

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 18 and 21 June 2018 (consideration of 2 bills from this period has been deferred);¹
 - legislative instruments registered on the Federal Register of Legislation between 24 April and 23 May 2018 (consideration of 5 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

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

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, <https://www.legislation.gov.au/>.

Response required

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

Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

Purpose	Seeks to make a range of amendments to the <i>Criminal Code Act 1995</i> , <i>Crimes Act 1914</i> , <i>Australian Security Intelligence Organisation Act 1979</i> , <i>Intelligence Services Act 2001</i> and the <i>Administrative Decisions (Judicial Review) Act 1977</i> , including to extend the operation of the control order regime, the preventative detention order regime, declared area provisions, and the stop, search and seize powers of the Australia Federal Police by a further three years; and to extend the operation of the Australian Security Intelligence Organisation's questioning, and questioning and detention powers for a further 12 months
Portfolio	Attorney-General
Introduced	House of Representatives, 24 May 2018
Rights	Equality and non-discrimination; liberty; freedom of movement; fair trial and the presumption of innocence; privacy; freedom of expression; freedom of association; protection of the family; prohibition on torture and cruel, inhuman or degrading treatment; work; social security; adequate standard of living; children (see Appendix 2)
Status	Seeking additional information

Background

1.5 The bill seeks to amend various Acts relating to counter-terrorism, including to extend for a further three years the following regimes which are scheduled to sunset on 7 September 2018, including:

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code);
- the preventative detention order regime in Division 105 of the Criminal Code;
- the declared areas provisions in sections 119.2 and 119.3 of the Criminal Code; and
- the stop, search and seize powers in Division 3A of Part IAA of the *Crimes Act 1914*.

1.6 The bill also seeks to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to extend the operation of ASIO's questioning and detention powers for a further 12 months.

1.7 Other amendments relevant to the human rights analysis of the bill are discussed below.

1.8 The committee has considered the measures listed above on a number of previous occasions.¹

Control orders

1.9 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.²

1.10 The control orders regime grants the courts power to impose a control order on a person (including children aged between 14 and 17) at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The maximum penalty for contravening a condition of a control order is five years imprisonment.³ The current 2018 bill would extend the operation of the control orders regime for a further three years noting the regime is currently due to sunset on 7 September 2018.⁴ The 2018 bill also makes some specific amendments to the operation of the regime.⁵

1 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101; and *Report 4 of 2018* (8 May 2018) pp. 88-90.

2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

3 Criminal Code, section 104.5.

4 Explanatory Memorandum (EM) p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

5 These amendments include permitting an issuing court to vary an interim control order where there is agreement to a variation between the AFP and the subject of the control order; extending the minimum duration of time between the making of the interim control order and the confirmation proceeding from 72 hours to seven days; providing that the issuing court cannot make cost orders against the controlee except in limited circumstances where the controlee has acted unreasonably in conducting the control order proceedings: See EM, pp. 3-38, 40-41.

Terms of a control order

1.11 The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.⁶

Steps for the issue of a control order

1.12 The steps for the issue of a control order are:

- a senior AFP member must obtain the Minister for Home Affairs⁷ consent to seek a control order on prescribed grounds;⁸
- once consent is granted, the AFP member must seek an interim control order from an issuing court through an *ex parte* proceeding. The court must be satisfied on the balance of probabilities:
 - (i) that making the order would substantially assist in preventing a terrorist act; or
 - (ii) that the person in respect of whom the control order is sought has provided training to, received training from or participated in training with a listed terrorist organisation; or
 - (iii) that the person has engaged in a hostile activity in a foreign country; or
 - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or

6 See Criminal Code, section 104.5.

7 See Criminal Code, section 104.2; EM p. 8.

8 See Criminal Code, sections 104.2 and 104.4.

- (v) that the person has been convicted in a foreign country for an equivalent offence; or
 - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
 - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
 - (i) protecting the public from a terrorist act; or
 - (ii) preventing the provision of support for or the facilitation of a terrorist act; or
 - (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.⁹

1.13 In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

- (a) as a paramount consideration in all cases the objects of:
 - (i) protecting the public from a terrorist act;
 - (ii) preventing the provision of support for or the facilitation of a terrorist act;
 - (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;
- (b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and
- (c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).¹⁰

1.14 The AFP must subsequently elect whether to seek the court's confirmation of the control order, with a confirmed order able to last up to 12 months (or three months if the person is aged between 14 and 17).¹¹ Currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72

9 See Criminal Code, section 104.4.

10 See Criminal Code, section 104.4.

11 See Criminal Code, sections 104.5(f); 104.14; EM, statement of compatibility (SOC) p. 8.

hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.¹²

Compatibility of continuing the control orders regime with human rights

1.15 The control orders regime involves significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the regular criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.16 The extension of the control orders regime by the 2018 bill engages and may limit a number of human rights, including:

- right to equality and non-discrimination;
- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to the protection of the family;
- right to work;
- right to social security and an adequate standard of living; and
- rights of children.

1.17 The statement of compatibility acknowledges that the bill engages a range of human rights.¹³ These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.18 The committee's previous reports have raised serious concerns as to whether control orders constitute permissible limitations on human rights.¹⁴ Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the

12 EM, p. 4.

13 EM, SOC, from page 10.

14 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 94; *Report 7 of 2016* (11 October 2016) p. 69.

availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand).¹⁵ As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending control orders - legitimate objective

1.19 In relation to whether extending the control orders regime pursues a legitimate objective, the statement of compatibility states that:

The control order regime achieves the legitimate objective of preventing serious threats to Australia's national security interests, including in particular, preventing terrorist acts. In the current national security landscape, it is critical that law enforcement agencies have access to preventative powers such as control orders to proactively keep the Australian community safe.¹⁶

1.20 In this respect, the statement of compatibility also provides some information as to the importance of this objective as a pressing concern.¹⁷ Based on this information the objective of preventing serious threats to Australia's national security interests, including preventing terrorist acts, is likely to constitute a legitimate objective for the purposes of international human rights law. The committee has previously considered that the objective of the measure constituted a legitimate objective.¹⁸

Extending control orders—rational connection to a legitimate objective

1.21 As set out above, a measure that limits human rights must be rationally connected to (that is, effective to achieve) its legitimate objective. In this respect, the human rights assessment in the committee's previous reports noted that there was doubt as to whether control orders are rationally connected to their stated objective. This was because it was unclear whether control orders are an effective tool to prevent terrorist acts noting the availability of regular criminal justice processes (including for preparatory acts).¹⁹

1.22 It is noted that since the committee's last report on control orders,²⁰ the current Independent National Security Legislation Monitor (INSLM), James Renwick

15 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 69.

