Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-first report of the 44th Parliament

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Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.[1] All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 9 to 12 November 2015, legislative instruments received from 2 to 29 October 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Amending Acts 1990 to 1999 Repeal Bill 2015;
- Automotive Transformation Scheme Amendment (Securing the Automotive Component Industry) Bill 2015;
- Export Control Amendment (Quotas) Bill 2015;
- Migration Legislation Amendment (Cessation of Visa Labels) Bill 2015;
- Statute Law Revision Bill (No. 3) 2015; and
- Tax Laws Amendment (Gifts) Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human

rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Australian Institute of Aboriginal and Torres Strait Islander Studies Amendment Bill 2015;
- Treasury Legislation Amendment (Repeal Day 2015) Bill 2015; and
- Veterans' Entitlements Amendment (Expanded Gold Card Access) Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[1] Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

1.11 The committee has also concluded its examination of the previously deferred Military Superannuation and Benefits (Eligible Members) Declaration 2015 [F2015L01527] and makes no comment on the instrument.[2]

Deferred bills and instruments

1.12 The committee has deferred its consideration of the following bills and instruments:

- Counter-Terrorism Legislation Amendment Bill (No. 1) 2015; and
- Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658].

1.13 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).[3]

1.14 The committee also continues to defer the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422]

1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

2 See Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

3 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 2.

pending a response from the Minister for Foreign Affairs regarding a number of related instruments.[4]

1.15 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[5]

4 See the entry 'Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*' in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38. The instrument was deferred by the committee in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

5 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

Response required

1.16 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Omnibus Repeal Day (Spring 2015) Bill 2015

Portfolio: Prime Minister

Introduced: House of Representatives, 12 November 2015

Purpose

1.17 The Omnibus Repeal Day (Spring 2015) Bill 2015 (the bill) seeks to make a number of amendments to a variety of Acts. The bill seeks to repeal redundant or spent provisions as well as make a number of amendments designed to reduce regulation.

1.18 Measures raising human rights concerns or issues are set out below.

Background

1.19 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the 2014 bill) sought to make a number of the amendments that are contained in this bill. The 2014 bill is currently before the House of Representatives.

1.20 The committee commented on the 2014 bill in its *Nineteenth Report of the 44th Parliament*[1] and its *Twenty-second Report of the 44th Parliament*.[2]

Removal of consultation requirement when changing disability standards

1.21 Part 2 of Schedule 3 of the bill seeks to repeal a number of provisions in various Acts relating to consultation requirements, including repealing subsections 382(1) and (3) of the *Telecommunications Act 1997* (the Telecommunications Act).

1.22 Currently, the Australian Communications and Media Authority (ACMA) can make a 'disability standard' in relation to equipment used in connection with a standard telephone service where features of the equipment are designed to cater for the special needs of persons with disabilities (for example, an induction loop designed to assist with a hearing aid).[3] Before making a disability standard, ACMA must try to ensure that interested persons have an adequate opportunity (of at least

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 29-38.

2 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 174-182.

3 Section 380 of the *Telecommunications Act 1997* (the Telecommunications Act).

60 days) to make representations about the proposed standard, and give due consideration to any representations made.[4]

1.23 By removing these requirements, the committee considers that the measure engages the right to equality and non-discrimination and the rights of persons with disabilities.

Right to equality and non-discrimination (rights of persons with disabilities)

1.24 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.25 These are fundamental human rights that are essential to the protection and respect of all human rights. They provide 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.

1.26 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[5] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[6] 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.[7]

1.27 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.28 Article 4 of the CRPD requires that when legislation and policies are being developed and implemented that relates to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

1.29 Article 9 of the CRPD requires state parties to take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems.

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4 Section 382 of the Telecommunications Act.

5 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

6 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

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

1.30 Article 21 of the CRPD requires state parties to take all appropriate measures to ensure persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others.

Compatibility of the measure with the right to equality and non-discrimination (rights of persons with disabilities)

1.31 The committee notes that the CRPD describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination. In particular, article 4(3) of the CRPD requires that when legislation and policies are being developed and implemented that relate to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

1.32 In addition, article 9 of the CRPD requires that state parties take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems. The United Nations Committee on the Rights of Persons with Disabilities has noted that access to information and communications technology (including telephones) is a requirement of the obligation to adopt and monitor national accessibility standards, and has noted that it 'is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders'.[8]

1.33 The obligation to respect the right to equality and non-discrimination in relation to persons with disabilities includes an obligation to closely consult when reviewing any regulations that affect accessibility, such as national disability standards administered by ACMA under the Telecommunications Act. As the bill seeks to repeal consultation requirements under the Telecommunications Act, it is necessary to demonstrate that existing legislation provides for as much, if not more, requirements to consult when any changes are made to disability standards.

1.34 The statement of compatibility states that the existing provisions of the *Legislative Instruments Act 2003* (LI Act) provide a statutory mechanism for people to comment on those standards, and that the differences between the standards in the LI Act and those repealed by this bill are not significant as they are both framed in terms of 'practicable' consultation.

1.35 However, as the committee noted in its consideration of this matter in relation to the 2014 bill, the LI Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In

8 Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Article 9: Accessibility* (2014) para 28.

the event that a rule-maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, there are no equivalent process requirements to those contained in the Telecommunications Act, which provides for at least 60 days for people to make comments on a proposed standard. In addition, the LI Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.

1.36 As the committee previously noted in relation to the 2014 bill, the consultation requirements under the LI Act are not equivalent to the current consultation requirements in the Telecommunications Act. Therefore, the repeal of the consultation requirements in relation to disability standards limits the right to equality and non-discrimination, in particular, the obligation to consult under the CRPD.

1.37 A limitation on a right can be justified if the measure seeks to achieve a legitimate objective and the limitation is rationally connected to, and is a proportionate way to achieve, its legitimate objective.

1.38 The statement of compatibility does not explain the specific purpose of this amendment, other than the general statement that the purpose of the bill as a whole is to 'reduce regulatory burden for business, individuals and the community sector'.[9]

1.39 The committee notes that to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The committee considers that broadly reducing regulatory burden may not be considered to meet a pressing or substantial concern, such that it would warrant limiting the obligation to closely consult with, and actively involve, persons with disabilities when adopting and monitoring national accessibility standards.

1.40 The statement of compatibility also provides no assessment of the proportionality of the measure, other than to say that the requirements under the LI Act will ensure that the views of persons with disabilities continue to be appropriately considered.

1.41 The committee's assessment of the repeal of consultation requirements in relation to disability standards against article 26 of the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination and rights of persons with disabilities) raises questions as to whether the repeal of these requirements is consistent with these rights.

9 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 88.

1.42 As set out above, the repeal of consultation requirements engages and limits the right to equality and non-discrimination and the rights of persons with disabilities. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Productivity 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;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Removal of requirement for independent reviews of Stronger Futures measures

1.43 Items 10 to 16 of part 3 of Schedule 11 of the bill seek to repeal several provisions in the *Stronger Futures in the Northern Territory Act 2012* (SF Act) that currently require certain reviews to be undertaken. Some of these requirements are now redundant as the reports of the review have now been tabled. However, the bill also repeals a requirement that there be an independent review of the first three years of operation of the SF Act, with the report of the review to be tabled in Parliament. Currently the review process in section 117 of the SF Act requires an assessment of the effectiveness of the special measures provided for by the Act and consideration of any other matter specified by the minister. This review is currently due to be completed before 16 July 2016.

1.44 As the committee previously noted in relation to similar measures in the 2014 bill, removing the legislated requirement for review of the measures in the SF Act engages and may limit a number of human rights, including the following rights:

- right to equality and non-discrimination;[10]
- right to social security;[11]
- right to an adequate standard of living;[12] and
- right to a private life.[13]

10 Article 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR); article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

11 Article 9 of the ICESCR.

12 Article 11 of the ICESCR.

13 Article 17 of the ICCPR.

Compatibility of the measure with multiple rights

1.45 The statement of compatibility states that the repeal places no limits on human rights and so is compatible with human rights:

> The Australian Government, with the Northern Territory Government, is currently negotiating a new National Partnership Agreement as a result of the formal revision of the Stronger Futures NPA. The new National Partnership Agreement will continue measures underpinned by the SF Act, and will also include specific review points of the operation of those measures with an equivalent level of scrutiny. This makes the provisions under section 117 in the SF Act redundant.
>
> Repeal of the review and reporting provisions under section 117 of the SF Act will provide clarity by removing duplicative requirements from the Commonwealth statute book. It is compatible with human rights, as to the extent that the SF Act engages human rights the repeal does not place any limitations on those rights.[14]

1.46 It is not clear to the committee that a legislated review of the Stronger Futures measures is redundant or duplicative, given the National Partnership Agreement (NPA) is not yet finalised and will not contain a legislative requirement to review the measures contained in the SF Act. The committee does not consider that the proposed review process arising from the Stronger Futures NPA provides an equivalent review process to the review currently prescribed by the SF Act. The review provisions in the SF Act specify that the review must be independent, provides a timeframe in which the review must be completed, provides frameworks for what must be reviewed and requires reports of the reviews be tabled in Parliament. In contrast, the potential review as part of the NPA process is likely to lack any legislated requirement that the review actually take place or that it will be independent and transparent. It is also likely to take place at a much later date than the current deadline of July 2016.

