

Social Security (Administration) (Enhanced Income Management Regime— State Referrals) Determination 2023

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security (Administration) Act 1999

Purpose

The Social Security (Administration) (Enhanced Income Management Regime—State Referrals) Determination 2023 (the Determination) is made for the purpose of enhanced income management (enhanced IM) in Part 3AA of the *Social Security (Administration) Act 1999* (the Act).

The effect of the Determination is to enable the operation of the child protection and supporting people at risk (SPaR) measures under the enhanced IM regime (sections 123SCA and 123SCJ respectively). These measures are considered ‘State Referrals’ as they operate on a basis of a decision made by a State or Territory authority or officer (that is a child protection officer or officer of a recognised State/Territory authority) to refer an individual onto the enhanced IM regime after an assessment of their particular circumstances.

The Determination enables the child protection and SPaR measures to operate by specifying locations in which eligible individuals must reside (for child protection) and the authorities that can refer individuals (for State/Territory referrals) for purposes of Part 3AA of the Act. Once a declared child protection State or Territory or a recognised State/Territory authority is determined, authorised officers or employees will be able to give the Secretary a notice requiring a person to be subject to the enhanced IM regime under the appropriate measure. If the criteria under the relevant provisions are satisfied, a portion of the person’s welfare payments will be directed to their priority needs, such as food, clothing and shelter, of the person and their dependents. The Determination also prescribes the percentages of a person’s welfare payments that will be qualified under the child protection measure.

Background

The enhanced IM regime in Part 3AA was inserted into the Act by the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* (CDC Repeal Act) and began operating from 6 March 2023.

The purpose of the enhanced IM regime is to ensure that welfare payments are not spent on products and services that contribute to social harm and, in conjunction with a support services program, to provide budgeting support for participants.

Welfare recipients who are subject to the enhanced IM regime will have access to a BasicsCard bank account with an associated debit card (known as a SmartCard) that operates like a standard Visa Debit card (except that cash cannot be withdrawn). A SmartCard can be used to make purchases at most merchants who can undertake eftpos transactions unless those merchants primarily offer excluded goods or excluded services. People subject to the enhanced IM regime are also able to access a range of mainstream banking functions including 'Tap and Go' payments, online shopping and BPAY. This means that the enhanced IM regime provides superior technology to that available under the income management (IM) regime in Part 3B of the Act while operating under a similar legislative framework.

The *Social Security (Administration) Amendment (Income Management Reform) Act 2023* (IM Reform Act) will expand access to enhanced IM by including all of the same measures that are in place for the IM regime in Part 3B of the Act. This allows people subject to the IM regime under Part 3B the choice to move to enhanced IM as well as allowing new entrants that meet the eligibility criteria to enter enhanced IM.

Part 3B of the Act has been operating in some form for more than 15 years, and over that time a large number of legislative instruments have been made to facilitate its operation. Similarly, Part 3AA requires legislative instruments to operate. Many of the instruments necessary to operationalise aspects of enhanced IM are equivalent to existing IM instruments. Where an instrument is required under the enhanced IM regime, the content of the equivalent IM instruments has been adapted and consolidated into a select number of enhanced IM instruments rather than replicating each instrument individually.

This Determination deals with State referrals. It reflects the content of 2 instruments made under Part 3B of the Act into a single instrument specifying locations for the purpose of the child protection and SPaR measures under enhanced IM regime. General information about each of these measures and their relationship to the Determination is provided below.

Child protection

Eligibility criteria for the child protection measure is outlined in section 123SCA of the Act. A person will be subject to the enhanced IM regime if, among other things:

- a child protection officer of a State or Territory has lawfully given the Secretary a notice requiring that the person be subject to the enhanced IM regime under section 123SCA and, at the test time, the notice remain in force; and
- at the test time, the State or Territory is a declared child protection State or Territory.

The term 'child protection officer' is defined in section 123SB of the Act as an officer or employee of a State or Territory who has functions, powers or duties in relation to the care, protection or welfare of children.

