

## 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 44<sup>th</sup> 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.<sup>1</sup>

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.

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1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44<sup>th</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</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>8</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.

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

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>11</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

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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.<sup>12</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.

**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

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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.<sup>13</sup>

## 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

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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.

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**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'.<sup>14</sup>

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.<sup>15</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>16</sup>

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

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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.'<sup>17</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 Indigenous persons, and as such may be indirectly discriminatory unless this disproportionate effect is demonstrated to be justifiable.'<sup>18</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>19</sup>

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

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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%.<sup>20</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>21</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>22</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.<sup>23</sup>

## 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.<sup>24</sup> 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

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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.<sup>25</sup>

**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

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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 44<sup>th</sup> 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.<sup>1</sup>

### 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

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1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44<sup>th</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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].<sup>4</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>5</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.

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'<sup>6</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

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

future, have some involvement in the domestic counterfeit goods market.<sup>7</sup>

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>8</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.<sup>9</sup>

### **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'.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

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**

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