

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Human Services

Social Security (Administration) Act 1999

Social Security (Administration) (Trial Area) Amendment Determination 2017

Purpose

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

Section 124PG of the Act sets out who will be participants in the debit card trial (the Trial) under Part 3D of the Act. Subsection 124PG(1) of the Act empowers the Minister to determine, by legislative instrument, whether a particular trigger payment is to apply both in respect of a particular class of person and in relation to a particular trial area, or simply in relation to a particular trial area.

The *Social Security (Administration) (Trial Area – Ceduna and Surrounding Region) Determination 2015* (the Ceduna Determination) declares Ceduna and the surrounding region (the Ceduna region) as a trial area from 15 March 2016 with effect for a period of 12 months. The Determination ceases on the date 12 months from its commencement under section 3.

The *Social Security (Administration) (Trial Area – East Kimberley) Determination 2016* (the East Kimberley Determination) declares East Kimberley as a trial area from 26 April 2016 with effect for a period of 12 months. The Determination ceases on the date 12 months from its commencement under section 3.

In accordance with subsection 124PG(1) of the Act, this Amending Determination amends section 3 of the Ceduna Determination and the East Kimberley Determination (the Determinations) to delay the cessation of the Determinations for a period of six months. This will extend the Trial in the Ceduna region until 14 September 2017 and will extend the Trial in East Kimberley until 25 October 2017.

Background

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

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

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

While the early indications of the Trial's impact are positive, the Trial's extension will allow the Government to make fully informed decisions about the future of welfare conditionality in Australia.

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

Effect of determination

The Amendment Determination is a legislative instrument.

Commencement

The Amendment Determination commences on the day it is registered on the Federal Register of Legislation.

Consultation

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

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

Consultations were undertaken to better understand local needs and gauge interest in the Trial. Advice was also sought from community members about the identification of local and cultural protocols and preferred entry points for community discussion. Topics of discussion included:

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

- differences between the Trial and income management

This consultation process provided Government with valuable feedback on the issues faced by the community.

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

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

Regulation Impact Statement (RIS)

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

Explanation of the provisions

Section 1 states the name of the Amendment Determination.

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

Section 3 provides that Schedule 1 amends the Ceduna Determination, and that Schedule 2 amends the East Kimberley Determination.

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

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

Item [1] omits the phrase “This Determination ceases on 14 March 2017” and substitutes “This Determination ceases on 14 September 2017”. This amendment is necessary to extend the duration of the Trial in the Ceduna region for a period of six months.

Schedule 2 to the Amendment Determination sets out the amendment to the East Kimberley Determination.

Item [1] omits the phrase “This Determination ceases on 25 April 2017” and substitutes “This Determination ceases on 25 October 2017. This amendment is necessary to extend the duration of the Trial in East Kimberley for a period of six months.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Social Security (Administration) (Trial Area) Amendment Determination 2017

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

Overview of the Legislative Instrument

The Cashless Debit Card Trial (the Trial) established by Part 3D of the Act tests the concept of cashless welfare arrangements by disbursing a percentage of particular welfare payments to a welfare restricted bank account, accessed by a debit card which does not allow the purchase of alcohol or gambling products, or cash withdrawals.

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

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

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

Some welfare recipients are subject to income management under Part 3B of the Act. Persons whose usual place of residence is in East Kimberley, Ceduna or the surrounding region may be subject to income management under the child protection measure of income management (section 123UC of the Act). Such persons will not

be trial participants while they remain subject to this measure of income management.

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

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

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

Officers will consider making this determination once they are made aware of facts which indicate that being a trial participant may seriously risk a person's mental, physical or emotional wellbeing. Where an officer is satisfied that being a trial participant would seriously risk that person's mental, physical or emotional wellbeing at the beginning of the Trial and makes a determination to this effect, the person will not be a trial participant from the commencement of the Trial while that condition is met. If the serious risk to the person is only brought to an officer's attention during the course of the Trial, the determination may be made, resulting in the person not being a trial participant while that condition is met.

This Amendment Determination extends the Trial in the Kimberley and Ceduna regions for a period of six months.