16 EM, SOC, p. 9.

17 EM, SOC, p. 7.

18 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 16.

19 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) p. 90; *Report 7 of 2016* (11 October 2016) p. 68. See, also, Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) p. 30.

20 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

SC, has reported that control orders may be effective in preventing terrorism, based on recent court cases.²¹ This contrasts with the findings of a previous INSLM, Bret Walker SC, who found that 'control orders in their present form are not effective, not appropriate and not necessary'.²²

1.23 On this issue, the statement of compatibility notes that since control orders were introduced in 2005 they have been used only six times. However, rather than indicating that control orders are ineffective or not necessary, the statement of compatibility argues that this indicates that the control order regime has been used judiciously to date.²³ It refers to the findings of the Parliamentary Joint Committee on Intelligence and Security (PJCS) that 'the limited use of the provisions reflects the AFP's position that, in circumstances where there is enough evidence to formally charge and prosecute a person, the AFP will take this approach over seeking the imposition of a control order'.²⁴ While this may be the case as a matter of policy and practice, there is no legal requirement that control orders be restricted in this matter.

1.24 It is therefore acknowledged that there is some evidence that the imposition of a control order could be capable of being effective in particular individual cases.²⁵ However, some questions remain as to whether the control order regime as a whole is rationally connected to its objective, noting in particular the availability of the regular criminal processes. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending control orders—proportionality

1.25 In relation to proportionality, the human rights assessment in the committee's previous reports on the control orders regime noted that there may be questions as to whether control orders are the least rights restrictive approach to preventing terrorist-related or hostile activities, and whether control orders contain

21 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (1 March 2018) p. 54.

22 INSLM, *Declassified Annual Report* (20 December 2012) p. 4.

23 EM, SOC, p. 9.

24 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (February 2018) [3.56] p. 54.

25 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54.

sufficient safeguards to appropriately comply with Australia's human rights obligations.²⁶

1.26 The previous human rights assessment raised concerns that control orders could be sought in circumstances where there is not necessarily an imminent threat to personal safety. The previous report stated that protection from imminent threats had been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. It further stated that, in the absence of an imminent threat, it is difficult to justify as proportionate the imposition of significant limitations on human rights without criminal charge or conviction.²⁷

1.27 As noted above, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act, or support for terrorist or hostile activities. The issuing court must also have regard to the impact of the obligations on the person's circumstances.²⁸ The statement of compatibility explains that this threshold ensures that any restrictions on human rights are 'reasonable, necessary and proportionate'.²⁹ However, while this criterion may act as a relevant safeguard, there is no explicit requirement that the conditions be the least rights restrictive measures for the person subject to the control order to protect the public.³⁰ In this respect, it is noted that the impact on the individual is given the status of 'additional consideration', while the effect on preventing or providing support to terrorism is to be a 'paramount consideration' of the issuing court.³¹

1.28 As noted in the previous human rights assessment of control orders, a less rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. Rather, it would require a decision-maker to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. In the absence of such requirements, it may be difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.³²

26 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) p. 11.

27 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

28 See Criminal Code section 104.4.

29 EM, SOC, p. 11.

30 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

31 See Criminal Code, section 104.4.

32 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

1.29 The statement of compatibility also outlines some additional safeguards relating to the application of the control orders regime against children (aged 14 to 17 years). This includes, subject to exceptions, the requirement that the court must appoint a lawyer to act for a young person (aged 14 to 17 years) in control order proceedings if the young person does not already have a lawyer. Additionally, when considering whether to impose a particular condition under a control order on a child, the court is required to consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.³³ Overall, while these safeguards are relevant to the proportionality of the limitations imposed on human rights, questions remain as to whether they are sufficient to ensure that the application of the control orders regime to children is a proportionate limit on human rights. This includes questions as to whether applying a coercive regime to children (noting their maturity and particular vulnerabilities as children) constitutes a least rights restrictive approach.

1.30 In order to constitute a proportionate limitation on human rights, coercive powers must also be no more extensive than is strictly necessary to achieve their legitimate objective. In this respect, there are questions about how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). The committee's previous human rights assessment of control orders noted there are a range of offences in the Criminal Code that cover preparatory acts to terrorism offences, which allow police to detect and prosecute terrorist activities at early stages.³⁴ In the absence of further information, and as indicated in the committee's previous assessment, the control orders regime is likely to be incompatible with a number of human rights.³⁵

Committee comment

1.31 The control orders regime engages and limits a range of human rights.

1.32 The committee has previously raised serious concerns about the compatibility of the regime with human rights.

1.33 Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose

33 See Criminal Code, subsection 104.4(1)-(2).

34 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

35 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). It is welcome that the statement of compatibility for the 2018 bill provides some of this foundational assessment.

1.34 It is noted that the control orders regime is likely to pursue a legitimate objective for the purposes of international human rights law.

1.35 However, in light of the proposed extension of the regime, the committee seeks the further advice of the minister as to:

- how the control orders regime as a whole is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing

1.36 As noted above, currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.³⁶ As interim control orders are made *ex parte* (that is, without the person subject to the control order being present), this means that the person will, generally, be subject to the conditions of the control order until the confirmation proceeding. In this context, while it is acknowledged that both parties to a confirmation proceeding may require sufficient time to prepare their case,³⁷ the extension of the minimum period raises other questions about the compatibility of the measure with the right to a fair hearing. This is because a delay in confirmation hearing may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

1.37 The explanatory memorandum explains the timing of confirmation hearings further in the context of the measure:

Confirmation proceedings have to date occurred many months after the making of an interim control order. However, under existing subsection 104.5(1A), it remains open to the issuing court to set the confirmation date only 72 hours after the making of an interim control order. This would

36 EM, p. 2.

37 EM, SOC, p. 15.

leave both parties potentially unprepared to make detailed submissions to the court at the confirmation proceeding.³⁸

1.38 While this may be the case as a matter of practice, it is unclear why it is insufficient to leave to the court to set a confirmation date as soon as reasonably practicable. It would have been useful if the statement of compatibility had provided further information in this respect.

