

## **National Gambling Reform Bill 2012**

*Introduced into the House of Representatives on 1 November 2012*

*Portfolio: Families, Housing, Community Services and Indigenous Affairs*

### **Committee view**

**1.2 The committee has written to the Minister for Families, Housing, Community Services and Indigenous Affairs seeking clarification on a number of issues before forming a view on the bill's compatibility with human rights.**

### **Purpose of the bill**

**1.3 This bill is part of a package of three bills in relation to a national scheme for gaming machines.**

**1.4 The bill provides for:**

- precommitment systems for gaming machines;
- enables registered users to set a loss limit;
- requires gaming machines to display certain warnings;
- limits daily withdrawals from automatic teller machines located in gaming premises (excluding casinos) to \$250;
- requires that new machines manufactured or imported are capable of supporting precommitment;
- establishes a Regulator to monitor and investigate compliance;
- provides for enforcement measures;
- establishes an Australian Gambling Research Centre within the Australian Institute of Family Studies; and
- provides for the Productivity Commission to undertake two inquiries.

**1.5 The bill sets out extensive new regulatory arrangements intended to address problem gambling through the introduction of a system of voluntary precommitment and related measures. The bill establishes arrangements under which a person may register as a user and nominate a maximum amount that the person is prepared to lose in a specified time period through certain forms of gambling. The bill does not make gambling conditional on registration under the scheme but recognises the possibility that this may occur in the future. In order to take advantage of the registration system, a person will need to provide certain personal information. This will be held electronically in such a way that the person will not be able to exceed the nominated limit wherever in a State or Territory he or she engages in gambling**

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(unless the gambling takes place in a casino or other place excluded from the operation of the scheme).

1.6 The bill also includes a series of monitoring and enforcement measures underpinning the operation of the scheme. These include entry, search and seizure powers, the power to require a person to provide information or produce documents, and the power to operate machines or electronic equipment on private premises. The bill also creates a number of civil penalties and criminal offences, a number of which are strict liability offences; it also provides for the imposition of an evidential or legal burden on an accused person in a number of cases.

### **Compatibility with human rights**

1.7 The statement of compatibility identifies the potential impact of the bill on the right to privacy (article 14 of the ICCPR) in so far as it requires the provision of personal information. The statement also notes that the use of reverse onus provisions engages the right to be presumed innocent until proven guilty (article 14(2) of the ICCPR). However, it provides only a general justification of the use of such provisions (which it states is limited to civil penalty provisions), without a listing or discussion of the individual provisions in the statement itself. Justifications of some reverse onus clauses appear in the explanatory memorandum.

1.8 The statement of compatibility does not refer to a number of strict liability offence provisions included in the bill (eg clauses 101, 115, 152) that may give rise to issues of compatibility. Once again, there is some discussion in the explanatory memorandum of the justifiability of those provisions.

1.9 The statement of compatibility does not, however, address any issues of compatibility with human rights that may arise from the provisions of the bill that relate to monitoring and enforcement, although there are justifications offered for the apparent encroachments on human rights in the notes on some individual clauses.

#### **1.10 The committee:**

- **reiterates its position set out in Practice Note 1 that a statement of compatibility should read as a stand-alone document;**
- **notes that, while the statement of compatibility adequately addresses the issues relating to the right to privacy and personal information, it would have been helpful for the general justification of reverse onus provisions in the statement of compatibility to have been supplemented by reference to individual provisions and for the statement to have addressed the strict liability offences created by the bill; and**
- **further notes that there is no discussion in the statement of compatibility of any human rights issues that may arise from the monitoring and enforcement powers contained in the bill.**

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*Compatibility issues**Right to privacy*

1.11 The right not to be subject to unlawful or arbitrary interference with one's privacy is guaranteed by article 17 of the ICCPR. The UN Human Rights Committee in its General Comment 16 has stated:

The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.<sup>1</sup>

1.12 To be a permissible interference with the right, a measure must be provided by law, pursue a legitimate objective, have a rational connection to the achievement of the purpose, and be proportionate to the achievement of that goal.

1.13 To the extent that the precommitment registration scheme engages the right to privacy, the scheme pursues the legitimate objective of offering individuals the opportunity to participate in the scheme which may assist them to limit their gambling losses. The statement of compatibility states that, without the collection of the information, it would not be possible to identify players to enable them to restrict their losses. The collection and storage of the information has a rational connection to the achievement of this purpose. There are a number of limitations on the use to which the information may be put, and these are supported by provisions which make it an offence to deal with information in a manner inconsistent with the statute.

**1.14 The committee considers that the provisions of the bill which concern the treatment of personal information appear compatible with the right to privacy.**

*Presumption of innocence*

1.15 The bill creates two categories of offences – civil penalties (Chapter 3), and criminal offences (Chapter 4). In relation to a number of civil penalties and strict liability offences the bill includes reverse onus provisions. Thus, if a person wishes to rely on certain excuses or exemptions, the person bears an evidential burden in relation to the relevant facts (see, eg clauses 58(7), and 65(3)).

