

Social Services Legislation Amendment (Housing Affordability) Bill 2017

Purpose	Seeks to amend the <i>Social Security (Administration) Act 1999</i> , <i>Social Security Act 1999</i> and <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> to incorporate a scheme for automatic deduction of rent and other household payments from social security or family tax benefit payments of tenants in social housing
Portfolio	Social Services
Introduced	House of Representatives, 14 September 2017
Rights	Multiple Rights (see Appendix 2)
Previous report	12 of 2017
Status	Concluded examination

Background

2.159 The committee first reported on the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Social Services by 13 December 2017.¹

2.160 The minister's response to the committee's inquiries was received on 11 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Automatic deduction of rent and housing payments from social security or family tax benefit payments

2.161 The bill seeks to amend the *Social Security (Administration) Act 1999*, *Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to introduce an automatic rent deduction scheme (ARDS). ARDS is a scheme for tenants in social (public or community) housing for the automatic deduction of rent and other household payments from the tenants' social security or family tax benefit payments.

2.162 The bill provides that a social housing lessor (landlord) may request the Secretary deduct an amount from a social housing tenant's 'divertible welfare

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 43-52.

payment² or family tax benefit to satisfy rent, household utilities or both that are payable by the tenant.³ The request can be made by the lessor to the Secretary in the following circumstances:

(a) both of the following apply:

(i) the tenant has an ongoing or outstanding obligation to pay an amount for rent, household utilities, or both, in relation to the tenant's occupancy of premises let by the lessor;

(ii) the tenant's agreement with the lessor for occupancy of the premises, or another written agreement with the lessor, authorises the lessor to make requests under this Part for deductions from divertible welfare payments payable to the tenant; or

(b) the tenant is to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor so as to comply with an order of a court, or of a tribunal or other body that has the power to make orders, and either:

(i) the period for appealing against the order ends without an appeal being made; or

(ii) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of; or

(c) the tenant agrees, in writing, to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor.⁴

2.163 A 'social housing tenant' is defined as a person who is 18 years or older who pays, or is liable to pay, rent in relation to a premises let by a social housing lessor, whether or not the person is named in the agreement with the lessor for occupancy of the premises.⁵ According to the explanatory memorandum, this definition will allow deductions to be sought from the welfare payment of any of the adult occupants of the house.⁶

2 See proposed section 124QB of the *Social Security (Administration) Act 1999*, which defines 'divertible welfare payment' as a social security payment or a payment under the ABSTUDY scheme that is payable to a particular person and is not '(i) an Australian Victim of Terrorism Overseas Payment; or (ii) a Disaster Recovery Allowance; or (iii) a student start-up loan; or (iv) an ABSTUDY student start-up loan under the *Student Assistance Act 1973*; or (v) of a kind determined in an instrument [made by the Minister]'.

3 See proposed section 124QF(3) to the *Social Security (Administration) Act 1999* and proposed section 67D(3) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

4 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

5 Proposed section 124QD to the *Social Security (Administration) Act 1999*.

6 Explanatory Memorandum (EM) p. 7.

Compatibility of the automatic rent deduction scheme with multiple rights

2.164 The initial analysis stated that the ARDS engages and limits several human rights, including:

- the right to social security;
- the right to an adequate standard of living;
- the right to privacy;
- the right to protection of the family; and
- the right to equality and non-discrimination (see **Appendix 2**)

2.165 The ARDS raises similar issues against the right to social security, the right to an adequate standard of living, the right to privacy and the right to protection of the family. Distinct considerations arise in relation to the right to equality and non-discrimination, which are discussed further below.

2.166 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.⁷ Additionally, the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. Under the Convention on the Rights of the Child (CRC), children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.⁸ Additionally, Australia has obligations under Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ICESCR to provide the widest possible protection and assistance to the family.

2.167 The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

2.168 The initial analysis stated that the ARDS may limit these rights, as the scheme limits social housing tenants' freedom and autonomy to make decisions about the way in which their social security payments or family tax benefits are used.