Committee comment

1.39 The committee seeks the advice of the minister as to the compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing.

Preventative detention orders

1.40 The committee has previously considered the Preventative Detention Orders (PDO) regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.³⁹

1.41 The AFP can apply for a PDO which allows a person to be taken into custody and detained⁴⁰ if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.⁴¹ The terrorist act must be one that 'is capable of being carried out, and could occur, within the next 14 days'.⁴²

1.42 The 2018 bill would extend the operation of the PDO regime for a further three years, noting the regime is currently due to sunset on 7 September 2018.⁴³

38 EM, p. 37.

39 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

40 The period of detention is up to 48 hours.

41 See subsection 105.4(4) of the Criminal Code. There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and detaining the subject for the period for which the person is to be detained is reasonably necessary for preserving that evidence (subsection 105.4(6)).

42 Criminal Code, section 105.4(5).

43 EM, p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, item 11.

1.43 The police must not question the person subject to a PDO while they are detained subject to limited exceptions.⁴⁴

1.44 There are restrictions on who the subject of the PDO can contact while detained.⁴⁵ A person subject to a PDO may contact a family member or employer. However, contact can be monitored by police and can only occur for the purposes of letting the contacted person know that the subject being detained is safe but is not able to be contacted for the time being.

Compatibility of extending the operation of the PDO with multiple human rights

1.45 The PDO regime engages and may limit a number of human rights, including:

- right to liberty;
- right to security of the person;
- right to a fair hearing and fair trial;
- right to freedom of expression;
- right to freedom of movement;
- right to privacy;
- right to be treated with humanity and dignity;
- right to protection of the family; and
- right to equality and non-discrimination.

1.46 In particular, as PDOs are administrative orders made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, the extension of the PDO regime engages and limits the right to liberty. Further, as there are restrictions on who a person can contact while detained under a PDO and what they can say to those they contact, the regime also engages and limits the right to freedom of expression. Being held in a form of detention, which is in effect incommunicado, may also have implications for a number of other human rights.

1.47 The statement of compatibility acknowledges that PDOs engage and limit a number of these rights.⁴⁶ These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.48 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a

44 Criminal Code, section 105.42.

45 Criminal Code, sections 105.34, 105.35, 105.45.

46 EM, SOC, p. 19.

statement of compatibility be prepared for the PDO regime,⁴⁷ setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge).⁴⁸ As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending the operation of the PDO regime – legitimate objective

1.49 In relation to the objective of the PDO regime, the statement of compatibility explains:

The PDO regime supports the legitimate objective of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. In recent years, there has been an increase in the threat of smaller-scale, opportunistic attacks by lone actors. Law enforcement agencies have had less time to respond to these kinds of attacks than other terrorist plots.⁴⁹

1.50 Consistent with the committee's previous analysis, the objective of preventing serious terrorist attacks is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending the operation of the PDO regime – rational connection

1.51 Since the committee's last report on PDOs,⁵⁰ current INSLM Renwick reported that PDOs 'have the capacity to be effective'.⁵¹ This contrasts with the findings of previous INSLM Walker who found that '[t]here is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism'.⁵² The PJCS has

47 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

48 See, for example, Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

49 EM, SOC, p.18.

50 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

51 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (1 March 2018) p. xii.

52 INSLM, *Declassified Annual Report* (20 December 2012) p. 67.

also recommended that the PDO regime continue.⁵³ There is therefore conflicting evidence as to whether the PDO regime is effective to achieve its stated objective.

1.52 The statement of compatibility notes that to date no PDOs have been issued since the commencement of the regime in 2005.⁵⁴ However, it argues that this

...reflects the policy intent that these orders should be invoked only in limited circumstances where traditional investigative powers available to law enforcement agencies are inadequate to respond to a terrorist threat.⁵⁵

1.53 However, while this may be the policy intention of the measure, the fact that no PDOs have been issued also raises questions as to whether the PDO regime is effective to achieve its stated objective. Further, noting in particular the availability of the regular criminal processes, additional questions remain as to whether the PDO regime as a whole is rationally connected to its objective. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending the operation of the regime – proportionality

1.54 In relation to proportionality, the previous human rights assessment of the PDO regime stated that the PDO regime involves very significant limitations on human rights. Notably, it allows the imposition of a PDO on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.55 The previous assessment noted that it was unclear that the PDOs were necessary to achieve their stated objective, noting the availability of ordinary criminal justice processes including the criminalisation of preparatory terrorism offences.⁵⁶ In this respect, the UN Human Rights Committee has indicated that, in order to justify preventive detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.⁵⁷

1.56 This issue was not fully addressed in the statement of compatibility.

1.57 In terms of proportionality, the statement of compatibility for the 2018 bill argues that the 'high threshold' for making a PDO ensures that it is 'inextricably linked to preventing an imminent terrorist incident' and is a proportionate limit on

53 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (February 2018) [4.80] p. 103.

54 EM, SOC, p. 18.

55 EM, SOC, p. 18.

56 Section 101.6 of the Criminal Code makes it an offence to do 'any act in preparation for, or planning a terrorist act'.

57 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

human rights.⁵⁸ However, the previous human rights assessment noted that given a PDO could be sought even where there is not an imminent threat to life, it was unclear that the regime imposes a proportionate limitation on the right to liberty in the pursuit of national security.⁵⁹ In this respect, it is noted that the regime would potentially allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. This kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

Committee comment

1.58 The PDO regime engages and limits a number of human rights.

1.59 The committee has previously raised serious concerns about the compatibility of the regime with human rights.

1.60 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the PDO regime, setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge). It is welcome that the statement of compatibility for the 2018 bill provides some of this foundational assessment.

1.61 It is noted that the PDO regime is likely to pursue a legitimate objective for the purposes of international human rights law.

