversed after the person undergoes the DHS assessment, and the person subsequently commits one or more mutual obligation failures to which a demerit is attached and not reversed. In those cases, the 3 active month penalty zone starts on the day on which the person commits:

- the fifth mutual obligation failure in 6 active months to which a demerit is attached that is not subsequently reversed; or
- the second, third or fourth mutual obligation failure in 6 active months to which a demerit is attached that is not subsequently reversed, where at least 1 of these failures is a 'job opportunity' failure.

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The purpose of subsection 5(3) is to ensure that if a person has one (or more) of their demerits reversed after they enter the penalty zone, their penalty zone will not start until they commit the requisite number of mutual obligation failures to which a demerit is attached that is not subsequently reversed.

Subsection 5(4) sets out when a demerit is reversed for the purposes of section 5. It provides that demerit is **reversed** if it is removed from the Employment Department's Information Technology System, including because:

- it was recorded in respect of a mutual obligation failure by a person who subsequently underwent a DHS assessment, or a capability assessment with their employment provider, and the outcome of that assessment was that the person's employment pathway plan was not suitable for the person;
- it was recorded in respect of a mutual obligation failure by a person and the person was subsequently found to have a valid reason for committing the failure; or
- it was recorded in error.

The note to subsection 5(4) states that if the outcome of the DHS assessment is that the person's employment pathway plan is not suitable for them, then all the person's demerits will be removed at that time.

**Subsections 5(5) and (6)** sets out the circumstances where the Secretary must not be satisfied that the person has persistently committed mutual obligation failures, despite subsections 5(1) – (3) of the Determination.

Subsection 5(5) provides that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures if the person has not committed a mutual obligation failure to which a demerit is attached, or a mutual obligation failure without a reasonable excuse, in the 3 active months prior to the relevant failure. This means that if a person is fully compliant for 3 active months, they cannot have their payments reduced or cancelled the next time they commit a mutual obligation failure.

The intention of this provision is to provide an incentive for those who have a history of non-compliance to change their behaviour. If a person remains fully compliant with their requirements for 3 active months in the penalty zone, they will be returned to the green zone with their demerits reset to zero.

Subsection 5(6) is included in the Determination for the avoidance of doubt. It provides that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures if one or more of the person's demerits referred to in subparagraphs 5(2)(a)(i) or (ii) is reversed, with the result that that a person has not committed the requisite number of mutual obligation failures to which a demerit is attached for the purposes of those sections.

This subsection confirms that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures (and therefore cannot reduce or cancel a person's payment under paragraphs 42AF(2)(c) and (d) of the Act), where a person had committed the requisite number of mutual obligation failures to which a demerit is attached to enter the penalty zone, but where one or more of those demerits is later reversed with the result that the person has not committed the requisite number of mutual obligation failures to which a demerit is attached.

**Section 6 – Circumstances where a person's participation payment is to be reduced (and by how much), or cancelled.**

**Section 6** sets out the circumstances in which the Secretary must determine that a person's participation payment is to be reduced under paragraph 42AF(2)(c) of the Act (and by how much under paragraph 42AN(4)), or cancelled under paragraph 42AF(2)(d).

Section 6 is made for the purposes of subsections 42AF(2) and 42AN(4) of the Act.

**Subsection 6(1)** provides that if the Secretary is satisfied the circumstances set out in paragraphs 5(1)(a) or (b) of the Determination apply to a person, then, for the purposes of paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, the Secretary must determine an instalment of a person's participation payment is to be reduced by the amount specified in paragraph 42AN(3)(a) of the Act – that is, an amount equal to half of the instalment that would otherwise have been payable.

The effect of this is that, subject to the subsequent subsections, a person's participation payment will be reduced by an amount equal to half their payment if they commit a mutual obligation failure without a reasonable excuse while in the penalty zone.

**Subsection 6(2)** sets out what happens for the purposes of paragraph 42AF(2)(c) and subsection 42AN(4) of the Act if, in the 3 active months prior to the relevant failure, an instalment of person's participation payment has been reduced by the amount specified in paragraph 42AN(3)(a) (that is, by an amount equal to half of the instalment that would otherwise have been payable), and where that reduction was the last reduction determination made under paragraph 42AF(2)(c) in relation to the person. In these circumstances, despite subsection 6(1) of the Determination, the Secretary must determine that an instalment of a person's payment is to be reduced by the amount specified in paragraph 42AN(3)(b) of the Act (that is, by an amount equal to the whole of the instalment that would otherwise have been payable).

The effect of this is that if a person commits a mutual obligation failure without a reasonable excuse while in the penalty zone, and they have already had their participation payment reduced by an amount equal to half their payment less than 3 active months ago because of a determination under paragraph 42AF(2)(c), their payment will be reduced by an amount equal to the whole amount of the payment. In short, this means that where a person commits a second mutual obligation failure without a reasonable excuse in the penalty zone, their payment will be reduced by an amount equal to the whole amount of the payment.



**Subsection 6(3)** sets out when the Secretary must determine that a person's participation payment is cancelled for the purposes of paragraph 42AF(2)(d) of the Act. This will occur if, in the 3 active months prior to the relevant failure, an instalment of the person's participation payment has been reduced by the amount specified in paragraph 42AN(3)(b) (that is, by an amount equal to the whole of the instalment that would otherwise have been payable), where that reduction was the last reduction determination made under paragraph 42AF(2)(c) in relation to the person. Subsection 6(3) applies despite subsections 6(1) and (2) of the Determination.

The effect of this is that if a person commits a mutual obligation failure without a reasonable excuse while in the penalty zone, and they have already had their participation payment reduced by an amount equal to the whole amount less than 3 active months ago because of a determination under paragraph 42AF(2)(c), their payment will be cancelled. In short, this means that where a person commits a third mutual obligation failure without a reasonable excuse in the penalty zone, their payment will be cancelled. In that case, a four week post-cancellation non-payment period will apply.