Human rights implications

Objectives

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

- (a) reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; and
- (b) determine whether such a reduction decreases violence or harm in the Region; and
- (c) determine whether such arrangements are more effective when community bodies are involved; and
- (d) encourage socially responsible behaviour.

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

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

In the Ceduna region, there is also clear evidence of the harm caused by alcohol in the community. The deaths of six Indigenous people related to alcohol abuse and sleeping rough were the subject of a coronial inquest in 2011. In March 2013, the Ceduna Sobering Up Unit had 89.7% occupancy, there were breath alcohol readings of 0.40 which is as high as the machine measures, as well as many readings in the 0.30 to 0.40 range.³

In a submission to the Senate Standing Committee on Community Affairs, the Mayor of Ceduna, Mr Alan Suter, provided an unsigned affidavit stating that in his role, he has participated in various initiatives to assist with the problems caused by alcohol abuse in Ceduna. Mr Suter stated that the most effective attempt 'was a restriction of sales [which] reduced the availability of take away alcohol and helped considerably until it was withdrawn by the licensees.'⁴

As well as alcohol, illegal drug use and gambling are also causing unacceptable levels of harm in the Ceduna region. The Ceduna region has a high level of welfare

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

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

³ Submission to the Senate Standing Committee on Community Affairs inquiry to the *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, District Council of Ceduna, Annexure 1, p. 3.

⁴ Submission to the Senate Standing Committee on Community Affairs inquiry to the *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, District Council of Ceduna, Annexure 3, p. 2.

dependence, and, importantly, there is an openness to participate from within the community.

General Safeguards

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

The second safeguard is the power delegated to community bodies to vary a participant's restricted percentage, subject to the participant's agreement (as provided for under section 124PK of the Act). This provides an ongoing mechanism to ensure flexibility when looking at individual cases.

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

Finally, subsection 124PF(1) of the Act acts as an appropriate and effective safeguard as Parliament must amend the legislation to continue the Trial beyond 2018.

The right to a private life

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

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

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

This Amendment Determination extends the Trial in the East Kimberley and Ceduna regions for a period of six months and in doing so contributes to continuing to limit how, and at what businesses, trial participants can spend their welfare payment. It does this by ensuring that transactions performed at businesses that sell certain products, including alcoholic beverages, gambling or gift cards that could provide access to cash, alcoholic beverages or gambling, are declined. In doing so, this

Amendment Determination engages the right to a private life. This limitation on a person's right to a private life is reasonable and proportionate given the extensive harm caused by alcohol and gambling in the trial areas (as discussed above). The limitations are also directly related to minimising such harms given they are placed on the execution of transactions at businesses that sell those certain products.

The right to social security

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

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

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

The right to an adequate standard of living

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

This Amendment Determination extends the Trial in the East Kimberly and Ceduna regions for a period of six months and in doing so contributes to continuing to limit how, and at what businesses, trial participants can spend their welfare payment. This promotes the right to an adequate standard of living. It means that people are able to use restricted funds to access any goods, with the exception of alcohol and gambling products, with the aim of reducing abuse of these goods and the

associated harm and violence. This Amendment Determination will not have the effect of restricting access to essential needs required to maintain an adequate standard of living. Access to some discretionary cash continues to be available, ensuring that people can still participate in cash economies to purchase items which contribute to an adequate standard of living.

The rights of equality and non-discrimination

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

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

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

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

It is acknowledged that Indigenous Australians comprise a large proportion of trial participants and those who will be affected by this Amendment Determination. However, the trial areas have been chosen as a location based on objective criteria, such as 'high levels of welfare dependence and community harm, as well as the outcomes of comprehensive consultation with prospective communities.'⁵ These criteria clearly relate to the legitimate objectives of this Amendment Determination. In turn, this Amendment Determination affects only those in the trial regions and those who volunteer for the Trial. Therefore, there is a rational connection between any limitation on the right to social security and the objectives of this Amendment Determination.

⁵ *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, Explanatory Memorandum, Statement of Compatibility, p. 3.

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

The right to self-determination

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

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

Conclusion

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