The term ‘declared child protection State or Territory’ has the meaning given by subsection 123SCA(6) of the Act. Subsection 123SCA(6) provides that a Minister may, by legislative instrument, determine that a specified State or Territory is a declared child protection State or Territory for the purposes of Part 3AA of the Act.

This Determination enables the child protection measure in section 123SCA to operate by specifying locations in which an individual must reside to be eligible. It also enacts the Minister’s powers to specify the percentage of an individual’s income support payment that is qualified for the purpose of 123SLA(1)(a)(ii) of the Act.

Referrals by recognised State/Territory authority

Eligibility criteria for the SPaR measure is outlined in section 123SCJ of the Act. A person will be subject to the enhanced IM regime under 123SCJ if, among other things:

- an officer or employee of a State/Territory authority has lawfully given the Secretary a written notice requiring that the person be subject to the enhanced IM regime under section 123SCJ and, at the test time, the notice remain in force; and
- at the test time, the State or Territory authority is a recognised State/Territory authority.

The term ‘recognised State/Territory authority’ has the meaning given by subsection 123SCK(1) of the Act. Subsection 123SCK(1) empowers the Minister to, by legislative instrument, determine that any of the following is a recognised State/Territory authority for the purposes of Part 3AA of the Act:

- a specified department, or a specified part of a department, of a State or Territory; or
- a specified body of a State or Territory; or
- a specified agency of a State or Territory.

The Determination specifies the locations in which individuals must reside to be eligible for enhanced IM under the SPaR measure. Before making such a determination, the Minister must be satisfied that officers or employees of the authority have functions, powers or duties in relation to the care, protection, welfare or safety of adults, children or families (subsection 123SCK(2)) and that there is an appropriate review process for reviewing the decision by an officer or employee of the authority to issue a notice requiring the person to be subject to the enhanced IM regime (subsections 123SCK(3) and (4)).

Commencement

The whole of this instrument will commence on the later of:

- the day after the Determination is registered on the Federal Register of Legislation; or

- the day on which the *Social Security (Administration) Amendment (Income Management Reform) Act 2023* commences.

Disallowable instrument

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*, and is subject to disallowance by either House of Parliament.

Interaction with protections in the social security law

As the Determination contains no decision-making powers, the internal and external review provisions in the social security law will not be expressly triggered by the Determination.

Information collected in relation to a person who is subject to the enhanced IM regime will be ‘protected information’ where it is obtained for the purposes of the social security law. This will ensure that each person’s information is obtained, recorded, used and disclosed consistently with the confidentiality provisions in Division 3 of Part 5 of the Act. There are additional provisions permitting sharing of information relating to the child protection and SPaR measures, which are included to ensure the Secretary and relevant State / Territory authorities or agencies are able to share information where that information sharing is relevant to the operation of the enhanced IM regime.

Consultation

Extensive consultation has been undertaken with affected communities in relation to abolishing the Cashless Debit Card program and reforming income management. This included the introduction and passage of the CDC Repeal Act and the IM Reform Act.

Consultation will be ongoing with stakeholders, merchants, community members and participants as the future of income management is refined by the Government.

Impact Analysis

An Impact Analysis (IA) was prepared and is titled *Reforming the Cashless Debit Card and Income Management*. The IA is available on the website of the Department of the Prime Minister and Cabinet at <https://oia.pmc.gov.au/published-impact-analyses-and-reports/abolish-cashless-debit-card>. The executive summary from the IA is included at the end of this explanatory statement.

Explanation of the provisions

Part 1—Preliminary

Section 1 provides that the name of the Determination is the *Social Security (Administration) (Enhanced Income Management Regime—State Referrals) Determination 2023*.

Section 2 provides that the Determination commences on the later of:

- the day after the Determination is registered on the Federal Register of Legislation; and
- the day on which the *Social Security (Administration) Amendment (Income Management Reform) Act 2023* commences.