**Subsection 6(4)** sets out a special rule for when a person previously received a participation payment that was cancelled under paragraph 42AF(2)(d) of the Act, and where the relevant failure is the first mutual obligation failure without a reasonable excuse in the 3 active months since that cancellation. In those circumstances, the Secretary must determine that an instalment of a person's participation payment is to be reduced by the amount specified in paragraph 42AN(3)(a) of the Act (that is, by an amount equal to half of the instalment). The rule in subsection 6(4) of the Determination applies regardless of subsections 6(1), (2) or (3).

The reason there is a special rule in these circumstances is to ensure that a person's participation payment is not cancelled again after the first mutual obligation failure without a reasonable excuse that a person commits after they return to payment.

The usual rules in subsections 6(2) and (3) of the Determination will apply in relation to subsequent mutual obligation failures without a reasonable excuse that the person commits after they return to payment.

### **Example**

This is one example of the way the Determination will operate:

*Annika is a Newstart allowance recipient. Between 1 July 2018 and 14 September 2018 she commits five mutual obligation failures. Her employment services provider decides Annika does not have a valid reason for her failures and so demerits are recorded on the Department of Jobs and Small Business' IT System for each of these failures. After the third failure, her provider assesses her Newstart Employment Pathway Plan (Job Plan) to ensure it is suitable for her and after her fifth demerit the Department of Human Services also conduct an assessment. Both assessments find that Annika is able to meet her requirements and Annika's Job Plan is appropriate for her. On 19 September 2018, the date her assessment by the Department of Human*

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*Services is finalised, Annika moves into the penalty zone for 3 active months. If she commits no further mutual obligation failures, Annika will be in the penalty zone for 3 active months (that is, until at least 19 December 2018 – which is 91 consecutive days from 19 September 2018 – plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure).*

*Annika is undertaking a National Work Experience Program placement with a local business, and participating in this placement is a requirement of her job plan. On 1 October 2018, Annika fails to show up to her placement as required. This is a mutual obligation failure under paragraph 42AC(1)(d) of the Act, and Annika has no reasonable excuse for this failure. Among other decisions made in relation to this failure (the ‘relevant failure’), a delegate of the Secretary within the Department of Human Services:*

- *decides he is satisfied, under paragraph 42AF(2)(a) of the Act, that Annika has persistently committed mutual obligation failures. This is because the relevant failure was committed within 3 active months beginning on 19 September 2018 (as per paragraph 5(1)(a) and subsection 5(2) of the Determination);*
- *determines, under paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, that an instalment of Annika’s Newstart allowance is to be reduced by an amount equal to half of the instalment that would otherwise have been payable to her for the relevant reduction period. This is due of the operation of subsection 6(1) of the Determination, which applies because the circumstances set out in paragraph 5(1)(a) applies to Annika.*

*Annika’s time in the Penalty Zone is also adjusted. Annika will stay in the penalty zone for a 3 active month period from 1 October 2018 (91 days plus an additional 1 weeks for incurring a reduction equal to half of her instalment). This extends Annika’s time in the Penalty Zone until 7 January 2019, plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure.*

*On 15 November 2018, Annika fails to satisfy her employment provider that she has undertaken adequate job search as required by her job plan. This is a mutual obligation failure under paragraph 42AC(1)(e) of the Act, and Annika has no reasonable excuse for this failure. Among other decisions made in relation to this failure (the ‘relevant failure’), a delegate of the Secretary within the Department of Human Services:*

- *decides she is satisfied, under paragraph 42AF(2)(a) of the Act, that Annika has persistently committed mutual obligation failures. This is because the circumstances set out in subsection 5(1)(b) of the Determination apply to Annika – that is, in the 3 active months prior to the relevant failure, Annika has committed at least 1 mutual obligation failure without a reasonable*

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*excuse, where the Secretary was satisfied that Annika had persistently committed mutual obligation failures; and*

- *determines, under paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, that an instalment of Annika's Newstart allowance is to be reduced by an amount equal to the whole amount of the instalment that would otherwise have been payable to Annika for the relevant reduction period. This is due to the operation of subsection 6(2) of the Determination, which applies because in the 3 active months prior to the relevant failure, the Secretary made a determination under paragraph 42AF(2)(c) to reduce an instalment of Annika's Newstart allowance by half, and this was the last determination made under paragraph 42AF(2)(c) in relation to Annika.*

*Annika's time in the Penalty Zone is also adjusted. Annika will stay in the penalty zone for a 3 active month period from 15 November 2018 (91 days plus two weeks due to the reduction of the whole amount of her payment instalment). This extends Annika's time in the Penalty Zone until 28 February 2019, plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure.*

*On 28 February 2019 Annika leaves the Penalty Zone, having served three active months in the Penalty Zone since her last failure (91 days plus two weeks due to the reduction of the whole amount of her payment instalment). Annika is returned to the Green Zone with her demerits reset to zero.*

*On 15 March 2019, Annika again fails to satisfy her employment provider that she has undertaken adequate job search as required by her Job Plan. However, it has been more than 3 active months since she committed her last mutual obligation failure without a reasonable excuse. The Secretary/delegate cannot be satisfied that Annika has persistently committed mutual obligation failures, so Annika's Newstart allowance is therefore not reduced or cancelled as a result of her failure on 15 March 2019.*

## **Consultation**

The Department of Jobs and Small Business consulted the Department of Human Services, the Department of Social Services, and also provided an electronic copy of the draft Determination to the following bodies and organisations and invited comment: Jobs Australia, the Australian Council of Social Service, the Administrative Appeals Tribunal, the National Employment Services Association and the National Social Security Rights Network.

In addition, known views from relevant experts and stakeholders were taken into account in development of the Determination. The Welfare Reform Act that inserted the power to make this Determination was the subject of an Inquiry by the Senate Community Affairs Legislation Committee, in which a large number of stakeholders expressed views about the measures.