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<sup>1</sup> Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 1988, paragraph 10.

1.16 Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.17 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, the reverse burden must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim. Human rights case-law has established that relevant factors to consider when determining if a reverse burden provision is justified include whether:

- the penalties are at the lower end of the scale;
- the offences arise in a regulatory context where participants may be expected to know their duties and obligations; and
- the burden relates to facts which are readily provable by the defendant as matters within their own knowledge or to which they have ready access.

1.18 While provisions which impose only an evidential burden are more likely to be considered compatible with the presumption of innocence, they should still be properly justified, particularly where the burden relates to an essential element of the offence.

#### *Civil penalties as 'criminal offences'*

1.19 Article 14(2) of the ICCPR states that everyone charged with a 'criminal offence' shall have the right to be presumed innocent until proved guilty according to law. Under international law the term 'criminal offence' includes not only offences or penalties that are classified as a criminal offence under national law, but also other forms of penalties that may be designated as civil penalties under domestic law. These penalties attract the protections which the ICCPR sets out in relation to 'criminal offences'.

1.20 In order to determine whether a penalty designated 'civil' is a 'criminal offence', the approach under international and comparative human rights law is to consider the substance and the effect of the proceedings, rather than their label. Therefore, it is possible for a civil regime which subjects a person to a high penalty and is intended to be punitive or deterrent in nature to constitute a 'criminal penalty' for the purposes of these rights.

1.21 Neither the explanatory memorandum nor the statement of compatibility addresses the issue of whether the civil penalties might be considered 'criminal

offences' within the meaning of article 14(2). However, the statement of compatibility states generally in relation to each of the provisions that requires the defendant to bear an evidential burden, that each of the cases involve matters which are peculiarly within the knowledge of the defendant.

**1.22 The committee considers that, if the civil penalty offences were considered to be 'criminal offences' within the meaning of article 14(2) of the ICCPR, the imposition of evidential burdens on the defendant in these cases appear to be reasonable limitations on the presumption of innocence and to be compatible with human rights.**

#### *Strict liability offences*

1.23 The bill creates a number of strict liability offences, which are clearly criminal offences within the meaning of article 14(2). These include the offence of failure to lodge a return in relation to levies that may be payable under the scheme, without reasonable excuse (clauses 101(1) and (2)) and the failure by an authorised person to return an identity card (clause 115). These are not referred to in the statement of compatibility.

1.24 In each case the burden imposed on the defendant is an evidential one. The explanatory memorandum appears to be incorrect in relation to the burden imposed by one of these provisions. Clause 115(3) provides that the loss or destruction of an identity card is a defence to a failure to surrender it. The note on this subclause (explanatory memorandum, p 54) states that 'the defendant is required to prove, *on the balance of probabilities*, that they lost their card or that the card was stolen, which is information that would be within the particular knowledge of the defendant.' However, the legislative note to clause 115(3) states that, in accordance with subsection 13.3(3) of the Criminal Code, the defendant bears an evidential burden in relation to this matter. Subsection 13(3)(6) of the Criminal Code provides that an '**evidential burden**, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.'

1.25 While there is no discussion of the strict liability offences in the statement of compatibility, the explanatory memorandum offers justifications for the various strict liability offences.

**1.26 The committee considers that the strict liability offences included in the bill, which provide for defences to be made out by discharge of an evidential burden, appear to be compatible with human rights.**

#### *Enforcement powers*

1.27 Chapter 7 of the bill provides for monitoring and investigation under the scheme. It confers powers on authorised persons that include a power to enter onto premises. It also confers a power on certain authorised persons to require individuals to answer questions, and provides that it is an offence to fail to do so (clause 148(3))

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and (4)). Similarly, clause 157 confers various powers on the Registrar, including powers to require the production of information, produce documents or to appear to answer questions. A failure to comply with such requirements amounts to an offence (clause 157(6)). The explanatory memorandum (p 70) states that clause 157(6) 'does not abrogate the common law privilege against self-incrimination', though it provides no further explanation of why this is so. No such statement is made in relation to clause 148 (explanatory memorandum, p 66).

1.28 These specific provisions and the powers of entry, search and seizure potentially raise issues of compatibility with human rights, and these are not addressed in the statement of compatibility nor in any consistent way in the explanatory memorandum.

1.29 **The committee proposes to seek clarification from the Minister as to whether the monitoring and enforcement powers conferred by the bill are consistent with human rights, in particular, but not limited, to whether the powers to require a person to provide information, to answer questions and to produce documents are consistent with the right not to incriminate oneself (article 14(3)(g) of the ICCPR) and rights to respect for one's privacy and correspondence (article 17 of the ICCPR).**