1.47 As previously noted in relation to the 2014 bill, the committee has previously examined the Stronger Futures measures and considered whether the limitations imposed on rights were justifiable.[15] The committee is currently conducting a further inquiry into these measures and intends to report shortly. As part of its initial examination the committee took into account the provisions requiring a legislated independent review process. For example, the committee examined the measures in the SF Act to address alcohol abuse. It considered that these measures engage and limit a number of rights, particularly the right to privacy and the right to non-discrimination. In making its conclusion on the proportionality of the measures, the committee relied on the then minister's analysis that the measures would not be

14 EM, SoC 95.

15 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

continued after their objective had been achieved and there was to be an independent review of the operation of the legislation after three years.[16] The committee noted the importance of continuing close evaluation of such measures.

1.48 The committee also noted that effective and meaningful consultation with affected Indigenous communities is an important and necessary requirement for safeguarding human rights, particularly the right to self-determination.[17] The committee concluded that this requires involving affected communities in decisions about whether to adopt measures and in implementing such measures, and also in their monitoring and evaluation.[18]

1.49 The committee notes that the government has previously stated that the measures in the SF Act are 'special measures' for the purposes of international law.[19] Under international law, if measures are 'special measures' there must be a process for a full evaluation of whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage.[20]

1.50 The committee considers that the existence of a legislative requirement for independent review and evaluation of the Stronger Futures measures is important to questions about justifying limitations on rights, particularly considering the proportionality of any such limitations. As the committee has concluded that the SF Act introduces a number of measures that limit multiple human rights, the committee considers that removing the requirement for independent review of these measures may affect the proportionality of the Stronger Futures measures.

1.51 The committee considers that the removal of a legislated requirement for independent review of the Stronger Futures measures may mean these measures may not be appropriately evaluated. The committee considers that repealing the legislated requirement for an independent review of the Stronger Futures

16 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 38-39.

17 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 34.

18 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 75.

19 Though note that the committee has previously concluded that it does not consider that these measures can properly be characterised as 'special measures' for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 21-28.

20 Note the Committee on Economic, Social and Cultural Rights, General Comment No. 16, para 36: 'States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant…The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved'. Note also the comments of Bell J in *Maloney v R* [2013] HCA 28 at [252].

measures may affect the proportionality of any limitations on rights posed by the Stronger Futures measures and impact on whether such measures can be considered to justifiably limit human rights.

1.52 The committee notes that it is currently conducting its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and will consider the effect of the removal of the review requirements as part of that inquiry.

Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]

Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673]

Portfolio: Foreign Affairs

Authorising legislation: Charter of the United Nations Act 1945

Last day to disallow: 3 December 2015 (Senate) (or 22 February 2016 (Senate) for the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673])

Purpose

1.53 The Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 and the Charter of the United Nations (Sanctions—Syria) Regulation 2015 (together the cultural sanctions regulations) seek to give effect to a resolution of the United Nations Security Council in relation to the protection of Iraqi and Syrian cultural property.

1.54 The Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) (the UN Sanction Enforcement Law regulation) amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008, to include contravention of aspects of the cultural sanctions regulations relating to Syria as a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act).

1.55 Measures raising human rights concerns or issues are set out below.

Australia's obligations under the United Nations Charter

1.56 In February 2015, the UN Security Council passed resolution 2199 that provides:

> all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people…[1]

1 United Nations Security Council, Resolution 2199 (2015), paragraph 17, 7379th meeting.

1.57 Under international law, Australia is bound by the Charter of the United Nations 1945 (UN Charter) to implement UN Security Council decisions.[2] In addition, Australia's obligations under the UN Charter may expressly override Australia's obligations under international human rights law.[3]

1.58 However, the terms of UN Security Council resolution 2199 give countries discretion as to what 'appropriate steps' are to be taken to prevent the trade in such items. On this basis, the committee considers that UN Security Council resolution 2199 requires Australia to implement appropriate steps to prevent the trade in Iraqi and Syrian cultural property that are consistent with Australia's international obligations including human rights obligations. Accordingly, the committee is required to assess whether these regulations, in implementing Australia's obligations under resolution 2199, are consistent with Australia's international human rights obligations.

Offences of dealing with 'illegally removed cultural property'

1.59 The cultural sanctions regulations provide that anyone who suspects an item is illegally removed cultural property from Iraq or Syria must notify either the Secretary of the Department of Foreign Affairs and Trade (DFAT) or of the Department of Communications and the Arts or a member of the police. If the Secretary of DFAT reasonably believes that a person has possession or control of an item that might be illegally removed cultural property, the Secretary may direct the person to comply with arrangements for storage of the item as specified by the Secretary.

1.60 An item is defined as 'illegally removed cultural property' if it is Syrian or Iraqi cultural property, or has archaeological, historical, cultural, rare scientific, or religious importance, and has been illegally removed from Syria on or after 15 March 2011 or from Iraq on or after 6 August 1990.

1.61 The cultural sanctions regulations do not specify what happens to an item once the Secretary of DFAT directs an item to be placed in storage. However, a legislative note states that the department and police will work together to determine whether the item is illegally removed cultural property and, if satisfied that it is, the department will arrange for its eventual return to Syria or Iraq. None of this detail is substantively set out in the legislative instruments.

1.62 A person commits an offence of strict liability if they fail to comply with arrangements specified by the Secretary, liable to up to 50 penalty units. In addition, as breach of such provisions in relation to Syria have been designated as a UN

2 See article 2(2) and article 41 of the Charter of the United Nations 1945.

3 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

sanction enforcement law, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions. This is then punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units (or $450 000).[4] In contrast, in relation to property removed from Iraq, only the strict liability penalty of 50 units applies to failing to comply with arrangements specified by the Secretary.

1.63 However, for both property from Iraq and Syria, there is an additional offence (specified as a UN sanction enforcement law) for persons who give, trade in or transfer the title of illegally removed cultural property, otherwise than in accordance with a direction of the Secretary.[5] This is also punishable by up to ten years imprisonment and/or a fine of up to $450 000.

1.64 The committee considers these measures engage and may limit the prohibition against arbitrary detention, as the offences which could lead to up to ten years imprisonment, may not have a clear legal basis as they are very vaguely drafted and imprecise.

Right to liberty (prohibition against arbitrary detention)

1.65 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty – the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.66 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

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4 See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673], which designates regulation 5 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as a UN Sanction Enforcement Law under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

5 See Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2), specifying regulation 10 of the Charter of the United Nations (Sanctions—Iraq) Regulation 2008 and regulation 6 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as UN sanction enforcement laws under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

1.67 The right to liberty applies to all forms of deprivations of liberty, including detention in criminal cases, immigration detention, forced detention in hospital (such as involuntary admission for psychiatric treatment), detention for military discipline and detention to control the spread of contagious diseases.

Compatibility of the measure with the right to liberty (prohibition against arbitrary detention)

1.68 The statements of compatibility for the cultural sanctions regulations state that the regulations advance the protection of human rights in Syria and Iraq as they assist with international efforts to deprive terrorist organisations from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property. The statement of compatibility for the UN Sanction Enforcement Law regulation states that the regulation does not engage any human rights. There is no further discussion in any of the statements about any rights that may be limited by the regulations, including the right not to be arbitrarily detained.

1.69 In assessing whether the regulations engage and may limit the right not to be arbitrarily detained, the committee notes that arbitrary detention under international human rights law is much broader than unlawful detention. Detention that is lawful under Australian law may nevertheless be arbitrary and thus in breach of Australia's obligations under article 9 of the ICCPR. The UN Human Rights Committee has explained:

> The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[6]

1.70 In addition, the UN Human Rights Committee has noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[7]

1.71 This is consistent with the committee' approach to limitations on rights more generally. As set out in the committee's Guidance Note 1, any limitation on a right must be prescribed by law. This requires not only that the measure limiting the right be set out in legislation, but that the law must be precise enough so that people know the legal consequences of their actions or the circumstance under which authorities may restrict the exercise of their rights.

1.72 The provisions of the cultural sanctions regulations set out above at paragraphs [1.59] to [1.63] appear in a number of respects to lack the required legal clarity for the purposes of international human rights law. In particular:

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6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) paragraph 12.

7 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) paragraph 22.

- The definition of what constitutes 'illegally removed cultural property' is defined as an item of property that 'has been illegally removed' from Syria or Iraq after certain dates. It is unclear what constitutes illegal removal. For example, it could mean illegal under Iraqi or Syrian law at the time of removal (including, therefore, under laws in force in Iraq during the regime of Saddam Hussein or in Syria under the Assad regime), or it could mean illegal under international law or Australian domestic law.
- It is also unclear if an item would be considered to be 'illegally' removed if the person removing it did so without direct authority but for the purposes of safe-keeping or with the intent of ensuring the items were not lost or plundered in the context of a civil war (including in circumstances where there is no direction in force, or where they are unaware of any such direction).
- In addition, there is no definition as to what may be considered to be 'cultural property' or what may be considered an item of 'archaeological, historical, cultural, rare scientific, or religious importance'. For example, what is considered of historical importance may differ between countries and within countries.
- A person is required to comply with written directions from the Secretary 'for storage of the item'. No further detail is specified as to what these directions may be, nor is there a requirement that the arrangements be reasonable. Further, no timeframe is provided as to when a person must comply with such arrangements. It is unclear what would constitute a failure to comply with arrangements (does partial compliance constitute a failure, for example).
- Any person who gives, trades in or transfers the title of illegally removed cultural property, unless it is in accordance with a direction of the Secretary, is guilty of an offence. This offence has extended geographical jurisdiction so that the offence can be committed in other countries where there is a link to Australia; for example that the person is an Australian citizen.
- There is no requirement that a direction is in force in relation to the property before the offence could apply. It is also not clear what fault element would apply in this instance. The default fault element under the *Criminal Code Act 1995* is intention for conduct (such as intentionally giving the property) but is recklessness in other instances. It appears a person could be subject to up to ten years imprisonment for giving property to another person, and they are reckless as to whether it was illegally removed cultural property, and regardless of their reasons for so doing.