**Regulatory Impact Analysis**

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

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### **Statement of Compatibility with Human Rights**

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

#### ***Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)***

This legislative instrument (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 Determination**

The Determination is made by the Minister for Jobs and Innovation under subsection 42AR(1) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to determine the circumstances in which the Secretary:

- must be satisfied that a person subject to participation requirements has, or has not, persistently committed mutual obligation failures for the purposes of paragraph 42AF(2)(a) of the Act;
- must make a determination that an instalment of a person's participation payment is to be reduced under paragraph 42AF(2)(c) (and by how much under subsection 42AN(4)); and
- must make a determination that a person's participation payment is cancelled under paragraph 42AF(2)(d).

This Determination underpins the operation of the new targeted compliance framework set out in Division 3AA of Part 3 of the Act.

The targeted job seeker compliance framework will apply to participation payment recipients other than 'declared program participants' from 1 July 2018. Participation payment recipients are recipients of: Newstart allowance; youth allowance (other); parenting payment (where the recipient is subject to participation requirements); and special benefit (Nominated Visa Holder).

In the first phase of this new framework, job seekers will begin in what is administratively known the 'green zone,' and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a valid reason this will result in income support payment suspension until re-engagement (at which point payment is back-paid) and accrual of a demerit. They will then be in the 'warning zone', where each additional failure without a valid reason will incur another demerit, as well as payment suspension. This arrangement recognises that the vast majority of job seekers are genuine in their efforts to meet their requirements.

A small minority of job seekers however are persistently and deliberately non-compliant, and need a strong incentive to change their behaviour. For this reason, financial penalties of

increasing amounts will apply to those who are assessed as having persistently committed mutual obligation failures. This determination sets out the criteria for this assessment.

After the accumulation of five demerits within a short period (generally six months), these job seekers will enter what is administratively known as the 'penalty zone'. Job seekers who fail to attend a job interview, fail to act on a job opportunity or act in a manner such that an offer of employment would not be offered to them may enter the penalty zone more quickly, recognising the seriousness of these failures.

In the penalty zone additional mutual obligation failures without reasonable excuse will result in escalating penalties, beginning with loss of 50 per cent of their fortnightly payment for their first mutual obligation failure without reasonable excuse, 100 per cent for their second strike and payment cancellation for four weeks for their third.

However, to ensure that genuine job seekers who are simply having difficulty meeting their requirements do not enter the penalty zone, their employment services provider will be required to assess their capability and requirements generally after their third demerit. The Department of Human Services will also assess the appropriateness of job seekers' requirements, usually after the person's fifth demerit (or earlier, if the failure is a failure to attend a job interview, or act on a job referral, or if they act in a manner such that an offer of employment would not be made). One of the effects of the Determination is that a person must undergo such an assessment, and that assessment must find that the person's requirements are appropriate for them, before the Secretary may be satisfied that the person has persistently committed mutual obligation failures.

In either assessment, if a person is found to be unable to meet their requirements because of some underlying capability issue, those requirements will be adjusted and they will return to the green zone with their demerits reset to zero.

If a job seeker enters the penalty zone, they will still have a strong incentive to change their behaviour. If they meet their requirements for a period of three 'active months', they will also return to the green zone with zero demerits. As the policy intent is for these job seekers with a history of persistent non-compliance to demonstrate that they are meeting their requirements, if a person is exempt from their requirements, or in a non-payment period due to non-compliance (rather than because they are supporting themselves), such periods would not be considered as demonstrating compliance. For this reason, these periods are generally excluded from the calculation of 'active months'.

### **Human rights implications**

The Determination engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

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- the right of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR;
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC;

**The right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family**

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11, and the obligation in Article 10 to provide protection and assistance to the family.

Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions. Article 27 of the CRC also recognises the right of the child to an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

Article 10(1) of the ICESCR recognises that 'the widest possible protection and assistance should be accorded to the family', particularly for its establishment, and 'while it is responsible for the care and education of dependent children'. The Committee on Economic, Social and Cultural Rights (CESCR) has noted that the provision of family benefits by way of cash payments and services is crucial for the realisation of the rights under Articles 9 and 10, thereby acknowledging that Article 10(1) may require provision of financial assistance (this may require the provision of family benefits as a measure of assistance).

Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The CESCR has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitations are available; and where such limitations are permitted, they should be of limited duration and subject to review.

Determining that a person has persistently committed mutual obligation failures after they have committed a mutual obligation failure without a reasonable excuse necessitates that

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that their payment be reduced or cancelled. Accordingly, the Determination may limit the right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family.

Reasons for limitation – legitimate objective

The purpose of the Determination is to enable the Secretary to determine when a person has persistently committed mutual obligation failures, and to determine that the person's payment is to be reduced or cancelled. The underlying objective is to encourage a person to do all they are reasonably able to do to remain connected to employment services and meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. This objective is legitimate because of the benefits workforce participation brings to a job seeker and their families.

Rational connection between the limitation and the objective

Limiting a person's rights through payment reduction and cancellation provides the necessary incentive for persistently non-compliant jobseekers to meet their mutual obligation requirements and remain connected to employment services. This will encourage job seekers to do all that they are able to move quickly into paid work. Paid work will increase the financial ability of individuals to provide themselves with an adequate standard of living.

Limitation is reasonable, necessary and proportionate

Any limitation on the right to social security, right to an adequate standard of living, and assistance to the family is necessary because, without the possibility of a penalty for a relevant participation failure, there is less incentive for a person to do all they are reasonably able to do to meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. An ineffective compliance framework has a detrimental impact on job seekers as they are not given a sufficient incentive to take active steps to meet their requirements and therefore increase their chances of moving off income support and experiencing the benefits of participation in the work force.

Further, the Determination, and the administrative policy surrounding the policy ensure that only those who are deliberately and persistently not complying with their mutual obligation requirements will face payment reduction or cancellation.

