

# **Appendix 1**

## **Correspondence**

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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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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

<sup>2</sup> *Social Services Legislation Amendment (Debit Card Trial) Bill 2015*, Explanatory Memorandum, Statement of Compatibility, p. 4.

<sup>3</sup> Australian Medical Association, 2014, National Alcohol Summit, available from <https://ama.com.au/alcoholsummit>.

<sup>4</sup> 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.'<sup>5</sup>

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 be 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.<sup>6</sup> 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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<sup>5</sup> Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44<sup>th</sup> Parliament*, 8 September 2015, p. 23.

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.'<sup>9</sup> 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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<sup>7</sup> Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44<sup>th</sup> Parliament*, 8 September 2015, p. 26.

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

<sup>9</sup> *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.<sup>10</sup>

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%.<sup>11</sup>

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%.<sup>12</sup>

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.<sup>13</sup>

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.'<sup>14</sup>

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

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

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

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

<sup>13</sup> 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.

<sup>14</sup> 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 26<sup>th</sup> Report of the 44<sup>th</sup> 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.



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].<sup>1</sup>

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.<sup>2</sup>

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.

<sup>1</sup> 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.

<sup>2</sup> *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’<sup>3</sup>. 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.<sup>4</sup>

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<sup>3</sup>p.74. *Organised Crime in Australia 2011*. Australian Crime Commission.

<sup>4</sup>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<sup>5</sup>.

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**

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<sup>5</sup> p.73. *Organised Crime in Australia 2011*. Australian Crime Commission.