1.62 However, in light of the proposed extension of the regime, the committee seeks the further advice of the minister as to:

- **how the PDO regime is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

58 EM, SOC, p. 19.

59 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

Extending the operation of declared area provisions

1.63 Section 119.2 of the Criminal Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area.⁶⁰ Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs may declare an area in a foreign country for the purposes of section 119.2 if the minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

1.64 In order to prove the offence, the prosecution is only required to prove that a person intentionally entered into (or remained in) a declared area and was reckless as to whether or not it had been declared by the minister. The prosecution is not required to prove that the person had any intention to undertake a terrorist or other criminal act. A person accused of entering, or remaining in, a declared area bears an evidential burden—that is, to establish a defence they must provide evidence that they were in the declared area solely for a legitimate purpose as defined by the Criminal Code (set out further below).

1.65 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.⁶¹ The committee has also considered specific declarations of an area in a foreign country for the purposes of section 119.2 of the Criminal Code.⁶²

1.66 The current 2018 bill proposes to extend the operation of the declared area provisions by a further three years (until 7 September 2021), noting that the provisions are currently due to sunset (cease to have effect) on 7 September 2018.

Compatibility of the measure with multiple human rights

1.67 The committee has previously concluded that the declared area offence provisions of the Criminal Code are likely to be incompatible with:

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and

60 The offence carries a maximum penalty of up to 10 years imprisonment.

61 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101. The bill passed both Houses of Parliament and received Royal Assent on 2 November 2014.

62 See, for example, Parliamentary Joint Committee on Human Rights, 'Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2018—Mosul District, Ninewa Province, Iraq [F2018L00176],' *Report 4 of 2018* (8 May 2018) pp. 88-90. Also see, *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73.

- the right to equality and non-discrimination.⁶³

1.68 In light of the committee's previous conclusions in this regard, it follows that the extension of the declared area provisions for a further three years as proposed in the bill are also likely to be incompatible with human rights.

1.69 The statement of compatibility acknowledges that the measure engages the right to freedom of movement, the right to a fair trial and the presumption of innocence.⁶⁴ The right to equality and non-discrimination and the prohibition on arbitrary detention are not cited in the statement of compatibility as being engaged by this particular measure. These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.70 Regarding the objective of the measure, the statement of compatibility for the bill argues:

The declared areas provisions support the legitimate objectives of protecting Australia's national security interests, deterring Australians from travelling to dangerous conflict areas where listed terrorist organisations are engaged in hostile activity, and protecting children by discouraging their parents and guardians from taking them to declared areas. There are two pressing and substantial concerns with Australians travelling to these conflicts areas. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. This concern also extends to children who have been taken to declared areas by their parents or guardians. The second is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist attacks.⁶⁵

1.71 It is acknowledged that the objectives of protecting Australia's national security interests and deterring Australians from travelling to conflict zones where listed terrorist organisations are engaged in hostile activity may be capable of constituting legitimate objectives for the purposes of international human rights law.

1.72 However, the committee has previously raised questions as to why the declared area provisions are necessary to address the stated objectives, and whether it may be possible to rely on measures that may constitute a less rights restrictive approach, such as existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries.⁶⁶

63 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44.

64 EM, SOC, pp. 23, 25.

65 EM, SOC, p. 22.

66 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 90.

1.73 The statement of compatibility cites as a safeguard the existing exceptions contained in 119.2(3) of the Criminal Code that permit individuals to enter or remain in a declared area for 'legitimate purposes'.⁶⁷ These matters are relevant to the proportionality of the limitations the measure imposes on human rights.

1.74 In the context of limitations on the right to freedom of movement, the statement of compatibility also points to several new proposed provisions in the bill that may act as further safeguards. These include:

- an additional exception to the offence for persons performing an official duty for the International Committee of the Red Cross;⁶⁸
- amending section 119.3 to provide that the Minister for Foreign Affairs may revoke a declaration at any time prior to the expiry of the declaration if the minister considers it necessary or desirable to do so;⁶⁹ and
- providing that the PJCIS may review a declaration at any time during which the declaration is in effect and report its findings to the parliament.⁷⁰

1.75 These proposed new provisions may assist with the human rights compatibility of the measure. However, key human rights concerns remain in relation to the declared area offence, outlined in detail in the committee's *Fourteenth Report of the 44th Parliament*.⁷¹

1.76 In particular, the committee's previous analysis has noted that the statutory exceptions or defences to the declared area offence contained in 119.2(3) of the Criminal Code are relatively narrow. For example, it is not a defence to visit friends,

67 These include: providing aid of a humanitarian nature; satisfying an obligation to appear before a court or other body exercising judicial power; performing an official duty for the Commonwealth, a State or Territory; performing an official duty for the government of a foreign country or the government of part of a foreign country; performing an official duty for the United Nations or an agency of the United Nations; making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist; making a bona fide visit to a family member; and other purposes prescribed by regulations. See, section 119.2(3) of the Criminal Code.

68 EM, SOC, p. 24.

69 Proposed subsection 119.3(6) (5a) of the Criminal Code. The statement of compatibility states that this new provision 'ensures that limitations on the right to freedom of movement are proportionate and operate for no longer than necessary in order to achieve the legitimate objective'. See EM, SOC, p. 24.

70 EM, SOC, p. 24. Currently, subsection 119.3(7) of the Criminal Code provides that the PJCIS may review a declaration before the end of the period during which the declaration made through a legislative instrument may be disallowed.

71 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-38.

retrieve personal property, transact business or undertake a religious pilgrimage. Accordingly, as stated in the previous human rights analysis, there appear to be a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the legitimate purpose defence.⁷² The expanded range of exemptions or defences provided for in the 2018 bill do not address these concerns.

1.77 In relation to the right to a fair trial and the presumption of innocence, the statement of compatibility states:

The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving elements of the offence. It is appropriate for an evidential burden of proof to be placed on a defendant where the facts in relation to the defence, being their individual motivation for entering or remaining in a declared area, are peculiarly within their knowledge.⁷³

1.78 The statement concludes that, to the extent the declared area provisions limit the right to a fair trial and the criminal process rights guaranteed under Article 14 of the International Covenant on Civil and Political Rights, including the presumption of innocence, any limitations are reasonable, necessary and proportionate to achieve legitimate objectives.

1.79 The committee previously acknowledged that under the relevant provisions the prosecution would still need to prove each element of the offence beyond reasonable doubt. However, the previous analysis noted that criminal liability will be *prima facie* established where a person enters or remains in a declared area, without the prosecution being required to prove any intent to engage in terrorist activity or other illegitimate activity.⁷⁴ Accordingly, the construction of the offence means that a person could commit the offence without actually knowing that the area was declared, and without any intention of engaging in or supporting terrorist activity.