Job seekers would generally need to commit six mutual obligation failures in a six month period before being determined to have persistently committed mutual obligation failures and facing financial penalty. Job seekers also would not face financial penalty if they had a reasonable excuse for their failure. Likewise, calculation of when a person may be determined to be persistently non-compliant is dependent on the number of mutual obligation requirements which have resulted in demerits being recorded in the Department of Jobs and Small Business' IT system. Where a person has committed a mutual obligation failure, but the employment service provider judges that they had a valid reason for committing that failure, the person would not have a demerit.



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In addition, before facing financial penalty for committing mutual obligation failures, job seekers would also be assessed by both their employment services provider and the Department of Human Services to determine if they are able to meet their mutual obligation requirements. The presence of the Department of Human Services assessment is a prerequisite for finding that the person has persistently committed mutual obligation failures, and the employment services provider assessment is an administrative requirement.

In either assessment, if a job seeker's requirements are inappropriate for their circumstances, their demerits will be reset to zero and their requirements will be adjusted. This means that they would be unable to be determined to have persistently committed mutual obligation failures unless they go on to commit further failures without a valid reason or reasonable excuse.

As a result of these safeguards, job seekers will not face financial penalties unless they have repeatedly demonstrated that they are unwilling to comply with their mutual obligation requirements.

Additionally, any imposed penalties are subject to review, both within the Department of Human Services and by appeal to the Administrative Appeals Tribunal.

*Proportionate limitation in relation to the obligation to provide protection and assistance to the family*

In relation to Article 10(1) of the ICESCR to provide protection and assistance to the family, the Determination will only apply to a person who has committed a mutual obligation failure without a reasonable excuse. This means that where a parent is genuinely attempting to meet their mutual obligation requirements, they will not be penalised.

If a parent or carer is penalised as a result of being determined to have persistently have committed mutual obligation failures, this may indirectly affect the assistance available for their child. However, if a parent or carer does face a financial penalty, it would only apply to the person's participation payment. Any payments made to parents or carers for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs, would not be affected by the penalty.

Ensuring that parents and carers on income support are doing all that they can to move into employment will help parents to secure paid work and therefore increase the financial support available to their children.

**Conclusion**

This Determination is compatible with human rights because, to the extent that it may limit human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate.

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### **Statement of Compatibility with Human Rights**

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

#### ***Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 (the Instrument)***

The Disallowable Legislative Instrument 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 Disallowable Legislative Instrument**

The Instrument is made under subsection 500(2) of the Act and specifies a class of persons, described as Compulsory Participants, for the purposes of paragraph 500(1)(ca) of the Act. The effect of the Instrument is that Parenting Payment recipients in this class of persons may be required to meet the participation requirements in section 500A of the Act, which must take account of their circumstances, unless an exemption – for one or more of a range of reasons, including domestic violence, certain caring responsibilities, sickness, injury – applies. Compulsory Participants may be required to meet these participation requirements to continue to qualify for parenting payment (paragraph 500(1)(ca) of the Act).

The Instrument supports the streamlining of ParentsNext announced by the Australian Government as part of the 2020-21 Budget.

#### **ParentsNext**

ParentsNext is a pre-employment program that aims to help parents plan and prepare for employment before their youngest child starts school. Participants, 95 per cent of whom are women, receive personalised assistance to help them identify their education and employment goals, improve their work readiness and link them to activities and services in the local community. Activities may include attending playgroups or similar activities, which provide social connections and networking opportunities for those with limited work history and significant non-vocational barriers, through to further education and training.

For many parents, particularly women, caring for young children means less time spent in the paid workforce. While valuable new skills and social networks can be acquired through parenting, parents also risk losing work-specific skills and the confidence to enter paid employment. For parents in receipt of government income support payments, this can increase the risk of long-term welfare dependency.

ParentsNext was first trialled in 10 locations across Australia from April 2016. ParentsNext demonstrated positive outcomes for parents during the trial with the ParentsNext Evaluation Report indicating that participation in the trial program improved a parents' attitude to work and wellbeing, as well as chances of engagement in further education and employment.

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ParentsNext was rolled-out nationally on 1 July 2018 and has continued to achieve positive outcomes for parents. Between 1 July 2018 and 31 December 2020, over 150,000 parents have received assistance through the program. This includes 65,500 parents who have commenced education and over 34,000 parents who have commenced employment. Over 4,500 parents have exited the program as a result of finding stable work.

The national expansion of ParentsNext included two separate streams with different eligibility requirements. The Intensive Stream provided services in 30 locations, including the 10 original pilot locations and a further 20 locations where a higher proportion of Parenting Payment recipients identified as Indigenous. Intensive Stream participants received additional assistance including access to the Participation Fund (a flexible pool of funds Providers can use to assist participants to gain the tools, skills and experience needed to prepare for future employment), employer wage subsidies (financial incentives used to encourage employers to hire work ready parents), and the Relocation Assistance To Take Up a Job (RATTUAJ) Program (financial assistance for parents to relocate to take up an offer of employment).

The Targeted Stream was delivered to disadvantaged parents with young children in the remaining non-remote locations. As at 31 December 2020, 57 per cent of ParentsNext participants were in the Targeted Stream and 43 per cent were in the Intensive Stream.

At times, the two-stream service resulted in complexity for ParentsNext participants and providers. The Instrument outlines changes to the program to streamline and simplify eligibility requirements.

Under the new eligibility requirements, parents with a lower level of educational attainment and those that were already receiving income support before they had their youngest child receive support earlier than parents who were employed immediately prior to having their youngest child. This recognises that parents with a lower level of education or a longer time on income support are at greater risk of long-term welfare dependency and are likely to benefit from early support to help them plan and prepare for employment before their youngest child starts school.

Any existing Intensive and Targeted Stream participants who, from 1 July 2021, do not become Compulsory Participants because they do not meet the new eligibility requirements but who remain in receipt of parenting payment will be able to volunteer to remain in ParentsNext, but will not be compelled to do so.

Additional assistance for ParentsNext participants

Separately to the Instrument, the single stream service will also include extended access to the Participation Fund, employer wage subsidies, and the RATTUAJ Program for all participants. This will mean that more than 50 per cent of ParentsNext participants, including more than 6,600 Indigenous participants, will have access to financial assistance not previously available to help them achieve their education and employment goals.