7 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security*, UN Doc E/C.12/GC/19 (2008), [22].

8 Article 26 and Article 27 of the Convention on the Rights of the Child.

The minister acknowledged in the statement of compatibility that the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children are engaged and limited by the ARDS. However, in relation to the right to privacy, the statement of compatibility only addressed the right to privacy insofar as it related to the disclosure of personal information. The statement of compatibility did not otherwise address the right to privacy, including the extent to which the bill may interfere with a person's private and home life through limiting affected persons' ability to choose the way in which their social security or family tax benefits are used.

2.169 For a limitation on a human right to be permissible, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate way to achieve that objective. The statement of compatibility explained that the objective of ARDS is to prevent evictions due to arrears and debt which may force a person, and their children, into homelessness.⁹ The statement of compatibility further stated:

ARDS aims to:

1. reduce the risk that social housing tenants will accumulate rental arrears and other housing debt risking their tenancies,
2. reduce the cost of managing social housing arrears and debt, and
3. better secure the income stream associated with housing assets.¹⁰

2.170 A legitimate objective is one that is necessary to address an area of public and social concern, not one that simply seeks an outcome that is regarded as desirable or convenient. The initial analysis stated that the objective of reducing the risk of rental arrears, evictions and homelessness is capable of constituting a legitimate objective for the purposes of international human rights law.¹¹ However, where a measure may limit a human right, the committee's usual expectation is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective.¹² In this instance, no evidence was provided in the statement of compatibility as to the extent to which rental arrears in the social housing sector is a pressing issue.

9 Statement of Compatibility (SOC) p. 2.

10 SOC p. 1.

11 The UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality and non-discrimination and the right to life: *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, A/HRC/34/51, (2017) [11].

12 Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

2.171 The statement of compatibility noted that, in most jurisdictions, social housing tenants have a condition in their lease to use a voluntary rent deduction scheme to pay housing tenancy costs, and that tenancy tribunals may order defaulting tenants to use the voluntary rent deduction scheme. It stated that under the present scheme tenants may 'bypass their social housing provider and cancel their authorised tenancy tribunal ordered voluntary rent deductions' due to social security payments and family tax benefits being 'absolutely inalienable' under the existing law.¹³ However, no evidence was provided as to the extent to which tenants have engaged in 'bypassing' of tribunal orders, and no evidence was provided to explain the extent to which the existing scheme of voluntary rent deduction is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness.

2.172 The statement of compatibility stated that people subject to the ARDS will benefit by way of a reduction in their liability to a social housing lessor, and that the scheme is designed to ensure persons continue to enjoy an adequate standard of living (including housing) by reducing the risk of arrears build-up which may lead to eviction and possible homelessness.¹⁴ It further stated that by preventing rental arrears and possible eviction, the bill will assist a person's capacity to meet the basic needs of his or her family and protects the rights of children.¹⁵ On these bases, the statement of compatibility argued that the measures are compatible with the rights to social security, an adequate standard of living, protection of the family and the rights of children.

2.173 However, the initial analysis stated that the application of the ARDS to persons with an 'ongoing or outstanding obligation'¹⁶ to pay rent or housing utilities suggests that the scheme may apply to tenants with ongoing obligations to pay rent regardless of whether or not they are in rental arrears. This may result in tenants having limitations placed on their social security payments or family tax benefits, even in circumstances where they may not need assistance managing rental payments or payment of household utilities. The initial analysis stated that it was not clear how applying the scheme to persons in such circumstances was rationally connected to the objective of reducing risk of evictions and homelessness, as such persons may not be at risk. On the contrary, there may be a risk that the imposition of the ARDS on persons who are not at risk could encourage welfare dependency by reducing a person's independent financial management capabilities.