1.80 In addition, as noted above, the committee's previous reporting has also raised concerns about the compatibility of the provisions with the right to equality and non-discrimination⁷⁵ and the prohibition on arbitrary detention.⁷⁶ The engagement of these rights was not addressed in the statement of compatibility.

72 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 41.

73 EM, SOC, p. 25.

74 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 37.

75 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 42-44.

76 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 38-39.

Committee comment

1.81 Noting the concerns raised in the previous human rights assessments of the declared area offence and the above analysis, the committee draws the human rights implications of this measure in the bill to the attention of parliament.

Australian Federal Police – stop, search and seize powers

1.82 The committee has previously considered stop, search and seize powers as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.⁷⁷

1.83 Part IAA Division 3A of the *Crimes Act 1914* was first introduced in 2005 to provide 'a new regime of stop, question, search and seize powers...exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.⁷⁸

1.24 Division 3A provides a range of powers for the AFP and state and territory police officers that can be exercised if a person is in a 'Commonwealth place' (such as an airport)⁷⁹ and:

- the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act; or
- the Commonwealth place is a 'prescribed security zone'.⁸⁰

1.25 In these circumstances, the powers that the officers may exercise include:

- requiring a person to provide their name, residential address and reason for being there;
- stopping and searching persons, their items and vehicles for a terrorist related item; and
- seizing terrorism related items.⁸¹

77 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Thirtieth Report of the 44th Parliament* (10 November 2015).

78 Explanatory memorandum, Anti-Terrorism Bill (No 2) 2005, p. 1.

79 'Commonwealth place' means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth: *Commonwealth Places (Application of Laws) Act 1970* section 3.

80 The minister may, upon application from a police officer, declare, in writing, a Commonwealth place to be a 'prescribed security zone' if the minister considers that a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred: *Crimes Act 1914*, section 3UJ.

81 *Crimes Act 1914*, sections 3UC-3UE.

1.84 Division 3A, section 3UEA also allows a police officer to enter and search premises without a search warrant and to seize property without the occupier's consent in certain circumstances.⁸² These powers are not limited in their application to Commonwealth places.⁸³

1.85 The 2018 bill would extend the operation of stop, search and seize powers for a further three years noting the regime is currently due to sunset on 7 September 2018.⁸⁴

Compatibility of extending the stop, search and seize powers with multiple human rights

1.86 The stop, search and seize powers engage and may limit a number of human rights, including:

- the right to privacy;
- the right to freedom of movement;
- the right to security of the person and the right to be free from arbitrary detention;
- the right to a fair trial and fair hearing.⁸⁵

1.87 These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.88 The committee's previous reports have raised concerns as to whether the stop, search and seize powers constitute permissible limitations on human rights.⁸⁶ Noting that the stop, search and seize powers were not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility⁸⁷ be prepared.⁸⁸ As set out below, the statement of compatibility for the 2018 bill provides some of this foundational assessment.

82 *Crimes Act 1914*, section 3UEA.

83 EM, SOC, p. 26.

84 EM, SOC, p. 26; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

85 As noted in the committee's *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 28: These powers may also engage and limit the right to freedom of expression; the right to be treated with humanity and dignity; and the right to equality and non-discrimination.

86 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

87 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

88 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Extending stop, search and seize powers - legitimate objective

1.26 The statement of compatibility states that the powers 'achieve the legitimate purpose of protecting Australia's national security, including in particular, preventing and responding to terrorist acts'. This is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending stop, search and seize powers – rational connection

1.89 The statement of compatibility acknowledges that the powers have not been used to date.⁸⁹ However, it points to recent reviews of the powers by INSLM Renwick and the PJCS which recommended that the powers be continued as evidence of their importance.⁹⁰ Other than pointing to these other reviews, the statement of compatibility does not further explain how the powers are effective. Accordingly, it is unclear from the information provided how the powers are rationally connected to their stated objective.

Extending stop, search and seize powers – proportionality

1.90 The human rights assessment of the powers in the committee's previous report raised concerns about the proportionality of the limitation. The assessment noted that these powers are coercive and highly invasive in nature. For example, once a 'prescribed security zone' is declared, everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.⁹¹

1.27 There are further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. The previous assessment noted that the powers are in addition to existing police powers under Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime.⁹² For example, Division 2 of Part IAA of the *Crimes Act 1914* sets out a range of search and seizure powers, including the primary Commonwealth search warrant provisions that apply to all offences against Commonwealth law. Under these provisions, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for

89 EM, SOC, p. 26.

90 EM, SOC, pp. 26-27.

91 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

92 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.⁹³ A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.⁹⁴ The statement of compatibility does not explain how these ordinary powers are insufficient to protect national security.

1.28 The statement of compatibility argues that the powers are proportionate, pointing to restrictions on their use and noting they are subject to oversight by the ombudsman. The 2018 bill also proposes to introduce additional requirements for the AFP to report to the PJCIS after the AFP exercises such powers. These matters assist with the proportionality of the limitation. However, as noted above, questions remain as to whether the powers are more extensive than is strictly necessary and represent the least rights restrictive approach.

Committee comment

1.91 The committee therefore seeks the advice of the Attorney-General as to the compatibility with international human rights of each of the stop, question, search and seizure powers, and their proposed extension, including:

- **whether each of the stop, question, search and seizure powers, and their proposed extension, is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether each of the stop, question, search and seizure powers, and their proposed extension, is a reasonable and proportionate measure for the achievement of that objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

Extending the operation of ASIO's questioning and detention powers

1.92 Under Division 3 of Part III of the ASIO Act, ASIO has the power to apply for questioning warrants and questioning and detention warrants that permit ASIO to question or question and detain a person in order to collect intelligence in relation to a terrorism offence.

1.93 Currently, Division 3 of Part III of the ASIO Act will sunset on 7 September 2018. The bill seeks to provide for the continuation of this division of the ASIO Act for a further 12 months (until 7 September 2019).