The Targeted Compliance Framework will apply in the same way as previously

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Compulsory Participants will be subject to the Targeted Compliance Framework (TCF) in Division 3AA of Part 3 of the *Social Security (Administration) Act 1999* in the same way that existing Intensive and Targeted Stream participants are currently subject to the TCF.

Evidence from the program indicates that those most in need of the support provided are less likely to participate if it is not compulsory with attendance at appointments increasing from 66 per cent during the trial (where attendance was voluntary) to almost 80 per cent since the national roll-out (when ParentsNext participants became subject to the TCF). The application of the TCF also encourages participants to develop work like behaviours to support them to transition to work when they are ready or to other employment service programs.

The Instrument – specifying a class of persons for ParentsNext

The Instrument repeals the *Social Security (Parenting payment participation requirements – Class of Persons) Instrument 2018 (No. 1)* (the 2018 Instrument). The Instrument will commence on 1 July 2021. It specifies one class of persons, in contrast to the 2018 Instrument which had specified two classes of persons. Through specifying a single class of persons, the Instrument will bring together the Intensive and Targeted Streams, as specified in the 2018 Instrument, by aligning and simplifying the eligibility criteria that will apply to all Parenting Payment recipients. A person in this class may be required to adhere to the participation requirements in section 500A of the Act to remain qualified for the payment, if the Secretary of the Department of Education, Skills and Employment or a delegate of the Secretary decides to impose such requirements on the person.

However, such a person will not be required to comply with participation requirements during a period where one or more of a range of exemptions applies to them – for example due to domestic violence, certain caring responsibilities, sickness or injury. These exemptions are set out in Division 3A of Part 2.10 of the Act.

**Human rights implications**

- the right to social security – Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 26 of the Convention on the Rights of the Child (CRC)
- the right to an adequate standard of living – Article 11 of ICESCR and Article 27 of the CRC
- the right to work – Articles 2 and 6 of ICESCR and Article 11 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- the right to education – Article 13 of ICESCR, article 10 of CEDAW and Article 28 of the CRC
- the right to equality and non-discrimination – Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the CRC, Articles 2, 3, 4 and 15 of CEDAW, and Article 5 of the International Convention on all Forms of Racial Discrimination (CERD)

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- the obligation to consider the best interests of the child in all actions concerning children – Article 3 of the CRC.

**1. Right to social security/Right to an adequate standard of living**

Article 9 of the ICESCR recognises the right of every person to social security. The right to social security requires State Parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

Article 11 of the ICESCR recognises the right of every person to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions. Article 27 of the CRC also recognises the right of the child to an adequate standard of living for the child’s physical, mental, spiritual, moral and social development.

The Committee on Economic, Social and Cultural Rights (CESCR) has stated that limitations on this right must be proportional; the least restrictive alternative should be adopted where several types of limitations are available; and, where such limitations are permitted, they should be of limited duration and subject to review.<sup>1</sup> The CESCR is a body of independent experts that monitor the implementation of the ICESCR. The CESCR’s views are influential but not binding on States Parties to the ICESCR.

As noted in the Overview above, by virtue of the Instrument, a person who falls within the Compulsory Participant class of persons may be required to meet participation requirements under section 500A of the Act if an exemption does not apply.

Failure to meet these requirements will result in the person being subject to the relevant compliance action under the TCF including the suspension, reduction or cancellation of the person’s parenting payment, depending on the circumstances. This engages the right to social security and the right to an adequate standard of living.

*Reason for limitation - legitimate objective*

The objective of ParentsNext is to encourage and assist eligible parents who are in receipt of parenting payment and have young children to identify and make progress towards achieving their education and employment goals through participation in activities and connecting to local services. This is a legitimate objective because the attainment of educational qualifications and skills that support undertaking work assists parents to find

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<sup>1</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, available at: <https://www.refworld.org/docid/47b17b5b39c.html> [accessed 21 December 2020].

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employment when their children reach school age and reduces the risk of long-term poverty and welfare dependency for themselves and their children.

*Rational connection between the limitation and the objective*

Participants often come from families that are subject to intergenerational disadvantage and may suffer from complex circumstances that act as barriers to employment and education. These circumstances can include homelessness, domestic violence, drug and alcohol dependency, mental health challenges, and/or language and numeracy difficulty. This can mean they are unable to identify ways to improve their education and work prospects, and are discouraged from seeking, or unable to seek, support.

The risk of compliance action has proved to be effective in ensuring participants engage with providers delivering ParentsNext and similar programs, and are able to benefit from the services that they offer (including support to address the barriers to employment and education identified above). Linking participation requirements to the continued receipt of income support payments also acts as a re-engagement mechanism to ensure participants continue to actively participate and are focussing on the long-term outcomes for themselves and their children.

As noted above, ParentsNext was first trialled in 10 locations across Australia from April 2016. ParentsNext demonstrated positive outcomes for parents during the trial with the ParentsNext Evaluation Report indicating that participation in the trial program improved a parent's attitude to work, confidence, self-esteem and wellbeing, as well as chances of engagement in further education and employment.

ParentsNext was rolled-out nationally on 1 July 2018 and has continued to achieve positive outcomes for parents. The majority of participants consider it to be an effective program.

Between 1 July 2018 and 31 December 2020, over 150,000 parents have received assistance through the program. This includes 65,500 parents who have commenced education and over 34,000 parents who have commenced employment. Over 4,500 parents have exited the program as a result of finding stable work.

*Limitation is reasonable, necessary and proportionate*

Any limitations there may be to the right to social security and the right to an adequate standard of living, due to imposing requirements directed at overcoming barriers to employment, are reasonable and necessary in view of the evidence outlined above. The limitations are also proportionate for the reasons discussed below.