1.73 Accordingly, there are significant questions as to whether the limitation on the right to arbitrary detention imposed by the regulations is sufficiently precise for the purposes of international human rights law.

1.74 If it were considered that the limitation was sufficiently precise it would be necessary to consider whether the regulations pursue a legitimate objective. Seeking to deprive terrorist organisations of funding by restricting the sale of Syrian and Iraqi cultural artefacts is clearly a legitimate objective for the purposes of human rights law, and is in fact likely to advance the protection of human rights internationally. The penalties in the regulations are rationally connected to that legitimate objective as a substantial prison term may deter individuals in trading in Syrian and Iraqi cultural artefacts which may fund terrorist activities.

1.75 In terms of proportionality, the questions raised above in relation to legal precision also go to whether the regulation is the least rights restrictive method of achieving the stated objective. As set out above, the regulations could apply to individuals who have no involvement in funding terrorism directly or indirectly and who in fact seek to protect cultural artefacts from loss or plunder. Accordingly, it has not been demonstrated that the measures impose a proportionate limitation on the right not to be arbitrarily detained.

1.76 The committee's assessment of the offences of dealing with illegally removed cultural property against article 9 of the International Covenant on Civil and Political Rights (prohibition on arbitrary detention) raises questions as to whether the offences as drafted are sufficiently prescribed and justifiable.

1.77 As set out above, the offences of dealing with illegally removed cultural property engage and limit the prohibition on arbitrary detention. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Foreign Affairs as to:

- **whether the offence provisions are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including that there are sufficient safeguards in place and the measure is no more rights restrictive than necessary to achieve that objective.**

Strict liability offence

1.78 The cultural sanctions regulations both provide that strict liability applies if a person is directed by the Secretary to comply with specified arrangements for storage of the item, and the person fails to comply with the arrangement. The regulations state that a penalty of 50 penalty unit applies. However, in relation to Syria, read together with the UN Sanction Law Enforcement regulation, any act contravening this provision is also punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units.

1.79 The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution but the defence of mistake of fact is available to the defendant.

1.80 The imposition of strict liability engages and limits the right to a fair trial, in particular the right to be presumed innocent.

Right to a fair trial (presumption of innocence)

1.81 Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.82 Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

Compatibility of the measure with the right to a fair trial (presumption of innocence)

1.83 Strict liability in this instance means that the prosecution does not have to prove any fault element in a person failing to comply with arrangements as directed. This is despite there being no detail in legislation as to what those arrangements might be, how the person might be directed or what the timeframe is for a failure to comply. The Attorney-General's Department's own *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability should only be applied to all elements of an offence if the offence is not punishable by imprisonment and there are legitimate grounds for penalising persons lacking fault.[8] It is not clear why it is considered appropriate to impose strict liability in this instance, and no justification was provided in the statement of compatibility or other explanatory materials. It is particularly concerning that contravention of this provision in relation to Syria is deemed to be a UN sanction enforcement law and subject to up to ten years imprisonment.

1.84 As stated above at paragraph [1.72], the committee agrees that seeking to deprive terrorist organisations from funding human rights violations in Syria and Iraq is a legitimate objective for the purposes of international human rights law. However, it is unclear how making the offence of failing to comply with directions one of strict liability is rationally connected to that objective, and whether it is a reasonable and proportionate limitation on the right to the presumption of innocence.

8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) 23.

1.85 The committee's assessment of the strict liability offence against article 14 of the International Covenant on Civil and Political Rights (presumption of innocence) raises questions as to whether the strict liability offence is justifiable.

1.86 As set out above, the strict liability offence engages and limits the presumption of innocence. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Foreign Affairs as to:

- **whether there is a rational connection between the limitation and the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.**

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Social Security Legislation Amendment (Debit Card Trial) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 19 August 2015

Purpose

2.3 The Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (the bill) seeks to amend the *Social Security (Administration) Act 1999*, and make consequential amendments to a number of other Acts, to provide for the trial of cashless welfare arrangements.

2.4 The bill would enable a legislative instrument to be made which would prescribe locations, or locations and classes of persons, in three discrete trial areas which would trial 'cashless welfare arrangements'. This would mean that persons on working age welfare payments in the specified locations would have 80 per cent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling.

2.5 Measures raising human rights concerns or issues are set out below.

Background

2.6 The committee previously considered the bill in its *Twenty-seventh Report of the 44th Parliament* (previous report) and requested further information from the Assistant Minister to the Prime Minister as to the compatibility of the bill with the right to a private life, right to equality and non-discrimination, right to social security and right to privacy.[1]

2.7 The bill passed both Houses of Parliament on 14 October 2015 before a response was received from the Assistant Minister, and achieved Royal Assent on 12 November 2015.

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (17 September 2015) 20-30.

Restrictions on how social security payments are spent

2.8 As set out above, the bill provides the legislative basis on which a trial could be conducted whereby 80 per cent of a person's social security would be placed in a restricted bank account. A person subject to the trial would not be able to access their social security payments in cash; rather their social security payments would be provided on a debit card that could not be used to purchase alcoholic beverages or gambling. This would be achieved by ensuring the debit card could not be used at excluded businesses.

2.9 It is not clear what businesses will be excluded businesses, for which any money linked to a welfare restricted bank account will not be able to be spent. This is because the bill leaves much of the detail as to how the trial will work to be dealt with in a future legislative instrument.[2] Little detail is provided in the explanatory memorandum or the statement of compatibility.

2.10 The statement of compatibility does explain that the trial is in response to a recommendation from Mr Andrew Forrest's Review of Indigenous Jobs and Training.[3] In this review, Mr Forrest recommended that specific retailers would be excluded, such as bottle shops, and that retailers who sell a mixed range of goods may be able to prohibit certain purchases at the point of sale.[4]

2.11 The bill also leaves to a legislative instrument the locations that will be the subject of the trial and the class of person who would be subject to the trial.

2.12 The restriction on how a person can spend their social security payments engages and limits the right to a private life. It may also engage and limit the right to equality and non-discrimination, as the measures may impact disproportionately on particular persons. In relation to these two rights, it also engages and may limit the right to social security.

Right to a private life

2.13 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

2.14 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.

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2 See proposed new subsection 124PQ(2) of the bill.

3 Andrew Forrest, *Creating Parity – the Forrest Review* (2014).

4 Andrew Forrest, *Creating Parity – the Forrest Review* (2014) 106.

2.15 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to a private life

2.16 The statement of compatibility does not acknowledge that the bill engages the right to a private life and therefore provides no justification as to any limit on this right.

2.17 Restricting how a person can access, and where they can spend, their social security benefits, interferes with the person's right to personal autonomy and therefore their right to a private life. In addition, being able to only access 20 per cent of welfare payments in cash could have serious restrictions on what a person is able to do in their private life. There are many instances where a person would only be able to use cash to purchase goods or services, such as at markets.

2.18 The committee considers that reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare recipients will be subject to harassment and abuse in relation to their welfare payments, is a legitimate objective for the purposes of international human rights law. However, in addition to a measure having a legitimate objective, it is necessary to demonstrate that the measure is rationally connected to that objective.

2.19 The committee notes that the measure, in quarantining a person's welfare payments and restricting where that quarantined payment can be spent, is very similar to the existing program of income management.

2.20 As the committee has previously noted in relation to income management, the government has not clearly demonstrated that the measure has had the beneficial effects that were hoped for.[5] Indeed, the most recent government-commissioned evaluation of income management in the Northern Territory has concluded that income management has been of mixed success. In particular, it found no evidence income management has achieved its intended outcomes.[6]

2.21 Given the similarities between income management and this proposed trial of cashless welfare arrangements, and the apparent failure of income management to achieve its intended outcomes, it is incumbent on the legislation proponent to explain how the measures are likely to be effective (that is, rationally connected) to the stated objective.

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5 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

6 The committee is currently undertaking a review of the income management measures as part of its review into Stronger Futures.

2.22 In addition, it is necessary for the legislation proponent to explain how the measure is proportionate to its stated objective.

2.23 The committee therefore sought the advice of the Minister for Social Services as to whether there is a rational connection between the limitation and that objective, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behaviour and reducing the likelihood of harassment and abuse; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.

Assistant Minister's response

1. Question - Whether there is a rational connection between the limitation and the objective of the Bill, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behavior and reducing the likelihood of harassment and abuse.

Government response

In asking this question, the committee has noted that restricting how a person can access and spend their social security benefits interferes with a person's right to a private life.[7]

As noted in the statement of compatibility of human rights accompanying this Bill, the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015* seeks to achieve:

> the legitimate objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behavior, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[8]

Excessive alcohol consumption, drug use and gambling is harmful and costly to the broader community, causing health problems, high crime rates, domestic and community violence, family breakdown and social dysfunction.

7 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 22.

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

Alcohol related harm results in 3,000 deaths and 65,000 hospitalisations every year in Australia. The total cost of alcohol related problems is estimated to be between $15 and $31 billion per year in Australia.[9]

Problem gambling is associated with a range of health, social and economic problems.