2.174 Similarly in relation to the proportionality of the measure, the initial analysis stated the application of the ARDS to persons with an ongoing (but not an

13 SOC, p. 1.

14 SOC, pp. 2-3.

15 SOC, pp. 2-3.

16 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999*.

outstanding) obligation to pay rent did not appear to be the least rights-restrictive means of achieving the objectives of reducing the risk of rental arrears, evictions and homelessness. There appeared to be other less rights-restrictive means of achieving these objectives, including limiting the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria, for example because the person may have fallen into rental arrears on several previous occasions.

2.175 In its *2016 Review of Stronger Futures Measures*, the committee commented that income management is most effective when it is voluntary, or when it is applied to individuals after considering their particular circumstances – that is, when it is applied flexibly.¹⁷ The committee also raised concerns that compulsory income management provisions which operate inflexibly raise the risk that the regime would be applied to people who did not need assistance managing their budget.¹⁸ The initial analysis of the present bill noted that the bill does not appear to include any requirement that a social housing lessor or the Secretary consider an individual's particular circumstances, beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. For example, there does not appear to be any requirement (discretionary or otherwise) for the Secretary to consider a tenant's personal circumstances, such as whether the imposition of the ARDS would cause hardship, in determining whether a deduction should be made following a request from a lessor.¹⁹ This raised concerns that the measure may not provide sufficient flexibility to treat different cases differently having regard to the merits of an individual case.

2.176 The initial analysis stated that the absence of any discretion to consider a tenant's personal circumstances raised particular concerns in relation to the right to protection of the family and the rights of children. If, for example, the timing of the automatic rent deduction was such that it made it difficult for a parent to pay for other necessities in circumstances of financial stress, this could affect the standard of living of children under the tenant's care. This raised additional questions about the proportionality of the measure to the protection of the family and the rights of the child.

2.177 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective

17 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 50-54.

18 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) p. 61.

19 See section 124QG.

- (including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective);
- how the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears); and
 - whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [2.162] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.

Minster's response

2.178 In relation to whether the stated objective addresses a pressing or substantial concern, the minster's response states:

Rent arrears and a failure to pay other tenancy charges is the single most significant tenancy management issue facing social housing providers nationally. The impact of failed social housing tenancies due to rent arrears is significant-including the direct impact of exits into homelessness and the longer-term impacts of housing instability (particularly in terms of continuity of support arrangements; employment opportunities and school attendance for children).

State and territory governments estimate that the social housing system is losing more than \$30 million annually from unpaid rent and administrative costs. This places an additional and unnecessary burden on the already financially strained public housing system.

The current Rent Deduction Scheme (RDS) is voluntary and easy to bypass. This is because arrangements can be cancelled by the tenant without the housing provider's knowledge, which can lead to increasing rental arrears and eventual eviction.

For example in 2013-14, around 80,000 households in social housing stopped their voluntary deductions at some time during the year which put them at greater risk of falling behind in their rent.

Social housing tenants not paying their rent can also put pressure on local support and homelessness services.

2.179 The minister's response also addresses the effectiveness of the current voluntary rent deduction scheme:

In 2013-14, more than 8,900 social housing tenants, including families with children, were in serious rental arrears, with more than 2,300 people evicted due to rent defaults. In NSW, during the same period, over 80 per cent of those evicted due to serious rental arrears had previously participated in the current voluntary Rent Deduction Scheme (RDS) but

had then cancelled. If an ARDS were in place, this group would have been unable to cancel their payment. This strongly suggests that ARDS would be effective in reducing tenancy eviction rates.

2.180 Based on the further information provided by the minister, it is likely that the ARDS addresses a pressing and substantial concern for the purposes of international human rights law.

2.181 The minister's response further explains that the ARDS will improve the operational efficiency of social housing, by ensuring social housing providers receive rent from tenants on time, including from those tenants who consistently fail to pay. The minister's response further explains that:

Tenants have a legal obligation to pay rent as part of their tenancy agreements with their relevant housing providers. The ARDS acts as both a facility to enable the payment of these rents in a cost effective manner for housing providers, and a seamless mechanism for the tenant to ensure that their legal obligations are met.

...