Section 3 provides that the authority for making the Determination is subsections 123SCA(7), 123SCK(1) and 123SLA(2) of the Act.

Section 4 outlines definitions for the purpose of the Determination.

In this instrument:

Act means the *Social Security (Administration) Act 1999*.

Part 2—Declared child protection State or Territory

Section 5 provides that for the purposes of Part 3AA of the Act, the following are determined to be a declared child protection State or Territory:

- New South Wales
- Victoria
- Queensland
- Western Australia
- South Australia
- the Northern Territory.

Child protection officers in the above States and Territory are able to provide notices to the Secretary requiring that a welfare recipient be placed on enhanced IM (providing they also meet the other criteria set out in section 123SCA of the Act).

Part 3—Recognised State/Territory authority

Section 6 provides that for the purposes of Part 3AA of the Act, the Department of Health of the Northern Territory is a recognised State/Territory.

The Department of Health of the Northern Territory administers the *Alcohol Harm Reduction Act 2017* (NT), which establishes a framework for making banned drinker orders (BDOs), to enable adults to be registered on the banned drinker register (BDR).

The BDR operates across the Northern Territory as a harm reduction tool. The BDR identifies people who are banned from purchasing takeaway alcohol and stops their

purchase. The objective of the BDR is to reduce the harm to individuals, families and the wider community caused by alcohol misuse, and to reduce anti-social behaviour.

For further information on the BDR see: <https://health.nt.gov.au/professionals/alcohol-and-other-drugs/alcohol/banned-drinker-register-bdr>.

The BDR Registrar will be located within the Department of Health of the Northern Territory and will have responsibility for issuing notices requiring a person to be subject to enhanced IM under paragraph 123SCK(1) of the Act.

Part 4—Qualified portion

Section 7 provides for the percentage of a person’s welfare payment that is the ‘qualified portion’ of an instalment of a category B welfare payment that is payable to a person subject to the enhanced IM regime under the child protection measure.

Under subsection 123SLA(2) of the Act, the Minister may, by legislative instrument, determine a percentage that is the qualified portion of a payment received by instalment for the purposes of subparagraph 123SLA(1)(a)(ii). This allows flexibility to respond to the needs of eligible groups.

The Determination provides that the qualified portion of a category B welfare payment (where those payments are made by regular instalments) is 70%. This is consistent with the percentage that is deducted from individuals subject to the child protection measure under Part 3B of the Act.

Statement of Compatibility with Human Rights

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

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This 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 *Social Security (Administration) (Enhanced Income Management Regime—State Referrals) Determination 2023* (the Determination) operationalises certain aspects of the enhanced Income Management (IM) regime established by Part 3AA of the *Social Security (Administration) Act 1999* (the Act). The Determination is required to support amendments that will be made by the *Social Security (Administration) Amendment (Income Management Reform) Act 2023* (the Act), which expands access to the enhanced IM regime.

This Determination enables the operation of the Child Protection and Supporting People at Risk (SPaR) measures under the enhanced IM regime (sections 123SCA and 123SCB of the Act respectively). These measures are considered 'State Referrals' as they operate on a basis of a decision made by a State or Territory authority or officer (that is a child protection officer or recognised State/Territory authority) to refer an individual onto the enhanced IM regime after an assessment of their particular circumstances.

The Determination enables the child protection and SPaR measures to operate by specifying locations in which eligible individuals must reside, and the State and Territory authorities that can give a notice to the Secretary requiring that an individual be placed on enhanced IM. The Determination also prescribes the percentages of a person's welfare payments that will be qualified under the Child Protection measure.

Objectives

The objective of this Determination is to provide mechanism to commence and operate enhanced IM in specified areas under the Child Protection (123SCA) and State and Territory Referral (123SCB) measures and provide participants with access to modern banking technology. This Determination responds to feedback from communities and the Senate Standing Committee on Community Affairs inquiry into the *Social Services (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* that the technology supporting the Income Management regime under Part 3B of the Act is insufficient to meet the needs of communities.