Problem gambling costs the Australian community an estimated $4.7 billion per year, and individuals with gambling problems lose on average $21,000 per year- a third of the average Australian salary.[10]

As part of the trial, 80 per cent of payments received by people on a working age welfare payment such as Newstart Allowance, will be placed in a cashless bank account. A person will not be able to use the debit card linked to the restricted account to access cash or purchase gambling products/services, alcohol or illegal drugs.

As the Bill seeks to limit the amount of cash available to individuals which can be spent on gambling, alcohol and illegal drugs, there is a rational connection between the legitimate objective the Bill seeks to achieve, and any limitation on an individual's right to a private life.

The committee has noted that 'given the similarities between income management and this proposed trial of cashless welfare arrangements, it is incumbent on the legislation proponent to explain how the measures are likely to be effective (that is, rationally connected) to the stated objective.'[11]

The trial of cashless welfare arrangement seeks to test different policy parameters and delivery arrangements from the current income management programme. Unlike income management, where most participants only have 50% of funds income managed, trial participants will have 80% of their payments directed to a cashless account. This clearly distinguishes the trial from income management. Indeed, the purpose of the trial is to test whether a reducing the amount of money available to be spent on alcohol and gambling is effective in reducing violence and harm in trial areas (see objects at s124).

Although the trial is different to income management, parallels can drawn between the programmes to the extent that they both seek to restrict how a person can spend their social security benefits. The existing income management legislation sets out restrictions around how individuals are able to use income management funds. Similarly, the trial legislation prohibits trial participants from spending their restricted funds on alcohol

9 Australian Medical Association, 2014, National Alcohol Summit, available from https://ama.com.au/alcoholsummit.

10 Australian Government, 2014, *Problem Gambling*, available from: http://www.problemgambling.gov.au/.

11 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 23.

and gambling products. Under the trial, participants will have more freedom in how they spend their money, as the debit card associated with the restricted account will be accepted at all merchants, except those selling alcohol and gambling products. Additionally, restricted funds will not have to be spent on priority needs, as is required under income management. Rather, trial participants will be able to choose how their money is spent, as long as it is not spent on alcohol and gambling. Formal evaluations of income management have shown that the programme has reduced expenditure on alcohol for many individuals in many circumstances. In addition, significant reductions in alcohol consumption have been self-reported by many participants and observed by case workers.[12] The trial will involve the application of income support restrictions on a larger proportion of individuals within the community, so community level data will be more relevant for analysis. However, any perceived and real effects of the programme at an individual level will still be analysed, and no conclusions about the effectiveness of the trial will be reached without appropriate consideration of the limitations of data sets and other potential contributing factors.

2. Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.

Government response

The trial will take place in two or three locations where there are high levels of welfare dependence, where gambling, alcohol and illegal drug abuse are causing unacceptable levels of harm, and there is an openness to participate from within the community. The trial is a reasonable and proportionate response to address these social issues.

Ceduna was the first location announced for the trial. Community leaders from the town approached the government and requested that Ceduna be considered as a trial location.

After significant consultation that included visits to each community by government, public meetings that carried formal resolutions to support the card from community and a willingness to participate from the Ceduna District Council, the government signed an MoU with the community to proceed with a trial in Ceduna subject to passage of the legislation.

The government is also in advanced discussions with the with leaders of the East Kimberley after several community leaders approached the

12 Deloitte (2014b) *Place Based Income Management- Process and short term outcomes evaluation*, *August 2014*, Deloitte Access Economics, Barton, ACT; Department of Social Services (DSS) (2014a) *A Review of Child Protection Income Management in Western Australia*, DSS, Canberra; and Australian Institute of Health and Welfare (2010) *Evaluation of income management in the Northern Territory*, Occasional Paper No 34. Department of Families. Housing, Community Services and Indigenous Affairs, Canberra.

government requesting that the East Kimberley be considered as a trial location

The committee has queried whether there are effective safeguards or controls over the measure. The trial of cashless welfare arrangements will be subject to an independent, comprehensive evaluation which 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 change in trial communities.

Section 124(1) of the legislation is a sunset clause, specifying the trial will commence on 1 February 2016 and end on 30 June 2018. The policy intention is that the trial will only run for 12 months in each location. Indeed, funding has only been appropriated for 12 months, reinforcing that this is a trial. The sunset clause acts as an appropriate and effective safeguard, as Parliament must amend the legislation to continue the trial beyond 2018.[13]

Committee response

2.24 **The committee thanks the Assistant Minister to the Prime Minister for his response.** The committee reiterates its previous analysis that the stated objective of the bill, in seeking to reduce hardship, is a legitimate objective for the purposes of international human rights law. The committee notes, in particular, the importance of reducing alcohol-related harm.

2.25 The committee notes the assistant minister's advice that, in seeking to limit the amount of cash available that could be spent on gambling, alcohol and illegal drugs, there is a rational connection with the objective of the bill. In particular the committee notes that the purpose of the trial is to test whether reducing the amount of money available to be spent is effective in reducing violence and harm in the trial sites. Evaluations of income management have concluded that income management has been of mixed success and has not achieved its intended outcomes. However, the committee notes the assistant minister's advice that this trial is intended to be different from that of income management, and on this basis the committee makes no conclusion at this stage as to whether the limitation on the right to privacy is rationally connected to the stated legitimate objective.

2.26 In considering whether the limitation on the right to a private life may be proportionate, the committee notes the assistant minister's advice that the trial will be subject to an independent, comprehensive evaluation (though noting there is nothing in the bill that would require this evaluation to be undertaken). The committee also notes the assistant minister's advice that the bill contains a sunset clause specifying the trial is time-limited and will end by 30 June 2018, with a policy

13 See Appendix 1, Letter from the Hon Alan Tudge MP, Assistant Minister to the Prime Minister, to the Hon Philip Ruddock MP (dated 19 October 2015) 1-3.

intention that the trial will run for 12 months in each location. In addition, the committee notes that the bill does allow a community body to vary the amount of money restricted (from 80 per cent to a minimum of 50 per cent) in individual circumstances.

2.27 **The committee is currently undertaking an evaluation of the human rights compatibility of income management as part of its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation*, which it intends to report on shortly. As the human rights issues raised by the trial are similar to those of income management, the committee intends to finalise its consideration of the compatibility of the bill with human rights when it publishes its final report on the Stronger Futures measures.**

Right to equality and non-discrimination

2.28 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR and article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2.29 This is a fundamental human right that is essential to the protection and respect of all human rights. 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.

2.30 The ICCPR defines 'discrimination' as 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.

2.31 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

2.32 Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

2.33 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

Right to social security

2.34 The right to social security is protected by article 9 of the ICESCR. This right 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, particularly the right to an adequate standard of living and the right to health.

2.35 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

2.36 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.37 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Compatibility of the measure with the right to equality and non-discrimination and the right to social security

2.38 The statement of compatibility states that the cashless welfare arrangements trial will not be applied on the basis of race or cultural factors. The statement of compatibility makes no reference to whether the measure may impact disproportionately on women or people with a disability.

2.39 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

2.40 It is difficult to say whether this measure will have a disproportionate impact on people of a particular race as the locations for the trial are not set out in the bill but are to be established by a legislative instrument. However, as the statement of compatibility acknowledges, these amendments are in response to a key recommendation made by Mr Andrew Forrest's Review of Indigenous Jobs and Training. This review examined options to help 'end the disparity between Indigenous Australians and other Australians'.[14]

2.41 It is also difficult to know whether the measure will disproportionately impact on women and people with a disability, though statistically overall, women and persons with a disability are more likely to be receiving social security payments.

2.42 The committee therefore also sought the Minister for Social Services' advice on the questions set out at paragraph [2.23] regarding the right to social security and the right to equality and non-discrimination.

Assistant Minister's response

3. Question - Whether there is a rational connection between the limitation and the objective of the Bill, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behavior and reducing the likelihood of harassment and abuse.

Government response

The committee has highlighted that while a measure may be neutral on its face, in practice it may have a disproportionate impact on groups of people with a particular attribute. The committee has noted that it is unclear whether this measure will have a disproportionate impact on people of a particular race, on women and on people with a disability, and that if this is the case, the measure will limit the right to social security and the right to equality and non-discrimination.[15]

As noted in regards to the right to a private life, the Bill seeks to achieve:

> the legitimate objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behavior, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[16]

The debit card will not reduce the amount of income support payments a recipient receives.

14 Andrew Forrest, *Creating Parity – the Forrest Review* (2014) 1.

15 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 26.

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

The trial participants will be able to use their debit card at any EFTPOS terminal to purchase anything they would like, except alcohol and gambling products. Cash cannot be withdrawn using the card.

Participants will still be able to use their existing bank account for the cash component of their payment.

Should participants require more cash because they find the card restrictive, they will be able to apply to an authority to reduce the cashless component of the debit card.

The committee has acknowledged that the locations for the trial will not be chosen on the basis of race or cultural factors. Rather, as outlined in the statement of compatibility, they will be chosen on the basis of non-race based objective criteria, 'such as high levels of welfare dependence and community harm, as well as the outcomes of comprehensive consultation with prospective communities.'[17] These criteria clearly relate to the legitimate objective of the Bill. There is therefore a rational connection between any limitation on the right to social security and the right to equality and non-discrimination and the objective of the Bill.

Evidence of the effectiveness of the measure has been provided in terms of the right to a private life.

4. Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.