93 Section 3R of the *Crimes Act 1914*.

94 Division 2 of Part IAA of the *Crimes Act 1914*.

1.94 The committee reported on ASIO's questioning and detention powers (special powers regime) in its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (now Act).⁹⁵

Compatibility of the measure with multiple human rights

1.95 The statement of compatibility identifies that the special powers regime engages the right to freedom of movement and freedom from arbitrary detention.⁹⁶ In addition to these rights, the committee's previous assessment considered that the measures also engage a number of other human rights, including the right to freedom of expression; the right to a fair trial; the right to privacy; and the right of the child to have their best interests as a primary consideration (because persons aged 16 to 17 years are also subject to these powers, subject to restrictions⁹⁷).

1.96 The committee previously noted that the special powers regime was legislated prior to the establishment of the committee, which means that it has not been subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The statement of compatibility for the 2018 bill goes some way to providing this foundational assessment.

1.97 The committee's previous assessment stated that, in the absence of a review into the measures by the PJCIS and the INSLM, it was unable to conclude that the special powers regime was compatible with human rights.⁹⁸ This finding is referred to in the statement of compatibility for the 2018 bill.⁹⁹ The previous human rights assessment also assessed that the measures were likely to be incompatible with human rights.¹⁰⁰ The proposed extension of the regime through the bill raises similar concerns as to the human rights compatibility of the measures, notwithstanding the further information provided in the statement of compatibility.

1.98 As noted above, most human rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

95 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101.

96 The SOC also refers to protections in the ASIO Act as a safeguard in relation to the prohibition on cruel, inhuman or degrading treatment or punishment. See EM, SOC, p. 33.

97 See, subsection 34ZE of Division 3 of Part III of the ASIO Act.

98 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

99 EM, SOC, p. 29.

100 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 12.

1.99 In relation to the objective of the special powers regime, and why the proposed extension of the measures is necessary, the statement of compatibility for the bill states:

The Division 3 powers support the legitimate objective of countering serious threats to Australia's national security interests and, in particular, preventing terrorist acts. Extending the operation of the Division 3 powers ensures Australia's counter-terrorism capabilities are maintained pending consideration of the PJCIS report reviewing the operation, effectiveness and implications of Division 3. The PJCIS completed its review on 1 March 2018.

...The Division 3 powers were originally introduced following the 11 September 2001 terrorist attacks in the United States to improve the capacity of intelligence agencies to identify and counter threats of terrorism in Australia. The current threat environment has evolved considerably since 11 September 2001 and is steadily worsening. Accordingly, it is critical that these powers remain available to ASIO, beyond 7 September 2018, pending consideration of the PJCIS review and 2016 INSLM Report into Certain Questioning and Detention Powers in Relation to Terrorism.

1.100 It is acknowledged that the stated objective of the measures is likely to be a legitimate objective for the purposes of international human rights law. However, questions arise as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to, the stated objective.

1.101 In extending the special powers regime for an additional year, the bill is in line with recommendation 4 of the PJCIS inquiry report into ASIO's questioning and detention powers, tabled on 10 May 2018.¹⁰¹ The PJCIS report recommends that ASIO's detention powers in Division 3 of Part III of the ASIO Act be repealed and that legislation should be developed to reform ASIO's compulsory questioning framework. The report recommends extending the relevant sunset date by one year in order to allow sufficient time for legislation to be developed by government and reviewed by the PJCIS.

1.102 The October 2016 report of the INSLM, The Hon Roger Gyles AO QC, 'Certain Questioning and Detention Powers in Relation to Terrorism,' also made several recommendations in relation to ASIO's special powers regime. These included that the questioning and detention powers be repealed or cease when the 7 September 2018 sunset date is reached.¹⁰² In relation to these powers, the report stated that the

101 Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018).

102 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 1.

measures 'are not proportionate to the threat of terrorism and are not necessary to carry out Australia's counter-terrorism and international security obligations'.¹⁰³ The report also recommended that ASIO's questioning power under Division 3 of Part III of the ASIO Act be repealed or not extended beyond the 2018 sunset date and 'be replaced by a questioning power following the model of coercive questioning available under the *Australian Crime Commission Act 2002* (Cth) as closely as possible'.¹⁰⁴

1.103 While it is acknowledged that full consideration of the PJCIS and INSLM's respective reports may take time, it remains a concern that these measures are being extended for one year in the bill despite serious questions as to their effectiveness, necessity and proportionality.

1.104 It is noted that these measures have been little used to date. According to Attorney-General's Department figures, ASIO has successfully requested 16 questioning warrants beginning in 2004, with none requested since 2010.¹⁰⁵ As of April 2017, ASIO had never requested or been issued with a questioning and detention warrant.¹⁰⁶ It is therefore open to question whether these measures are effective or necessary, which is a particular concern in light of their highly invasive nature.

1.105 In particular, the committee's previous analysis stated that the special powers regime is essentially coercive in nature.¹⁰⁷ A questioning warrant, for example, empowers ASIO to request a person give information or produce records or things that are (or may be) relevant to intelligence in relation to a terrorism offence. Failure to appear for questioning or to answer questions or provide requested records or things, or the giving of false or misleading information is a criminal offence

103 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 41.

104 Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) p. 1.

105 See figures cited in Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018) p. 11.

106 See, Attorney-General's Department, *Submission 7*, p. 14, made in relation to the Parliamentary Joint Committee on Intelligence and Security's review of ASIO's questioning and detention powers. See also, Parliamentary Joint Committee on Intelligence and Security, *ASIO's questioning and detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018) p. 11.

107 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 11.

punishable by five years' imprisonment.¹⁰⁸ In requiring that a person give information or produce a record or thing, the privilege against self-incrimination is abrogated.¹⁰⁹

1.106 Further, a questioning and detention warrant allows ASIO to request the detention of a non-suspect for the purpose of intelligence-gathering, and allows police officers to enter and search any premises where they reasonably believe the person is, and to use reasonable force in order to take the person into custody. In executing a detention warrant, the AFP officer is not required to give the person any information about the grounds for the warrant. A person may be detained for a maximum of seven days.¹¹⁰

1.107 The statement of compatibility for the 2018 bill argues that there are a range of safeguards in the ASIO Act in relation to the use of the measures.¹¹¹ These include that the Attorney-General must be satisfied of certain matters before issuing questioning and detention warrants¹¹² and that the ASIO Act provides for the appointment of 'prescribed authorities' to supervise the execution of questioning or questioning and detention warrants.¹¹³

1.108 However, consistent with the analysis in the committee's previous reports, such safeguards are unlikely to be sufficient to ensure the measures are a proportionate limitation on the human rights outlined at [1.95] above. It is noted in particular that the application of ASIO's special powers regime may be very broad in scope, as the powers may apply in relation to individuals who are not suspected of, nor charged with, any offence, including a terrorism-related offence.