ARDS recognises that social welfare payments should be used towards a person's and their family's basic needs and is intended to support security of tenure in housing. It also recognises that a person's home is an important precondition to their ability to exercise their human rights and their economic, social and cultural rights in particular.

2.182 In light of further information as to the level of arrears in the social housing context, to the extent that the ARDS would apply to persons that have an *outstanding* obligation to pay rent, the scheme appears to be rationally connected to the objective of reducing the risk of homelessness insofar as it could reduce tenancy eviction rates by preventing rental arrears from occurring.

2.183 However, the minister's response does not overcome the committee's specific concerns that the application of the ARDS to persons with an *ongoing* (but not an outstanding) obligation to pay rent does not appear to be rationally connected to the objective of reducing the risk of evictions and homelessness. This is because persons in such circumstances may not be at risk of eviction. This is also relevant to whether the limitation is proportionate, as concerns remain that tenants may have limitations placed on their social security and family tax benefits in circumstances where they pose no risk of falling into arrears. It would appear that a less rights-restrictive means of achieving the objective would include only applying the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria (such as previously falling into arrears).

2.184 As to the safeguards that are in place to consider individual circumstances, the minister's response explains that states and social housing providers are responsible for tenancy management and 'they would continue to retain

responsibility and flexibility for tenancy management and rent setting policies', such as deciding to which of their occupants of properties covered by a current lease ARDS should apply. The minister's response further explains:

If a tenant is not able to resolve their concerns regarding an Automatic Rent Deduction Scheme (ARDS) deduction with their housing provider or a State based Review Body, they could approach the Department of Human Services (DHS). If it is a matter where the Commonwealth has responsibility, DHS and the Department of Social Services would monitor such requests for review as part of their usual business operations.

The Secretary (or their delegate) also has the power to intervene and make a decision as to whether a deduction is made and the amount deducted. Policy guidelines will also be developed following the passing of the Bill, which will provide further clarity on the operation of ARDS.

In addition, deductions under the scheme will stop as soon as the person is no longer living in public or community housing covered by a current lease.

An ARDS is designed to work alongside government funded financial counselling and other available support services, to ensure that tenants continue to be housed safely and affordably while they get the help they need to sustain their tenancy.

2.185 While the minister's response provides information about the avenues that may be pursued by persons who have concerns over the operation of the scheme, it remains unclear whether sufficient safeguards are in place to accommodate tenants' individual circumstances. This includes whether the automatic deduction of rent would increase financial hardship or would operate in a manner that prevented a person having funds available to meet other basic and reasonable needs. In relation to the Secretary's power to intervene and make a decision as to whether a deduction is made, it is also not clear whether that power includes a discretion to consider matters beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. While the minister's response indicates that policy guidance will be provided in relation to the operation of the ARDS, this is less stringent than the protection of statutory processes. This is because such guidance can be removed, revoked or amended at any time and is not required as a matter of law. Therefore, based on the information provided, it is not possible to conclude that the safeguards referred to by the minister overcome the concerns that the blanket operation of the scheme may not provide sufficient flexibility to have regard to an individual's particular circumstances.

Committee response

2.186 The committee thanks the minister for his response and has concluded its examination of this issue.

2.187 Notwithstanding the legitimate objective of the bill, the preceding analysis indicates that the automatic rent deduction scheme may be incompatible with the

right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children. This is because:

- the application of the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent does not appear to be rationally connected or proportionate to the stated objective of the bill of reducing the risk of rental arrears and homelessness; and
- the bill does not appear to provide sufficient flexibility to have regard to a tenant's individual circumstances.

The right to equality and non-discrimination

2.188 The right to equality and non-discrimination is protected by the ICCPR and the ICESCR. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.189 'Discrimination' refers to a distinction based on a personal attribute (for example, race, sex, or religion) which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights. The UN Human Rights Committee 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.²⁰

2.190 Demographic information published by the Australian Institute of Health and Welfare in July 2017 states that in social housing households, the majority of tenants were female (62%) and that 43% reported a disability, although only 29% identified a disability support pension as their main source of income.²¹ Similarly in state-owned and managed Indigenous housing, approximately three quarters of tenants were female (76%) and 34% of tenants reported having a disability. In community housing households, 57% of tenants were female with more than one-third (35%) reporting having a disability.²²

2.191 The initial analysis noted that the statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged or limited by the bill. However, the information in the preceding paragraph indicates that the ARDS may have a disproportionate impact on women and persons with a disability.