Government response

At this stage, the only confirmed trial location is Ceduna. Community consultation remains ongoing with the East Kimberley. The committee has noted that a high proportion of the population in Ceduna and the East Kimberley are Indigenous and it 'therefore appears likely that the measures may disproportionately impact on Indigenous persons, and as such may be indirectly discriminatory unless this disproportionate effect is demonstrated to be justifiable.'[18]

In the Ceduna trial site, Indigenous people make up 72% of the total income support payment population who will become trial participants. Women make up 53% and participants receiving the disability support pension make up 24%.[19]

In the possible East Kimberley trial site Indigenous people make up 91 % of the total income support payment population who will become trial

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

18 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 27.

19 Department of Human Services administrative data (DSS Blue Book dataset) as at 27/03/15.

participants. Women make up 56% and participants receiving the disability support pension make up 29%.[20]

In Ceduna there is 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.[21]

In a submission to the Senate Standing Committee on Community Affairs, the mayor of Ceduna, 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.'[22]

In light of this evidence, any limitation on the right to social security and right to equality and non-discrimination is reasonable and proportionate. As noted above in relation to the right to a private life, the trial will be subject to an independent, comprehensive evaluation. The evaluation will act as a safeguard, by testing whether the measures implemented are effective.[23]

Committee response

2.43 **The committee thanks the Assistant Minister to the Prime Minister for his response. The committee notes the assistant minister's advice that women in the proposed trial sites make up roughly half of those who would be subject to the trial, and persons with a disability make up around one-third to one-quarter. This roughly equates to the percentage of persons with these attributes who receive income support.[24] On this basis the committee is of the view that the measures are unlikely to disproportionately impact on women or persons with a disability.**

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20 Department of Human Services administrative data (DSS Blue Book dataset) as at 27/03/15.

21 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.

22 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.

23 See Appendix 1, Letter from the Hon Alan Tudge MP, Assistant Minister to the Prime Minister, to the Hon Philip Ruddock MP (dated 19 October 2015) 3-5.

24 For example, based on statistics published by the Department of Social Services (DSS), in 2013 821 738 persons were receiving the Disability Support Pension (DSP). Once persons receiving the Aged Pension are removed from the total number of recipients, persons receiving DSP made up 29.5 per cent of the total number of recipients. See DSS, Statistical Paper No. 12, *Income support customers: a statistical overview 2013* (2014) 2.

2.44 However, the committee notes the assistant minister's advice that in the selected trial site of Ceduna, 72 per cent of people who will be subject to the trial are Indigenous, and in the proposed trial site of East Kimberley, 91 per cent of potential participants are Indigenous.

2.45 The committee accepts that the bill does not constitute direct discrimination on the basis of race as it is clear that the trial sites, and its participants, are chosen on the basis of high rates of disadvantage rather than on the basis of race. However, as the committee outlined previously, while the bill does not directly discriminate on the basis of race, indirect discrimination may occur when a measure which is neutral on its surface has a disproportionate impact on groups of people with a particular attribute, such as race. Where a measure impacts on particular groups disproportionately, it establishes prima facie, that there may be indirect discrimination.

2.46 In this case it seems clear, based on the statistics as to how many likely trial participants are Indigenous, that Indigenous people will be disproportionately affected by this measure. However, under international human rights law such a disproportionate impact may be justifiable if it can be demonstrated that it seeks to pursue a legitimate objective, is rationally connected to that objective and is proportionate. The committee notes that this test is largely the same as that examined in relation to the right to a private life. While the committee accepts that the bill seeks to achieve a legitimate objective for the purposes of international human rights law, the committee has concerns over whether the limitation on rights is rationally connected and proportionate to that objective.

2.47 **The committee is currently undertaking an evaluation of the human rights compatibility of income management as part of its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation*, which it intends to report on shortly. As the human rights issues raised by the trial are similar to those of income management, in particular in relation to indirect discrimination on the basis of race and the right to social security, the committee intends to finalise its consideration of the compatibility of the bill with human rights when it publishes its final report on the Stronger Futures measures.**

Disclosure of information

2.48 The bill also seeks to introduce two new provisions which would allow the disclosure of information about a person involved in the trial if the information is relevant to the operation of the trial.

2.49 Proposed new sections 124PN and 124PO would allow an officer or employee of a financial institution, and a member, officer or employee of a community body (as specified in a legislative instrument), to disclose such information about a person to the Secretary of the relevant Commonwealth department. This is stated to operate despite any law in force in a state or territory.

2.50 In addition, if such information is disclosed, the bill would also enable the Secretary to disclose any information about the person to a member, officer or employee of a financial institution or community body for the purposes of the performance of their functions or duties or the exercise of their powers.

2.51 Disclosing personal information engages and limits the right to privacy.

Right to privacy

2.52 As noted above at paragraph [2.13] to [2.15], article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

Compatibility of the measure with the right to privacy

2.53 The statement of compatibility does not acknowledge that the bill engages the right to privacy and therefore provides no justification as to any limit on this right. However, disclosing personal information clearly engages and limits the right to privacy. Any such limitation must be justified in order to be compatible with human rights.

2.54 Of particular concern is that these disclosure powers apply despite any law in force in a state or territory, which would include laws regulating privacy.

2.55 As noted above at paragraph [2.16], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility explain how the measure supports a legitimate objective and how it is rationally connected to, and a proportionate way to achieve, its legitimate objective.

2.56 The committee therefore sought the advice of the Minister for Social Services as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Assistant Minister's response

Question - Whether the proposed changes are aimed at achieving a legitimate objective.

Government response

Sections 124PN and PO seek to achieve a legitimate objective and are necessary for the trial to operate effectively and to be evaluated. In order to establish bank accounts for trial participants, the Department of Human Services (OHS) will need to transfer customer information to the financial institution. The financial institution will then need to provide new account details back to OHS. While the trial is operating, the financial institution

will need to transfer information about participants (its customers) to the Department of Social Services (DSS). DSS will use this information to evaluate the trial.

The purpose of establishing community boards is to test whether involving the community assists with decreasing violence and harm in trial areas. Community bodies will also have the power to vary the percentage of funds that a person has restricted, subject to that person's agreement (s124PK). To allow this provision to operate, community bodies will need to be able to confirm with OHS what percentage of funds a person has restricted, and will need to be able to advise OHS to change that percentage.

6. Question - Whether there is a rational connection between the limitation and that objective.

Government response

There is a clear, rational connection between sections 124PN and PO and the objectives they are trying to achieve. In the absence of these sections, information could not be shared between Government and the financial institution/community body, and the trial could not be implemented.

7. Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Government response

Sections 124PN and PO do not provide a blanket exemption from privacy laws for Government/the financial institution/the community body - they simply allow the sharing of information that is necessary for the trial to be implemented and evaluated. This means there are still safeguards in place to protect individual privacy. Government and the financial institution will still be required act in accordance with privacy laws, more generally, and the Australian Privacy Principles (APPs). The APPs set out strict rules around how personal information can be used. For example, they prohibit the disclosure of personal information for direct marketing. Notably, Government will not be able to see what people are buying with their welfare money.[25]

Committee response

2.57 **The committee thanks the Assistant Minister to the Prime Minister for his response.** In particular, the committee notes the assistant minister's advice as to why it is necessary to enable the information to be shared, namely to facilitate the conduct of the trial, and consider, as noted above, this is likely to be considered a legitimate objective for the purposes of international human rights law. The

25 See Appendix 1, Letter from the Hon Alan Tudge MP, Assistant Minister to the Prime Minister, to the Hon Philip Ruddock MP (dated 19 October 2015) 5-6.

committee also notes the assistant minister's advice that privacy laws will continue to apply to the financial institutions and the department.

2.58 **Accordingly, the committee considers that the new disclosure of information powers are likely to be compatible with the right to privacy.**

Crimes Legislation (Consequential Amendments) Regulation 2015 [F2015L00787]

Portfolio: Justice
Authorising legislation: Australian Crime Commission Act 2002; *Crimes Act 1914*; *Crimes Legislation (Serious and Organised Crime) Act 2010*; *Financial Transaction Reports Act 1988*; *Law Enforcement Integrity Commissioner Act 2006*; and *Proceeds of Crime Act 2002*
Last day to disallow: 8 September 2015 (Senate)

Purpose

2.59 The Crimes Legislation (Consequential Amendments) Regulation 2015 (the regulation) makes amendments to a range of Commonwealth instruments that support Australian criminal justice arrangements. In particular, the regulation:

- makes amendments to a number of instruments to reflect the new name of the Queensland Crime and Misconduct Commission;
- amends the Proceeds of Crime Regulations 2002 to update references to state and territory proceeds of crime laws and update the list of offences that are considered 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* (POC Act); and
- makes technical amendments to remove redundant references.

2.60 Measures raising human rights concerns or issues are set out below.

Background

2.61 The committee previously considered the regulation in its *Twenty-sixth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Justice as to the compatibility of the regulation with the right to a fair trial and right to a fair hearing.[1]

List of 'serious offences' under the Proceeds of Crime Act

2.62 Under the POC Act various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including a 'serious offence'. The term 'serious offence' is defined in the Act as including 'an indictable offence specified in the regulations'.

2.63 The regulation amends regulation 9 of the Proceeds of Crime Regulations 2002 to expand the type of indictable offences that will be considered as a 'serious offence' under the POC Act. This will include new offences relating to

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 7-11.

slavery-like practices, trafficking in persons and child sexual abuse material, and infringement of copyright.