A person who falls within the Compulsory Participant class is required to attend quarterly appointments with ParentsNext providers, agree to a Participation Plan containing a compulsory activity – unless the most suitable activity can only be voluntary e.g. medical treatment – and participate in that activity. This is much less than standard participation requirements for those serviced by jobactive employment service providers, which usually include more regular appointments, monthly job search requirements, and more intensive activities with minimum hourly requirements.

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A ParentsNext provider is required to work actively with a person to understand their specific needs, the barriers to employment and education that they face, and their family circumstances in determining an appropriate compulsory activity. In agreeing the Participation Plan, the person agrees that the compulsory activity is appropriate and undertakes to complete the activity.

Activities may include, for example, updating existing skills or gaining recognition of prior skills; training or further study (particularly Year 12 or Certificate III qualifications for parents who have not completed the final year of secondary school); referrals to local services, literacy and numeracy courses; or referrals to services to address non-vocational barriers to employment like confidence building, health care or counselling.

Participation requirements must take account of the person's capacity to comply with the requirements and of their needs – section 501A(6) of the Act. In having regard to a person's capacity to comply, a range of circumstances must be taken account of, including circumstances relating to their health, skills, education, local labour market, family and caring responsibilities, and any other circumstances which the person considers to be relevant, or which the Secretary of the Department of Education, Skills and Employment or a delegate considers to be relevant – section 501A(7) of the Act.

In relation to the compliance action that may (or will) be taken if a person fails to comply with their participation requirements, all participants are given two business days to resolve any non-compliance to facilitate their re-engagement with the program, if required, before a payment suspension is applied. Should a participant's parenting payment be suspended, the payment suspension is lifted once the participant re-engages.

Should a payment suspension result in a participant's payment being temporarily withheld, the participant will still receive the full amount of payment (including back payment) once they have re-engaged in the program.

A financial penalty or payment cancellation will not occur if the person has a reasonable excuse for the failure. A reasonable excuse includes, for example, where the person is suffering from a serious illness, has unforeseen family or caring responsibilities, or is experiencing family or domestic violence.

Participants are unlikely to incur financial penalties, as penalties will only be applied if there are repeated instances of non-compliance. Providers work closely with participants, who can have their participation requirements adjusted if they are having difficulty meeting them – for example appointment times can be changed or participants can be referred to different activities.

Also, not all aspects of the TCF apply to ParentsNext participants. The *Social Security (Administration) Act 1999* expressly provides that participants cannot be subject to compliance action for work refusal failures (refusing an offer of suitable employment without a reasonable excuse) or for unemployment failures (becoming unemployed due to a voluntary act which was not reasonable, or due to misconduct as an employee) – see paragraphs 42AD(aa) and 42AE(1)(aa) respectively. Further, participants will also be able to seek a review of any decision to apply a financial penalty or to cancel their payment. Finally,

notwithstanding non-compliance, Family Tax Benefits payable to the person remain unaffected.

ParentsNext providers make participants aware of the risks of not meeting participation requirements and work actively to support them to do so. Participants also receive notifications, including SMS and email reminders, about the requirements they must meet. Once commenced in the program, participants usually see its benefits very quickly and choose to actively engage for the benefit of themselves and their families.

## **2. Right to work**

Article 2 of ICESCR requires that each State Party undertakes to take steps to the maximum of its available resources, especially economic and technical, to realise the rights recognised in the Covenant, particularly through legislative measures. Article 6 of ICESCR recognises the right of every person to the opportunity to gain a living by work which they freely choose or accept, and Article 11 of CEDAW provides for equality of men and women in employment, including the right to free choice of profession and employment.

The Instrument promotes the right to work by increasing the opportunities of those within the specified class to gain employment. Participation in the ParentsNext program will assist those persons to identify their education and employment goals and to achieve these goals by participating in activities and connecting to local support services. Participants will not be required to look for work, but will be supported to increase their education, and improve their work readiness, broader networks, and greater self-confidence to better enable them to work when their youngest child starts school or earlier should they choose to do so.

## **3. Right to education**

Article 13 of ICESCR recognises the right of every person to education. Relevantly, it recognises that secondary education, including technical and vocational secondary education, should be made generally available and accessible to all. Article 28 of the CRC recognises the right of children to education and Article 10 of CEDAW provides for equality in access to education for women and for the organisation of programs for girls and women who have left school prematurely.

The Instrument promotes the right to education by providing support for parents, including young parents, to continue their education. Participants, particularly early school leavers will receive support to identify education or training that will assist them to attain a Year 12 (or Certificate III equivalent qualification). The program will support all participants to identify and work towards their education goals. As noted above, ParentsNext providers may assist participants through the use of the Participation Fund to achieve their education and employment goals. The program can also assist participants to address literacy and numeracy difficulties, where needed.

## **4. Right to equality and non-discrimination**

The right to equality and non-discrimination is protected by Articles 2, 16 and 26 of the ICCPR and Article 2 of the CRC. This is a fundamental human right that is essential to the



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protection and respect of all human rights. It provides that every person is entitled to enjoy their rights without discrimination of any kind on the basis of a number of prohibited grounds, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

The United Nations Human Rights Committee (HRC) which monitors implementation of the ICCPR by its State parties defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.<sup>2</sup> The HRC has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute. Views of the Committee are influential but not binding on States Parties to the ICCPR.

Article 5 of the CERD reinforces the general prohibition in the ICCPR and recognises the right of everyone to equality before the law, without distinction as to race, colour, or national or ethnic origin.

Articles 2, 3, 4 and 15 of CEDAW further describe the content of the right to equality and non-discrimination as it relates to women, outlining the specific elements that States Parties are required to take into account to ensure relevant rights are maintained for women.

The Instrument, by specifying a particular group of parents who comprise mostly young people, early school leavers, and females, engages the right to equality and non-discrimination. The ParentsNext program is designed to support participants depending on whether they are in a particular age range and meet other criteria. The identification of participants based on their age is direct discrimination on the basis of a personal attribute and therefore limits the right to equality and non-discrimination.