20 *Althammer v Austria*, HRC 998/01 [10.2].

21 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) <https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1>.

22 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) <https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1>.

Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.²³

2.192 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective. For the reasons stated earlier, no evidence is provided in the statement of compatibility as to whether the existing scheme is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness. This raises questions as to whether the measure is based on reasonable and objective criteria to justify the disproportionate impact this measure may have on women and persons with a disability. Information to justify the rationale for the differential effect on women and persons with a disability will also be relevant to the proportionality analysis.

2.193 The committee therefore sought the advice of the minister as to the compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.

Minster's response

2.194 In response, the minister provides the following information:

An ARDS is not discriminatory; it is a mechanism available for social housing providers to use to ensure rent is paid when it is due. It is a matter for housing providers to determine to which tenants ARDS will apply.

An ARDS will assist tenants by ensuring that they are able to honour rent and other household costs associated with tenancy obligations they have entered into.

The intent of this measure is to improve longer-term housing stability and reduce the risk of homelessness. ARDS may therefore have a comparatively larger positive impact on women and persons with a disability as they are most likely to be overrepresented in social housing.

2.195 As noted earlier, a measure that is neutral on its face or without intent to discriminate may constitute indirect discrimination where a measure disproportionately affects people with a particular personal attribute. As noted by the minister in his response, women and persons with a disability are most likely to be overrepresented in social housing. In light of the demographic information [2.190] above, it appears that the ARDS may have a disproportionate impact on women and persons with a disability and therefore constitutes indirect discrimination.

2.196 As discussed above, the minister has provided further information as to the effectiveness of the existing scheme and the legitimate objective of the ARDS. The

23 *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

minister has also identified that the scheme may positively impact women and persons with a disability as it will reduce their risk of homelessness.

2.197 However, the concerns discussed above in relation to the application of the scheme to persons with an ongoing obligation to pay rent are equally relevant in ascertaining whether the discrimination would be unlawful. By applying the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent, there is a risk that the scheme may restrict social housing tenants' (of which women and persons with a disability are overrepresented) social security payments and family tax benefits in circumstances where those persons are not at risk of falling into arrears. There appear to be other, less rights-restrictive, measures available, such as applying the scheme only to those persons who are at risk. The minister has not provided information as to any reasonable and objective criteria to justify the disproportionate impact the measure may have on women and persons with a disability.

Committee response

2.198 The committee thanks the minister for his response.

2.199 The committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination.

Amendments to the trial of the cashless welfare arrangements

2.200 Part 3D of the *Social Security (Administration) Act 1999* provides for the trial of cashless welfare arrangements. The trial permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.²⁴ Currently, section 124PM provides that a person who receives a 'restrictable payment'²⁵ may use the restricted portion of the payment to purchase goods or services other than alcohol beverages or gambling, and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.

2.201 Item 7 of the bill proposes to repeal section 124PM and substitute it with the following provision:

A person who received a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to purchase goods or services, other than alcoholic beverages or gambling.

2.202 The effect of this amendment, according to the explanatory memorandum, would be to allow for automatic rent deductions 'to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary'.²⁶

24 See section 124PB of the *Social Security (Administration) Act 1999*.

25 Which includes a number of payments, including specified social security payments and family tax benefits: see section 124PD(1) of the *Social Security (Administration) Act 1999*.

26 EM, p. 6.

Compatibility of the amendments to the cashless welfare arrangements with the right to equality and non-discrimination

2.203 The committee has previously commented on the human rights compatibility of the cashless welfare arrangements.²⁷ The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.²⁸ Those reports noted that the cashless welfare arrangements engage and limit several human rights, including the right to social security, the right to privacy and family and the right to equality and non-discrimination.