2.64 The committee considered in its previous report that the measures, in expanding the application of the POC Act to apply to a new range of offences, engage and may limit the right to a fair trial and fair hearing.

Right to a fair trial and right to a fair hearing

2.65 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.66 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial and right to a fair hearing

2.67 The statement of compatibility for the regulation states that proceedings under the POC Act do not engage the fair trial rights in article 14 of the ICCPR.[2]

2.68 However, as set out in the committee's Guidance Note 2, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law.

2.69 The committee has previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.[3] The POC Act enables a person's property to be frozen, restrained or forfeited either where a person has been convicted or where there are reasonable grounds to suspect a person has committed a serious offence. As assets may be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt, the POC Act limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR.

2.70 The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

2.71 As the statement of compatibility does not acknowledge that the right to a fair trial is engaged and limited, no justification is provided for this limitation.

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2 Explanatory Statement, Statement of Compatibility 3.

3 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 189-191.

2.72 Because the POC Act engages and may limit the right to a fair trial and right to a fair hearing (see above), it is therefore necessary to assess whether expanding its application to the new offences is justifiable under international human rights law.

2.73 The committee previously considered that a legitimate objective had been set out for the expansion of the POC Act in regards to the creation of new offences relating to slavery-like practices, trafficking in persons and child sexual abuse material, but not to new offences relating to copyright infringement.

2.74 The committee also considered that in assessing the proportionality of the regulation against the right to a fair trial and fair hearing, it is also relevant as to whether the POC Act itself sets out sufficient safeguards to protect this right.

2.75 The committee therefore sought the advice of the Minister for Justice 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; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Article 14 of the ICCPR provides two separate sets of obligations. Article 14(1) provides for the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law', both in the cases of a 'criminal charge' and the determination of one's rights and obligations in 'a suit at law'. Article 14(2) to (7) then provide the minimum guarantees which apply to criminal proceedings only.
>
> When considering the content of fair trial and fair hearing obligations to which the committee refers, it is important to consider whether a matter is either a criminal charge or a 'suit at law'. This establishes whether one or both sets of rights under article 14 apply.
>
> I note that the committee has stated that:
>
> > *'even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal ' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), such as the right to be presumed innocent'.*
>
> In General Comment 32, the United Nations Human Rights Committee set out its views in relation to article 14(1) of the ICCPR. It stated:
>
> > The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding

> the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity [citing Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2].[4]

There is little other jurisprudence from the United Nations Human Rights Committee as to when it considers that an act designed as civil in domestic law may be found to constitute a criminal charge as a result of the purpose of the law, its character or its severity.

The European Court of Human Rights' test for whether a matter should be characterised as a 'criminal charge', also reflected in the Committee's Guidance Note 2, relies on three criteria: the domestic classification of the offence; the nature of the offence; and the severity of the penalty.[5]

Asset recovery actions under the *Proceeds of Crime Act 2002* (the POC Act) make no determination of a person's guilt or innocence, but are civil actions designed to complement criminal laws that criminalise conduct such as drug trafficking and corruption. These proceedings cannot in themselves create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanction. The POC Act authorises the imposition of penalties that aim to confiscate the proceeds of offences, the instruments of offences and the benefits derived from offences. These are stand-alone penalties aimed at preventing the reinvestment of illicit proceeds and unexplained wealth amounts in further criminal activities. These penalties are not able to be commuted into a period of imprisonment, and are separate from and less severe than the criminal penalties imposed by a court with respect to a person's conduct. The committee has already been advised of other safeguards that apply to these proceedings in its consideration of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012. The Regulation does not affect these safeguards.

For these reasons, obtaining a proceeds of crime order under the POC Act against the person should not be viewed as involving a 'criminal' penalty.

As a result, the Regulation, which broadens the application of the POC Act to include certain copyright offences as 'serious offences' for the purposes of that Act, engages the rights to a fair hearing in Article 14(1) of the ICCPR but does not engage rights in Article 14(2)-(7) relating to minimum guarantees in criminal proceedings. As these proceedings provide for a

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4 Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007.

5 *Engel and Others v the Netherlands*, Application No. 5100/71, 5101/71 , 5102171 , 5354/72, 5370/72, 8 June 1976.

right to a fair hearing consistent with Article 14(1) they do not limit the right to a fair trial in Article 14.

I note that the committee has sought further information on the objectives of listing the copyright offences. The following information addresses this request.

Copyright piracy is a pressing and substantive concern. The *Copyright Amendment Act 2006* that you introduced as Attorney-General implemented a range of major reforms to address copyright piracy, and harmonise the criminal law offence provisions in the *Copyright Act 1968* with the *Criminal Code Act 1995*. It introduced a tiered system of criminal offences to provide indictable, summary and strict liability offences for copyright infringement.

As you would be aware, the Copyright Amendment Act aimed to provide remedies under the POC Act for the indictable offences. The Explanatory Memorandum states that 'stronger enforcement measures such as proceeds of crime remedies will also assist in minimising lost remedies to the Government through the detection of other economic related crime such as tax evasion and money laundering'. The inclusion of copyright offences as 'serious offences' for the purposes of the POC Act gives effect to the original intention of the 2006 amendments. A measured and targeted approach was taken to listing copyright offences. Only those indictable copyright offences contained in Parts V and XIA of the *Copyright Act 1968* are included in this list of serious offences by the Regulation.

Expanding the number of offences to which a wider range of proceeds of crime orders can attach to include serious intellectual property crime could counter the growth and impact of these crimes.

A key harm of intellectual property crime is the channelling of substantial illicit proceeds to criminal networks, organised crime and other groups. The Australian Crime Commission's *Organised Crime in Australia 2011* report notes that 'counterfeit goods constitute an expanding criminal market in Australia'[6]. The 'high profit and low penalty nature' of intellectual property crime provides an incentive for criminal networks and gangs to engage in piracy and counterfeiting activity. The ACC identifies increasing global intellectual property crime with an Australian presence, reporting that:

> Members of outlaw motorcycle gangs and Italian organised crime groups have been identified as being involved in importing counterfeit goods into Australia... Middle Eastern and Asian organised gangs are known to be prominent in specific areas within the counterfeit goods market globally. Given the known presence in Australia of these groups, it is probable that they do, or will in the

6 p.74. *Organised Crime in Australia 2011*. Australian Crime Commission.

> future, have some involvement in the domestic counterfeit goods market.[7]
>
> The rapid increases in technology will only facilitate intellectual property crime. The ACC reports that counterfeit goods importation is influenced by factors including:
>
> ...the high profit and low penalty nature of the crime market, the large potential market size, the power of genuine brands, demand, and the established distribution networks. An increasingly important driver is the ability to raise funds this way to facilitate other crime types[8].
>
> Further, there is compelling evidence of a broad connection between film piracy and organised crime. The 2009 report '*Film Piracy, Organised Crime and Terrorism*' by the US-based RAND Corporation found that DVD piracy has a higher profit margin than narcotics and combined with the minimal risks of enforcement, is attractive around the world as an element of criminal portfolios.[9]

Committee response

2.76 **The committee thanks the Minister for Justice for his response.** The committee agrees with the minister's assessment that the test for whether a matter should be characterised as a 'criminal charge' relies on three criteria:

(a) the domestic classification of the offence;

(b) the nature of the offence; and

(c) the severity of the penalty.

2.77 In relation to (a), it is clear that the asset recovery actions are defined under Australian domestic law as civil in nature.

2.78 In relation to (b), the committee's Guidance Note 2 states that a penalty will likely be considered criminal under international human rights law if it is intended to punish and deter and the penalty applies to the public in general as opposed to being in a particular regulatory or disciplinary context. It is clear that the POC Act has wide application and applies to general criminal conduct that may occur across the public at large.

2.79 The response states that the POC Act authorises the imposition of penalties that aim to confiscate the proceeds of offences, the instruments of offences and the benefits derived from offences and otherwise prevent the reinvestment of illicit proceeds and unexplained wealth amounts in further criminal activities. The committee notes that section 5 of the POC Act sets out the objectives of that Act

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7 p.75. *Organised Crime in Australia 2011*. Australian Crime Commission.

8 p.73. *Organised Crime in Australia 2011*. Australian Crime Commission.

9 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Philip Ruddock MP (dated 13 October 2015) 1-4.

which includes 'to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories'.[10] Accordingly, a core purpose of the POC Act is to punish and deter. This is also confirmed by analysis prepared by the Australian Institute of Criminology which noted that:

> [Asset] [c]onfiscation also entails punishment for wrongdoing, which may deter further offending by both the criminal and others in the community.[11]

2.80 Moreover, the POC Act is structured such that a forfeiture order under the Act is conditional on a person having been convicted of a serious criminal offence, or a court being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'. Such a judgment would appear to entail a finding of 'blameworthiness' or 'culpability' on the part of the respondent, which, having regard to a number of English authorities would suggest that the provision may be criminal in character.[12]

2.81 In addition, the Canadian courts have considered confiscation, or 'forfeiture proceedings' as being a form of punishment, and characterised them as a 'penal consequence' of conviction.[13]

2.82 In relation to (c), the severity of the penalty, the response notes that:

> These penalties are not able to be commuted into a period of imprisonment, and are separate from and less severe than the criminal penalties imposed by a court with respect to a person's conduct.