ParentsNext could also be considered indirectly discriminatory on the basis of sex, as the vast majority of those affected by the Instrument will be female, with 95 per cent of current or previous participants being female. Any indirect discrimination against females may limit the right to equality and non-discrimination.

In contrast to the 2018 Instrument, the Instrument does not make reference to Indigenous people or to any other racial group.

*Permissible limitation - legitimate objective*

It is appropriate to restrict the eligibility for ParentsNext to particular groups of parents as the program is designed to provide those groups with support to address the specific disadvantage they face.

Since the national roll out on 1 July 2018, ParentsNext has continued to achieve positive outcomes for Australian parents. As noted above, between 1 July 2018 and

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<sup>2</sup> See CCPR, *General comment No. 18: Non discrimination*, 10 November 1989, available at: <https://www.refworld.org/docid/453883fa8.html> [accessed 21 December 2020]

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31 December 2020, over 150,000 parents have received assistance through the program. This includes 65,500 parents who have commenced education and over 34,000 parents who have commenced employment. Over 4,500 parents have exited the program as a result of finding stable work.

The Instrument targets those groups which are most at risk of experiencing sustained hardship without appropriate assistance. That is, historically, 95 per cent of ParentsNext participants have been women, many of whom are young Australians, who have not completed their final year of school. The Instrument aims to improve the ability of particular groups to access education (such as a year 12 certificate), and community services, to improve their work readiness and return to, or enter the work force once their youngest child starts school. By doing so, the Instrument aims to reduce intergenerational poverty and welfare dependence.

*Rational connection between the limitation and the objective*

If parents on income support are assisted to gain employment-related skills and education earlier, as well as using the time when their children are young to stabilise their family life, they are more likely to gain ongoing employment and less likely to need to rely on income support on a continuing basis. ParentsNext will assist more parents to identify their barriers to education and employment, to develop a plan to address those barriers and to participate in activities to meet their education and employment goals, thereby increasing their capacity to work in the future.

*Limitation is reasonable, necessary and proportionate*

The identification of specific groups of parents, including by reference to their age, their children's age, and indirectly, their sex, is reasonable, necessary and sufficiently precise to assist those parents to improve their family wellbeing, educational attainment and employment prospects and to begin to disrupt the intergenerational disadvantage from which many suffer. It also recognises that the right to education and the right to work are essential for realising other human rights.

**5. Rights of the Child**

The obligation to consider the best interests of the child as a primary consideration is contained in article 3 of the CRC. The objective of ParentsNext is to encourage and assist parents of young children in receipt of parenting payment to progress towards their education and employment goals. The attainment of educational qualifications and work-specific skills will assist parents to find employment in the future, therefore helping to disrupt intergenerational disadvantage and reducing the risk of long-term welfare dependency for participating parents and their children.

The rights of children are given primary importance in ParentsNext. A ParentsNext provider is required to work actively with participants to understand their specific needs, the barriers to employment and education that they face, and their family circumstances. Participation in ParentsNext will connect parents, and by proxy their children, with local services and community organisations which will assist and support them to meet their identified needs.

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Depending on a person's circumstances, support provided to the person may include assistance with accessing appropriate childcare or other services.

Finally, notwithstanding non-compliance of a participant with participation requirements, Family Tax Benefits payable to that person will remain unaffected.

***Conclusion***

The Disallowable Legislative Instrument is compatible with human rights. It promotes the right to work, the right to education, and the rights of the child. To the extent that it limits rights to social security and an adequate standard of living, or the right to equality and non-discrimination, those limitations are for a legitimate objective, have a rational connection to achieving the objective, and are reasonable, necessary and proportionate to achieve the objective. That objective is to help parents plan and prepare for employment before their youngest child starts school by assisting them to identify their education and employment goals and to attain these goals by participating in activities and connecting them to relevant local services.

## **Statement of Compatibility with Human Rights**

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

### ***Social Security (Declared Program Participant) Determination 2018***

This 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 Determination**

The *Social Security (Declared Program Participant) Determination 2018* (the Determination) is made under subsection 28C(1) of the *Social Security Act 1991* (the Act). Subsection 28C(1) provides that the Secretary may make a determination for the purposes of the definition of declared program participant in subsection 23(1) of the Act. The determination may provide for the operation of the social security law in relation to a person who becomes, or ceases to be, a declared program participant at a particular time including in relation to things that happened before that time (subsection 28C(2)).

Various provisions of the social security legislation, as amended by the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (the Welfare Reform Act), are expressed to apply, or not to apply, to persons in receipt of certain income support payments who are declared program participants.

In particular, from 1 July 2018, people claiming or receiving participation payments who are declared program participants will remain subject to the current compliance framework under Division 3A of Part 3 of the *Social Security (Administration) Act 1999* (the Administration Act) while participation payment claimants or recipients who are not declared program participants will be subject to the new targeted compliance framework under Division 3AA of Part 3 of the Administration Act.

Further, from 1 July 2018, certain income support recipients who are not declared program participants will no longer be able to obtain particular exemptions from their activity test or participation requirements in relation to circumstances wholly or predominately attributable to drug or alcohol misuse or dependency (including abuse of drugs or alcohol). However, declared program participants will not be affected by this tightening of exemptions.

The Determination provides that participants in the Community Development Programme (CDP) are 'declared program participants' for the purposes of the social security legislation, and provides for the operation of the compliance provisions under Divisions 3A and 3AA of Part 3 of the Administration Act for people who become or cease to be CDP participants.

Where a person's payment is suspended because they have committed a failure under Divisions 3A or 3AA of Part 3 of the Administration Act, and they subsequently move into or out of CDP, their suspension will end and they will be taken to have met any reconnection or further reconnection requirements. This is because a job seeker is usually required to re-engage with their activity or provider when given a reconnection requirement. Where a job seeker moves between employment services, this is no longer appropriate, and so their suspension will end.