Committee comment

1.109 Noting the concerns raised in its previous human rights assessments of ASIO's special powers regime and the above analysis, the committee draws the human rights implications of these measures in the bill to the attention of parliament.

108 See, section 34L of Division 3 of Part III of the ASIO Act.

109 See, subsection (8), section 34L of Division 3 of Part III of the ASIO Act.

110 See, subsection 4(c), section 34G of Division 3 of Part III of the ASIO Act.

111 See EM, SOC, pp. 30-34.

112 This includes that relying on other methods of collecting the intelligence would be ineffective and that there is a written statement of procedures in force to be followed in the exercise of authority under the warrant. See, EM, SOC, p. 32.

113 A 'prescribed authority' is a person who has served as a judge in a superior court for a period of at least five years, and no longer holds a commission as a judge of a superior court, or in certain circumstances a current judge of a state or territory Supreme Court or District Court (or an equivalent) who has served in the position for at least five years. See, section 34B of Division 3 of Part III of the ASIO Act.

1.110 The committee recommends that, in considering any amendments to the special powers regime, the minister have regard to the human rights assessment of the special powers regime set out above.

Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018

Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]

Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251]

Purpose	<p>The bill seeks to expand the operation of the cashless debit card trial to the Bundaberg and Hervey Bay area.</p> <p>F2018L00245: determines the trial area and trial participants for the Goldfields trial area, East Kimberley trial area and the Ceduna trial area.</p> <p>F2018L00251: sets out the kind of bank account to be maintained by a participant in the trial</p>
Portfolio	Social Services
Introduced	<p>House of Representatives, 30 May 2018</p> <p>F2018L00245: 15 sitting days after tabling (tabled Senate 20 March 2018)</p> <p>F2018L00251: 15 sitting days after tabling (tabled Senate 20 March 2018)</p>
Rights	Social security; private life; family; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Background

1.111 The committee has examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.¹

1.112 The committee has also previously considered the trial of cashless welfare arrangements in the two trial locations of Ceduna (and its surrounding region) and

1 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

East Kimberley in previous reports, including in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill 2015).²

1.113 The Debit Card Bill 2015 amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to provide for a trial of cashless welfare arrangements in up to three prescribed locations. Persons on working age welfare payments in the prescribed sites would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcohol or to conduct gambling. A person subject to the trial is prevented from accessing this portion of their social security payment in cash. Rather, payment is accessible through a debit card which cannot be used at 'excluded businesses' or 'excluded services'.³

1.114 The trial arrangements were initially extended to a period of twelve months in two instruments⁴ and, subsequently, by a further six months.⁵ The trial was further extended in the Ceduna region for a further six months (until 14 March 2018) and in East Kimberley for a further six months (until 25 April 2018).⁶

1.115 The committee also considered amendments to the cashless debit card trial proposed to be introduced by the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (the 2017 bill).⁷ After the committee's consideration of the 2017 bill, the 2017 bill was amended and the version as passed specifically defined the 'trial areas' of the cashless debit card trial to be the Ceduna area, the East Kimberley Area and the Goldfields area in the Social Security Administration Act.⁸ Section 124PF

2 Parliamentary Joint Committee on Human Rights, *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29 and *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36. Also see, Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], *Report 7 of 2016* (11 October 2016) pp. 58-61.

3 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 39.

4 Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) p. 53.

5 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33 and *Report 8 of 2017* (15 August 2017) pp. 122-125.

6 Social Security (Administration) (Trial Area) Amendment Determination (No. 2) 2017 [F2017L01170]; see Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

7 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

8 Item 1, Section 124PD(1) of the *Social Services Legislation Amendment (Cashless Debit Card) Act 2018*. Each of these areas were defined in section 124PD(1).

of that bill (as amended) also provided that the cashless debit card trial in the 'trial areas' was to end on 30 June 2019 and include no more than 10,000 trial participants.

Expansion of the cashless debit card trial to the Bundaberg and Hervey Bay area

1.116 The Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (the 2018 bill) expands the cashless debit card trial to the Bundaberg and Hervey Bay area, to run until 30 June 2020.⁹ It also expands the number of trial participants for the cashless welfare trial (including in the other trial sites) to 15,000.¹⁰

1.117 The trial participants in the Bundaberg and Hervey Bay area are defined in the bill. A 'trial participant' is a person whose usual place of residence 'is, becomes or was' within the Bundaberg and Hervey Bay area; is receiving newstart allowance, youth allowance (except those receiving the allowance as new apprentices or undertaking full-time study) or parenting payment; and is under the age of 35 years on the day the provision commences and has not turned 36 years of age.¹¹ There are also several circumstances identified in the bill where the person would not be a trial participant, including where the person has a payment nominee; where the person is subject to a determination under section 43(3A) (that is, where their social security periodic fortnightly payment may be paid in two instalments); and where the person is already subject to certain types of income management.¹² A person will also not be a trial participant if they are undertaking full-time study outside of the Bundaberg and Hervey Bay area.¹³

1.118 Section 124PGA(4) and (5) further provide:

- (4) The Secretary must determine that a person is not a trial participant under this section if the Secretary is satisfied that being a trial participant under this section would pose a serious risk to the person's mental, physical or emotional wellbeing.

9 Proposed section 124PF(1)(b) of the bill.

10 Proposed section 124PF(3) of the bill.

11 Proposed section 124PGA(1)(a)-(c) of the bill.

12 Proposed section 124PGA(1)(d)-(f) of the bill. The relevant types of income management are income management under section 123UC (child protection income management), 123UCB (disengaged youth income management), 123UCC (long-term welfare payment recipient income management), or 123UF (Queensland Family Responsibilities Commission income management).

13 Proposed section 124PGA(1)(g); 124PGA(3) of the bill.

- (5) The Secretary is not required to inquire into whether a person being a trial participant under this section would pose a serious risk to the person's mental, physical or emotional wellbeing.