Human rights implications

The Determination engages the following rights and freedoms:

- the rights of equality and non-discrimination
- the right to self-determination
- the right to an adequate standard of living, including food, water and housing
- the right to social security

The right to equality and non-discrimination

The rights of equality and non-discrimination are provided for in a number of the 7 core international human rights treaties to which Australia is a party, most relevantly the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (the CERD). In particular, article 5 of the CERD requires parties *‘to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law’*, notably in the enjoyment of *‘the right to...social security and social services’* (article 5(e)(iv)).

This Determination does not directly limit an individual’s right to equality and non-discrimination. It ensures that individuals who choose to transfer to the enhanced IM regime, and those that become subject to it by virtue of their particular circumstances, are not identified based on race, colour, nationality, sex or gender. Rather, all individuals who become subject to the enhanced IM regime under this Determination do so on the basis of their individual circumstances.

This Determination does specify some of the locations in which the enhanced IM program will operate and, as has been observed with the abolished Cashless Debit Card program and the IM regime, individuals who become subject to the enhanced IM regime may include a high proportion of First Nations people. Extensive consultation has occurred with First Nations people and communities in the establishment of the enhanced IM program, including on the locations in which it operates. This Determination does not expand the footprint of the IM regime, rather responds to reported needs of communities by provision of enhanced banking technology. Any impact on the right to equality and non-discrimination is considered to be reasonable and proportionate.

Right to self determination

Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that *‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’*.

This Determination does not limit or interfere with the right to self-determination or a person’s right to freely pursue their economic, social or cultural development. Individuals subject to enhanced IM under this Determination can continue to spend 30 per cent of their welfare payments on any goods or services when and how they choose while, ensuring that the remainder of the welfare payments are reserved for living expenses such as rent, food and utilities.

Whilst this does limit people's ability to freely dispose of their resources it does not impact on their right to freely pursue their economic, social or cultural development. Any limitation on the right to self-determination is minimal and is considered to be reasonable, necessary and appropriate to reduce the adverse behaviours and social harm present within communities.

The right to an adequate standard of living, including food, water and housing

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

This Determination does not limit the right to an adequate standard of living. Persons subject to enhanced IM in the locations or measures enabled by this determination will have 70% of their income support payments reserved to make any purchases that are not excluded goods, excluded services or cash-like products that can be used to purchase such goods and services. Excluded goods include alcohol, gambling products, pornography and tobacco and excluded services include gambling. By stopping individuals from spending a significant portion of their welfare payment to purchase these goods and services, the enhanced IM regime ensures individuals will have sufficient funds available to meet their basic needs such as rent, food and household bills. This will in turn promote improvement of living conditions, while also enabling individuals to spend the remaining portion of the welfare payment in an unrestricted manner, including participation in a cash economy if needed.

The right to social security

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

The right to social security is limited only to the extent that individuals subject to the enhanced IM program under the Child Protection and State and Territory Referral measures may not use a portion of their payment to purchase excluded goods or excluded services. This Determination does not affect the eligibility of a person to receive welfare payments, nor reduce the amount of a person's welfare payments. It simply ensures that individuals subject to enhanced IM under this measure have a portion of their welfare payments available to meet their basic needs, such as rent, food, and household bills. The remaining portion of the person's welfare payment can be used at their discretion. Therefore, the parameters made by this Determination do not limit the right to social security.

Conclusion

This Determination is compatible with human rights. It protect human rights by ensuring that welfare payments are spent in the best interests of welfare payment recipients and their dependents. To the extent this Determination may limit human

rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of enhanced IM.

**[Circulated by the authority of the Minister for Social Services,
the Hon Amanda Rishworth MP]**

Impact Analysis Executive Summary

Currently, there are 2 programs in operation that restrict what people can purchase with their welfare payments. These programs are IM which was established in 2007 and the Cashless Debit Card (CDC) program which was established in 2016. These programs run concurrently across several locations in Australia. Both CDC and IM have an objective to restrict the purchase of items such as alcohol and gambling products so participants prioritise expenditure on essential expenses such as rent, food and utilities.