2.204 The initial assessment stated that, in allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit. It appears, for example, that a possible outcome of rent being automatically deducted from the unrestricted portion of a person's welfare payment is that a cashless welfare participant could have no amount of their unrestricted welfare payment remaining. That is, the amendment to section 124PM appears to leave open the possibility that no portion, or only a small portion, of a cashless welfare participant's welfare payment could be used at the person's discretion.

2.205 The issues raised in the previous section relating to the automatic rent deduction scheme apply equally to the amendments to the cashless welfare arrangements.²⁹ Further, the amendments to the cashless welfare regime raise additional issues in relation to the right to equality and non-discrimination. This is because, as the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates.³⁰

2.206 As noted earlier, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the

27 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

28 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (27 June 2013) and *2016 Review of Stronger Futures Measures* (16 March 2016).

29 See also the previous comments of the committee: Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

30 See, Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

2.207 The minister does not acknowledge that the amendments to the cashless welfare regime introduced by the bill engage and limit the right to equality and non-discrimination. However, as noted earlier, measures that disproportionately impact particular groups establish *prima facie* that there may be indirect discrimination. In addition to the concerns raised at [2.175] above in relation to the ARDS, the particular impact on participants in the cashless welfare scheme raises further questions as to the proportionality of the measure.

2.208 Accordingly, the committee sought the advice of the minister as to whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right).

Minster's response

2.209 The minister's response provides the following information in relation to the amendments to the cashless welfare arrangements:

These amendments do not adversely affect CDC participants. They simply provide consistency for all welfare recipients subject to deductions such as the ARDS, regardless of whether they are also subject to the CDC.

The amendments to allow the automatic deduction of rent where a person is also subject to the cashless debit card (CDC) do not have a negative effect on any CDC participants, including those that identify as Aboriginal or Torres Strait Islander. The interaction between the ARDS and the CDC program was considered carefully during drafting to ensure that CDC participants were not disadvantaged by the introduction of the ARDS.

Generally, the amendments to cashless welfare provisions (contained in Part 30 of the *Social Security (Administration) Act 1999*) will allow for the automatic deduction of rent from the restricted portion of a CDC participant's payment.

2.210 While the minister's response states that the amendments do not adversely affect participants in the cashless welfare scheme, removing the reference in current section 124PM to a person's ability to 'use the unrestricted portion of the payment... at the person's discretion' would allow for automatic rent deductions to be made from a person's previously unrestricted portion of their welfare payment.³¹ The bill therefore appears to further restrict how a person subject to the cashless welfare regime may spend their social security or family tax benefit, and may limit, or entirely preclude, a person's discretionary income if they are subject to both the

31 See item 7 of the bill, and page [6] of the explanatory memorandum.

ARDS and the cashless welfare regime. As such, the measure would appear to constitute a further limitation on the right to social security and right to privacy.

2.211 Additionally, as the committee has previously noted in its analysis of the cashless welfare regime,³² Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates. This aspect of the bill therefore raises additional concerns in relation to the compatibility of the measure with the right to equality and non-discrimination. However, the minister has not provided any further information which directly addresses the compatibility of the amendments to the cashless welfare regime with this right. In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime, serious concerns remain as to the compatibility of the amendments to the cashless welfare regime with the right to equality and non-discrimination.

Committee response

2.212 The committee thanks the minister for his response and has concluded its examination of this issue.

2.213 The effect of the amendments to the cashless welfare arrangements would be to allow for automatic rent deductions to be made from the previously unrestricted portion of a cashless debit card participant's welfare payment. This limits the right to equality and non-discrimination, as Indigenous people are disproportionately affected by the cashless welfare regime in locations where the scheme currently operates.

2.214 In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime,³³ the proposed amendments to the cashless welfare regime introduced by the bill may be incompatible with the right to equality and non-discrimination.

32 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

33 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.