However, if a person is subject to a serious failure period or an unemployment non-payment period under Division 3A before moving out of CDP, they will be treated as though they remain a declared program participant until that period is served or 'waived' (that is, ended early by the Secretary under a determination). They will also remain subject to deductions of penalty amounts determined before they moved out of CDP. Affected individuals will retain access to waiver and payment pending review provisions, as if they had not moved, and will maintain rights of review under social security law. Likewise, if a person who is not in CDP is subject to a payment reduction, payment cancellation, unemployment preclusion period, or post cancellation non-payment period under Division 3AA, and moves into CDP, the reduction, cancellation, preclusion period or non-payment period will continue as if they had not moved and they will maintain rights of review under social security law as if they had not moved.

These provisions ensure that where a person has committed a failure without reasonable excuse, and moves between CDP and other employment services, they are treated the same as recipients who do not move, or move but remain in the same employment service. The provisions also ensure that there is no incentive to move in order to avoid a penalty.

The policy intent behind declaring CDP participants as 'declared program participants' is that income support claimants or recipients participating in CDP should remain subject to existing arrangements, despite the passage of the Welfare Reform Act, given the unique labour market and reduced access to services in the regions in which CDP operates. The Government is currently reviewing the operation of CDP. Until this review is finalised, it is appropriate for existing arrangements to continue to apply to CDP participants.

For clarity, as Disability Support Pension is not a participation payment, people receiving Disability Support Pension are not subject to the compliance frameworks set out in Divisions 3A and 3AA of Part 3 of the Administration Act. These recipients, therefore, are not affected by the arrangements in the Determination relating to movement between compliance frameworks.

### **Human rights implications**

The Determination engages the following human rights:

- the rights of equality and non-discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the

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Convention on the Rights of the Child (CRC), and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);

- the right to social security in Article 9 of the ICESCR, and the right of the child to benefit from social security in Article 26 of the CRC; and
- the right to an adequate standard of living in Article 11 of the ICESCR.

**The rights to equality and non-discrimination**

Article 2(2) of the ICESCR, Article 26 of the ICCPR and Article 2 of the CRC recognise the right to equality and non-discrimination on a range of grounds including of race, sex, colour, language, national or social origin or ‘other status’. Place of residence within a country is considered to fall within ‘other status’ for the purposes of these articles.

Article 5 of the CERD reinforces this general prohibition and provides that States ‘undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law’.

This Determination engages the rights to equality and non-discrimination because declared program participants will remain subject to the current compliance framework under Division 3A of Administration Act, while participation payment claimants or recipients who are not declared program participants will be subject to the new targeted compliance framework under Division 3AA of Part 3 of the Administration Act. Another effect of this Determination is that job seekers in the CDP will not be affected by the removal of exemptions wholly or predominantly due to drug or alcohol dependence.

This Determination, therefore, results in differential treatment for people in different locations and in certain employment services programs because CDP supports job seekers in remote Australia. In addition, approximately 83 per cent of job seekers in the CDP identify as Aboriginal and Torres Strait Islander people. On this basis, there may also be differential treatment on the basis of race.

However, the rights to equality and non-discrimination are subject to the international human rights law principle of ‘legitimate differential treatment’. This principle allows particular groups of people to be treated differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

*Legitimate differential treatment*

The CDP provides employment services to job seekers in remote Australia who face unique obstacles such as fewer job opportunities, higher levels of dependence on welfare, lower levels of literacy and numeracy, and persistent and entrenched disadvantage. These factors and the lack of a labour market in remote Australia when compared with the opportunities for employment available in other parts of Australia, mean it is appropriate to further consider the most appropriate and effective arrangements for CDP participants.

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As the Government is currently reviewing the operation of the CDP generally, it is appropriate to consider the compliance framework (including related participation requirements and exemptions, such exemptions wholly or predominantly due to drug or alcohol dependence), that should apply to CDP participants as part of that broader review. In the interim, the current compliance framework continues to apply to CDP participants.

The Determination is therefore reasonable, necessary and proportionate to achieve the legitimate objective of applying a compliance framework that the Secretary considers is most appropriate for persons in certain employment services programs.

**The right to social security and the right to an adequate standard of living**

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11.

Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions.

Article 4 of the ICESCR provides that countries may only subject economic, social and cultural rights to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. The Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitation are available; and where such limitations are permitted, they should be of limited duration and subject to review.

The Determination provides for what happens in respect of compliance action for social security participation payment recipients that was taken when a person was, or was not, a declared program participant, and what happens when the person then becomes, or ceases to be, a declared program participant. The Determination, therefore, engages the right to social security and the right to an adequate standard of living.

*No limitation on a person’s right to social security or an adequate standard of living*

For a person who has their payment suspended because they committed a failure under either Division 3A or Division 3AA of Part 3 of the Administration Act, the effect of this Determination is that their suspension ends when they change status and move between

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compliance frameworks. This does not limit the rights to social security or an adequate standard of living. Rather, this part of the Determination may promote these rights in providing access to a participation payment when previously there was no such access for a payment suspension period.

Where more serious compliance action was taken under one compliance framework (either Division 3A or 3AA of Part 3 of the Administration Act) and a person subsequently becomes or ceases to be a declared program participant by moving employment services, the effect of the Determination is to continue that action:

- for a person who receives a serious failure penalty or is subject to an unemployment non-payment period under Division 3A before moving out of CDP and ceasing to be a declared program participant, the penalty or non-payment period would continue as if they had not moved. In addition, such a person retains access to waiver and payment pending review provisions, as if they had not moved; and
- for a person who is not in CDP and is subject to a payment reduction or cancellation, an unemployment preclusion period, or post cancellation non-payment period under Division 3AA and moves into CDP, this penalty or non-payment period continues to apply as if the person had not moved.

The effect of the Determination is that no new obligations or new requirements are imposed on a person. While the continuance of certain compliance action engages the rights to social security and an adequate standard of living, those rights are not limited by this Determination.

Further, persons who move into CDP or out of CDP will maintain their rights of review under social security law.

**Conclusion**

This Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.