2.83 However, the committee notes that the forfeiture orders can involve significant sums of money, sometimes far in excess of any financial penalty that could be applied under the criminal law. For example the AFP's 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited.[14]

2.84 This short analysis of the POC Act suggests that asset confiscation may be considered criminal for the purposes of international human rights law, because of the nature of the offence and the severity of the penalty. The committee notes that the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies important and necessary tools in the fight against crime in Australia. Assessing the

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10 Section 5(2) POC Act.

11 Australian Government, Australian Institute of Criminology, *Transnational crime brief no. 1* (January 2008) 1.

12 See *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 16733; *R v Dover Magistrates Court* [2003] Q.B. 1238.

13 *R v Green* [1983] 9 C.R.R. 78; Johnston v British Columbia [1987] 27 C.R.R. 206.

14 Australian Federal Police, *Annual Report 2012-13*, 101.

forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the ICCPR.

2.85 Finally, in relation to the copyright offences added by the regulation to the type of indictable offences that will be considered as a 'serious offence' under the POC Act, the committee notes that the minister draws the link between copyright offences and organised crime in Australia. In this regard, the committee notes that the Australian Crime Commission's most recent report (from 2015) states:

> It remains likely that organised crime involvement in piracy of these products [film, music, television and computer software] should decrease as consumers increasingly download them illegally from the Internet without paying. Already some law enforcement agencies have reported that the decrease in the number of detections of pirated copies of music, films, television programs and software has been greater than that observed for other unauthorised goods.[15]

2.86 Accordingly, it is unclear why it is necessary to add these specific copyright offences at this time given the current criminal trends identified in this report.

2.87 **The committee's assessment against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing) of the inclusion of copyright offences as 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* (POC Act) raises questions as to whether expanding the application of the POC Act is a justifiable limitation on the right to a fair trial and right to a fair hearing.**

2.88 **As the POC Act was introduced prior to the establishment of the committee and no statement of compatibility was provided for that legislation, the committee recommends that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing in light of the committee's comments above.**

The Hon Philip Ruddock MP

Chair

15 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 49.

Appendix 1

Correspondence

ASSISTANT MINISTER
TO THE PRIME MINISTER

Reference: C15/87594

15 OCT 2015

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter dated 8 September 2015 regarding the Parliamentary Joint Committee on Human Rights' (the Committee) review of the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015* (the Bill).

I am pleased to be able to provide responses to each of the questions raised in your report. The attached document addresses each specific concern separately and I trust that this will be of use to the Committee.

If you have further questions in regards to the Bill, please do not hesitate to contact me.

Yours sincerely

ALAN TUDGE

The Parliamentary Joint Committee on Human Rights (the committee) has sought advice on the human rights compatibility of the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015* (the Bill). This document addresses each of the committee's questions.

Regarding the right to a private life

1. **Question - Whether there is a rational connection between the limitation and the objective of the Bill, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behavior and reducing the likelihood of harassment and abuse.**

Government response

In asking this question, the committee has noted that restricting how a person can access and spend their social security benefits interferes with a person's right to a private life.[1]

As noted in the statement of compatibility of human rights accompanying this Bill, the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015* seeks to achieve:

> the legitimate objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behavior, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[2]

Excessive alcohol consumption, drug use and gambling is harmful and costly to the broader community, causing health problems, high crime rates, domestic and community violence, family breakdown and social dysfunction.

Alcohol related harm results in 3,000 deaths and 65,000 hospitalisations every year in Australia. The total cost of alcohol related problems is estimated to be between $15 and $31 billion per year in Australia.[3]

Problem gambling is associated with a range of health, social and economic problems. Problem gambling costs the Australian community an estimated $4.7 billion per year, and individuals with gambling problems lose on average $21,000 per year – a third of the average Australian salary.[4]

As part of the trial, 80 per cent of payments received by people on a working age welfare payment such as Newstart Allowance, will be placed in a cashless bank account. A person will not be able to use the debit card linked to the restricted account to access cash or purchase gambling products/services, alcohol or illegal drugs.

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[1] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 22.

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

[3] Australian Medical Association, 2014, National Alcohol Summit, available from https://ama.com.au/alcoholsummit.

[4] Australian Government, 2014, *Problem Gambling*, available from: http://www.problemgambling.gov.au/.

As the Bill seeks to limit the amount of cash available to individuals which can be spent on gambling, alcohol and illegal drugs, there is a rational connection between the legitimate objective the Bill seeks to achieve, and any limitation on an individual's right to a private life.

The committee has noted that 'given the similarities between income management and this proposed trial of cashless welfare arrangements, it is incumbent on the legislation proponent to explain how the measures are likely to be effective (that is, rationally connected) to the stated objective.'[5]

The trial of cashless welfare arrangement seeks to test different policy parameters and delivery arrangements from the current income management programme. Unlike income management, where most participants only have 50% of funds income managed, trial participants will have 80% of their payments directed to a cashless account. This clearly distinguishes the trial from income management. Indeed, the purpose of the trial is to test whether a reducing the amount of money available to be spent on alcohol and gambling is effective in reducing violence and harm in trial areas (see objects at s124).

Although the trial is different to income management, parallels can drawn between the programmes to the extent that they both seek to restrict how a person can spend their social security benefits. The existing income management legislation sets out restrictions around how individuals are able to use income management funds. Similarly, the trial legislation prohibits trial participants from spending their restricted funds on alcohol and gambling products. Under the trial, participants will have more freedom in how they spend their money, as the debit card associated with the restricted account will be accepted at all merchants, except those selling alcohol and gambling products. Additionally, restricted funds will not have to be spent on priority needs, as is required under income management. Rather, trial participants will be able to choose how their money is spent, as long as it is not spent on alcohol and gambling.
Formal evaluations of income management have shown that the programme has reduced expenditure on alcohol for many individuals in many circumstances. In addition, significant reductions in alcohol consumption have been self-reported by many participants and observed by case workers.[6] The trial will involve the application of income support restrictions on a larger proportion of individuals within the community, so community level data will be more relevant for analysis. However, any perceived and real effects of the programme at an individual level will still be analysed, and no conclusions about the effectiveness of the trial will be reached without appropriate consideration of the limitations of data sets and other potential contributing factors.

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[5] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 23.

[6] Deloitte (2014b) *Place Based Income Management – Process and short term outcomes evaluation, August 2014*, Deloitte Access Economics, Barton, ACT; Department of Social Services (DSS) (2014a) *A Review of Child Protection Income Management in Western Australia*, DSS, Canberra; and Australian Institute of Health and Welfare (2010) *Evaluation of income management in the Northern Territory*, Occasional Paper No. 34, Department of Families, Housing, Community Services and Indigenous Affairs, Canberra.

2. **Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.**

Government response

The trial will take place in two or three locations where there are high levels of welfare dependence, where gambling, alcohol and illegal drug abuse are causing unacceptable levels of harm, and there is an openness to participate from within the community. The trial is a reasonable and proportionate response to address these social issues.

Ceduna was the first location announced for the trial. Community leaders from the town approached the government and requested that Ceduna be considered as a trial location.

After significant consultation that included visits to each community by government, public meetings that carried formal resolutions to support the card from community and a willingness to participate from the Ceduna District Council, the government signed an MoU with the community to proceed with a trial in Ceduna subject to passage of the legislation.

The government is also in advanced discussions with the with leaders of the East Kimberley after several community leaders approached the government requesting that the East Kimberley be considered as a trial location

The committee has queried whether there are effective safeguards or controls over the measure. The trial of cashless welfare arrangements will be subject to an independent, comprehensive evaluation which 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 change in trial communities.

Section 124(1) of the legislation is a sunset clause, specifying the trial will commence on 1 February 2016 and end on 30 June 2018. The policy intention is that the trial will only run for 12 months in each location. Indeed, funding has only been appropriated for 12 months, reinforcing that this is a trial. The sunset clause acts as an appropriate and effective safeguard, as Parliament must amend the legislation to continue the trial beyond 2018.

Regarding the right to social security and the right to equality and non-discrimination

3. **Question - Whether there is a rational connection between the limitation and the objective of the Bill, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behavior and reducing the likelihood of harassment and abuse.**

Government response

The committee has highlighted that while a measure may be neutral on its face, in practice it may have a disproportionate impact on groups of people with a particular attribute. The committee has noted that it is unclear whether this measure will have a

disproportionate impact on people of a particular race, on women and on people with a disability, and that if this is the case, the measure will limit the right to social security and the right to equality and non-discrimination.[7]

As noted in regards to the right to a private life, the Bill seeks to achieve:

> the legitimate objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behavior, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[8]

The debit card will not reduce the amount of income support payments a recipient receives.

The trial participants will be able to use their debit card at any EFTPOS terminal to purchase anything they would like, except alcohol and gambling products. Cash cannot be withdrawn using the card.

Participants will still be able to use their existing bank account for the cash component of their payment.

Should participants require more cash because they find the card restrictive, they will be able to apply to an authority to reduce the cashless component of the debit card.

The committee has acknowledged that the locations for the trial will not be chosen on the basis of race or cultural factors. Rather, as outlined in the statement of compatibility, they will be chosen on the basis of non-race based objective criteria, 'such as high levels of welfare dependence and community harm, as well as the outcomes of comprehensive consultation with prospective communities.'[9] These criteria clearly relate to the legitimate objective of the Bill. There is therefore a rational connection between any limitation on the right to social security and the right to equality and non-discrimination and the objective of the Bill.

Evidence of the effectiveness of the measure has been provided in terms of the right to a private life.