Since the CDC program inception, the policy landscape has changed considerably in Australia. Frameworks established between the Commonwealth and the State and Territory governments have seen the development of new national and community level initiatives to address the effects of drug and alcohol misuse and reduce domestic, family and sexual violence. The Commonwealth and State governments have also entered into a National Partnership agreement with the Coalition of Peaks on Closing the Gap.

Both programs have undergone several evaluations to monitor and evaluate the programs' successes and shortfalls. These evaluations have established that the CDC program has produced mixed results. The recent audit report of the *Cashless Debit Card by the Australian National Audit Office (ANAO)* (published 2022) highlights a lack of available data to confirm that the CDC program is achieving its outcomes and little evidence to support the continuation of the program.

The Government made an election commitment to abolish the CDC program and consult with communities about alternative options to support individuals and communities including options for voluntary IM.

In supporting the Government's implementation of this commitment, the Department of Social Services (the Department) has considered 2 options regarding the future of welfare quarantining.

The first option, for purpose of comparison, maintains the status quo, and continues a CDC program that has not demonstrated an ability to achieve its policy outcomes and places a regulatory burden on participants, businesses and communities due to geographical location and places barriers in relation to undertaking simple financial transactions. The CDC program assumes all people in a particular geography, in receipt of working age income support payments, need restrictions on the types of goods and services that can be purchased with their money.

The **preferred option is Option 2** where the CDC program is abolished and reforms are made to IM to enable a greater level of community decision-making. Transitional arrangements including support services would assist those who choose to leave the programs. Option 2 complements the Government's strategic priority to give people on these programs more choice on how they spend their income support payments. It will also provide greater value for money given the lack of evidence that the programs are meeting their objectives.

Option 2 will see a reduction in the regulatory burden faced by individuals and businesses in affected locations and provide participants with greater freedom to

choose how and where to spend their money and how they manage their finances including decisions on who they bank with. These are freedoms afforded to most Australians and those on the program have limits placed on these choices. The **regulatory save** has been calculated at **\$21.5m over 10 years**.

The Department has undertaken consultation with those in affected locations including targeted Ministerial visits by the Minister for Social Services, the Hon Amanda Rishworth MP (the Minister) and the Assistant Minister for Social Services, the Hon Justine Elliot MP (the Assistant Minister). Senator the Hon Patrick Dodson, Senator the Hon Malarndirri McCarthy, and Ms Marion Scrymgour MP have also participated in consultations. This has included consulting with CDC participants and other local stakeholders about the cessation of the CDC program. Consultations captured a wide range of stakeholders and captured a diversity of perspectives, including CDC participants, senior First Nations leaders, Community Reference Groups, service providers, local police, health services and local councils. Engagement with communities will continue as part of the implementation of the reforms.

Consultations involved understanding what the impacts of the CDC program are and how these are impacting individuals and businesses in the affected regions. It also involves seeking their views on what a suitable process for people to transition off the CDC program needs to include and what supports the community feel are required. In addition, in preparation for stage 2 discussions were held regarding what IM could look like.

At all times, the focus of these consultations is to understand the CDC participants' experiences and possible impacts on them and their communities to inform implementation arrangements and understand individual and community support needs.

These early consultations have included key service agencies and First Nations leadership groups. Consistent with the CDC program's evaluations they have stated that the impact of the program has been variable. The preference is the importance of support services to participants and their communities. Further, they have been clear that if the CDC program is removed, these services must endure to support the community and they must be guided by local priorities and led by local leadership.

Transition will be a staged approach with any future evaluation focused on the experience of participants coming off the programs and effectiveness of support services. The Department will consult with affected communities to ensure that the evaluation methodology is fit for purpose. This may include co-designing an evaluation methodology with communities, and identifying measures the communities see as important. It is important to note this information along with any lessons learnt will help develop Government's future evidence based policy.