4. **Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.**

Government response

At this stage, the only confirmed trial location is Ceduna. Community consultation remains ongoing with the East Kimberley. The committee has noted that a high proportion of the population in Ceduna and the East Kimberley are Indigenous and it 'therefore appears likely that the measures may disproportionately impact on

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[7] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 26.

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

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

Indigenous persons, and as such may be indirectly discriminatory unless this disproportionate effect is demonstrated to be justifiable.'[10]

In the Ceduna trial site, Indigenous people make up 72% of the total income support payment population who will become trial participants. Women make up 53% and participants receiving the disability support pension make up 24%.[11]

In the possible East Kimberley trial site Indigenous people make up 91% of the total income support payment population who will become trial participants. Women make up 56% and participants receiving the disability support pension make up 29%.[12]

In Ceduna there is 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.[13]

In a submission to the Senate Standing Committee on Community Affairs, the mayor of Ceduna, 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.'[14]

In light of this evidence, any limitation on the right to social security and right to equality and non-discrimination is reasonable and proportionate. As noted above in relation to the right to a private life, the trial will be subject to an independent, comprehensive evaluation. The evaluation will act as a safeguard, by testing whether the measures implemented are effective.

Regarding the right to privacy

5. Question - Whether the proposed changes are aimed at achieving a legitimate objective.

Government response

Sections 124PN and PO seek to achieve a legitimate objective and are necessary for the trial to operate effectively and to be evaluated. In order to establish bank accounts for trial participants, the Department of Human Services (DHS) will need to transfer customer information to the financial institution. The financial institution will then need to provide new account details back to DHS. While the trial is operating, the financial institution will need to transfer information about participants (its customers) to the

[10] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 27.

[11] Department of Human Services administrative data (DSS Blue Book dataset) as at 27/03/15.

[12] Department of Human Services administrative data (DSS Blue Book dataset) as at 27/03/15.

[13] 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.

[14] 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.

Department of Social Services (DSS). DSS will use this information to evaluate the trial.

The purpose of establishing community boards is to test whether involving the community assists with decreasing violence and harm in trial areas. Community bodies will also have the power to vary the percentage of funds that a person has restricted, subject to that person's agreement (s124PK). To allow this provision to operate, community bodies will need to be able to confirm with DHS what percentage of funds a person has restricted, and will need to be able to advise DHS to change that percentage.

6. **Question - Whether there is a rational connection between the limitation and that objective.**

Government response
There is a clear, rational connection between sections 124PN and PO and the objectives they are trying to achieve. In the absence of these sections, information could not be shared between Government and the financial institution/community body, and the trial could not be implemented.

7. **Question - Whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Government response
Sections 124PN and PO do not provide a blanket exemption from privacy laws for Government/the financial institution/the community body – they simply allow the sharing of information that is necessary for the trial to be implemented and evaluated. This means there are still safeguards in place to protect individual privacy. Government and the financial institution will still be required act in accordance with privacy laws, more generally, and the Australian Privacy Principles (APPs). The APPs set out strict rules around how personal information can be used. For example, they prohibit the disclosure of personal information for direct marketing. Notably, Government will not be able to see what people are buying with their welfare money.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister on Counter-Terrorism

MC15-003858

13 OCT 2015

The Hon Phillip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock Phillip

I refer to the following comments of the Parliamentary Joint Committee on Human Rights in the committee's 26th Report of the 44th Parliament concerning the *Crimes Legislation (Consequential Amendments) Regulation 2015* (the Regulation).

> *The committee's assessment against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing) of the inclusion of copyright offences as 'serious offences' for the purposes of the Proceeds of Crime Act 2002 raises questions as to whether expanding the application of this Act is a justifiable limit on the right to a fair trial and fair hearing.*
>
> *The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights laws. The committee therefore seeks 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;*
> - *whether there is a rational connection between the limitation and that objective; and*
> - *whether the limitation is a reasonable and proportionate measure for achievement of that objective.*

Article 14 of the ICCPR provides two separate sets of obligations. Article 14(1) provides for the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law', both in the cases of a 'criminal charge' and the determination of one's rights and obligations in 'a suit at law'. Article 14(2) to (7) then provide the minimum guarantees which apply to criminal proceedings only.

When considering the content of fair trial and fair hearing obligations to which the committee refers, it is important to consider whether a matter is either a criminal charge or a 'suit at law'. This establishes whether one or both sets of rights under article 14 apply.

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I note that the committee has stated that:

> *'even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), such as the right to be presumed innocent'.*

In General Comment 32, the United Nations Human Rights Committee set out its views in relation to article 14(1) of the ICCPR. It stated:

> The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity [citing Communication No. 1015/2001, *Perterer v. Austria,* para. 9.2].[1]

There is little other jurisprudence from the United Nations Human Rights Committee as to when it considers that an act designed as civil in domestic law may be found to constitute a criminal charge as a result of the purpose of the law, its character or its severity.

The European Court of Human Rights' test for whether a matter should be characterised as a 'criminal charge', also reflected in the Committee's Guidance Note 2, relies on three criteria: the domestic classification of the offence; the nature of the offence; and the severity of the penalty.[2]

Asset recovery actions under the *Proceeds of Crime Act 2002* (the POC Act) make no determination of a person's guilt or innocence, but are civil actions designed to complement criminal laws that criminalise conduct such as drug trafficking and corruption. These proceedings cannot in themselves create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanction. The POC Act authorises the imposition of penalties that aim to confiscate the proceeds of offences, the instruments of offences and the benefits derived from offences. These are stand-alone penalties aimed at preventing the reinvestment of illicit proceeds and unexplained wealth amounts in further criminal activities. These penalties are not able to be commuted into a period of imprisonment, and are separate from and less severe than the criminal penalties imposed by a court with respect to a person's conduct. The committee has already been advised of other safeguards that apply to these proceedings in its consideration of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012. The Regulation does not affect these safeguards.

For these reasons, obtaining a proceeds of crime order under the POC Act against the person should not be viewed as involving a 'criminal' penalty.

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[1] Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007.

[2] *Engel and Others v the Netherlands,* Application No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976.

As a result, the Regulation, which broadens the application of the POC Act to include certain copyright offences as 'serious offences' for the purposes of that Act, engages the rights to a fair hearing in Article 14(1) of the ICCPR but does not engage rights in Article 14(2)-(7) relating to minimum guarantees in criminal proceedings. As these proceedings provide for a right to a fair hearing consistent with Article 14(1) they do not limit the right to a fair trial in Article 14.

I note that the committee has sought further information on the objectives of listing the copyright offences. The following information addresses this request.

Copyright piracy is a pressing and substantive concern. The *Copyright Amendment Act 2006* that you introduced as Attorney-General implemented a range of major reforms to address copyright piracy, and harmonise the criminal law offence provisions in the *Copyright Act 1968* with the *Criminal Code Act 1995*. It introduced a tiered system of criminal offences to provide indictable, summary and strict liability offences for copyright infringement.

As you would be aware, the Copyright Amendment Act aimed to provide remedies under the POC Act for the indictable offences. The Explanatory Memorandum states that 'stronger enforcement measures such as proceeds of crime remedies will also assist in minimising lost remedies to the Government through the detection of other economic related crime such as tax evasion and money laundering'. The inclusion of copyright offences as 'serious offences' for the purposes of the POC Act gives effect to the original intention of the 2006 amendments. A measured and targeted approach was taken to listing copyright offences. Only those indictable copyright offences contained in Parts V and XIA of the *Copyright Act 1968* are included in this list of serious offences by the Regulation.

Expanding the number of offences to which a wider range of proceeds of crime orders can attach to include serious intellectual property crime could counter the growth and impact of these crimes.

A key harm of intellectual property crime is the channelling of substantial illicit proceeds to criminal networks, organised crime and other groups. The Australian Crime Commission's *Organised Crime in Australia 2011* report notes that 'counterfeit goods constitute an expanding criminal market in Australia'[3]. The 'high profit and low penalty nature' of intellectual property crime provides an incentive for criminal networks and gangs to engage in piracy and counterfeiting activity. The ACC identifies increasing global intellectual property crime with an Australian presence, reporting that:

> Members of outlaw motorcycle gangs and Italian organised crime groups have been identified as being involved in importing counterfeit goods into Australia... Middle Eastern and Asian organised gangs are known to be prominent in specific areas within the counterfeit goods market globally. Given the known presence in Australia of these groups, it is probable that they do, or will in the future, have some involvement in the domestic counterfeit goods market.[4]

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[3] p.74. *Organised Crime in Australia 2011.* Australian Crime Commission.
[4] p.75. *Organised Crime in Australia 2011.* Australian Crime Commission.

The rapid increases in technology will only facilitate intellectual property crime. The ACC reports that counterfeit goods importation is influenced by factors including:

> …the high profit and low penalty nature of the crime market, the large potential market size, the power of genuine brands, demand, and the established distribution networks. An increasingly important driver is the ability to raise funds this way to facilitate other crime types[5].

Further, there is compelling evidence of a broad connection between film piracy and organised crime. The 2009 report '*Film Piracy, Organised Crime and Terrorism*' by the US-based RAND Corporation found that DVD piracy has a higher profit margin than narcotics and combined with the minimal risks of enforcement, is attractive around the world as an element of criminal portfolios.

I thank the committee for its consideration of the Regulation and trust that this information is of use in any further consideration.

The relevant officer for this matter in the Attorney-General's Department is Anthony Coles who can be contacted on 02 6141 2770.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

[5] p.73. *Organised Crime in Australia 2011.* Australian Crime Commission.

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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[1] Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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