1.119 The 2018 bill also includes provisions for the minister to make a determination varying the percentages of restricted and unrestricted portions for a person who is a trial participant in the Bundaberg or Hervey Bay area in certain circumstances. Circumstances include where the secretary is satisfied that the person is unable to use the person's cashless debit card as a direct result of a technological fault or natural disaster, or where the secretary is satisfied the person is being paid in instalments (at a time determined by the secretary pursuant to section 43(2) of the Social Security Administration Act) because the person is in severe financial hardship as a result of exceptional and unforeseen circumstances, or where a person is being paid in advance following a determination under section 51 of the Social Security Administration Act.¹⁴

Compatibility of the measure with multiple human rights

1.120 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to privacy and family and the right to equality and non-discrimination.¹⁵ Each of these rights is discussed in detail in the context of the income management regime more broadly in the committee's 2016 Review of Stronger Futures measures (2016 Review).¹⁶

1.121 The expansion of the trial to the Bundaberg and Hervey Bay area also engages and limits these rights. The statement of compatibility acknowledges these rights are engaged and limited by the bill.¹⁷ These rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) and proportionate to that objective.

14 Proposed sections 124PJ(4B); 124PJ(4C).

15 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) p. 61; and *Report 7 of 2016* (11 October 2016) pp. 58-61; Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

16 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 43-63. It is noted that the statement of compatibility states that in the Bundaberg and Hervey Bay area, it is estimated that 14% of participants will be Aboriginal and Torres Strait Islander peoples. The statement of compatibility also states that the proportion of Indigenous participants across the four trial sites will be approximately 33%: SOC, p. 9.

17 Statement of compatibility (SOC) p. 1.

1.122 The statement of compatibility states that the objectives of the cashless debit card trial are 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time'.¹⁸ The statement of compatibility describes the pressing and substantial concern justifying the expansion of the trial to the Bundaberg and Hervey Bay area as being that the area has 'significant issues regarding youth unemployment, intergenerational welfare dependency and families who require assistance in meeting the needs of their children'.¹⁹

1.123 The committee has previously accepted that the cashless welfare trial measures described above may pursue a legitimate objective.²⁰ However, concerns have previously been raised as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to this objective.²¹

1.124 The statement of compatibility cites the evaluation of the cashless debit card trial by ORIMA Research as evidence of the effectiveness of the trial.²² The interim research undertaken by ORIMA had previously been relied upon for similar purposes in previous statements of compatibility for cashless welfare measures.²³ The statement of compatibility explains that the evaluation found that the cashless debit card trial has had a 'considerable positive impact' in the communities in which it operated, and that the trial had been effective in reducing alcohol consumption and gambling in both of the trial sites.²⁴ Statistics cited in the statement of compatibility from the ORIMA report include that 41 per cent of persons reported drinking alcohol less frequently,²⁵ and 37 per cent of binge drinkers were doing this less frequently;²⁶

18 SOC, p. 2.

19 SOC, p. 2. The SOC also provides some statistics as to the prevalence of these issues in the Bundaberg and Hervey Bay area on page 2 of the SOC.

20 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

21 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

22 SOC, pp. 2-3. See ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017).

23 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 36-37.

24 SOC, p. 3.

25 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

26 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

48 per cent reported gambling less;²⁷ and 48 per cent reported using illegal drugs less often.²⁸

1.125 However, it is noted that the report also contains some more mixed findings on the operation of the scheme. For instance, while the statement of compatibility notes that nearly 40 per cent of non-participants in the trial perceived that violence in their community had decreased,²⁹ and the ORIMA report pointed to evidence of the reduction in alcohol-related harm in the trial sites based on administrative data,³⁰ the ORIMA report states that 'with the exception of drug driving offense and apprehensions under the Public Intoxication Act (PIA) in Ceduna, crime statistics showed no improvement since the commencement of the trial'.³¹ The ORIMA report also notes that 32 per cent of participants on average reported that the trial had made their lives worse;³² 33 per cent of participants had experienced adverse complications and limitations from the trial, including difficulties transferring money to children that are away at boarding school and being unable to make small transactions at fundamentally cash-based settings (such as canteens);³³ 27 per cent of participants on average noticed more 'humberging',³⁴ as did 29 per cent of non-participants;³⁵ and in the East Kimberley, a greater proportion of participants felt

27 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

28 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4. The report caveats, however, that self-reports of illegal drug use in a survey context are subject to a high risk of social desirability bias and should be interpreted with caution.

29 SOC, p. 3.

30 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) pp. 4-5.

31 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

32 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 6.

33 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 7.

34 Defined as 'making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial* (February 2017) p. 6.

35 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 76.

that violence had increased rather than had decreased.³⁶ These statistics are not cited in the statement of compatibility.³⁷

1.126 Further, as noted in the statement of compatibility, the Bundaberg and Hervey Bay area has a much larger population than the three current sites, and is not a remote location.³⁸ It is not clear, therefore, whether the positive findings from the ORIMA report are relevant in determining whether the cashless debit card trial in Bundaberg and Hervey Bay areas would be an effective means of achieving the legitimate objective. In particular, the statement of compatibility emphasises that the cashless debit card trial in the new area is targeted towards the issues of youth unemployment, intergenerational welfare dependency and families who require assistance in meeting the needs of their children.³⁹ While the ORIMA report identified that 40% of trial participants who had caring responsibility reported that they had been better able to care for their children,⁴⁰ the ORIMA report does not discuss effectiveness in relation to youth unemployment or intergenerational welfare dependency. While the statement of compatibility provides information as to the extent of these issues within the Bundaberg and Hervey Bay areas, there is no information provided as to how expanding the cashless debit card trial would be effective to achieve these objectives of the measure.

1.127 It is also unclear that the extension of the trials is a proportionate limitation on human rights. The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, are relevant to assessing the proportionality of these limitations.

1.128 Of particular concern, as has been discussed in previous reports, is that the cashless debit card trial would be imposed without an assessment of individuals' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

36 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 64.

37 It is noted that the ORIMA report findings and methodology have also been criticised in a review by the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University: see J Hunt, *The Cashless Debit Card Evaluation: Does it really prove success?* (CAEPR Topical Issue No.2/2017).

38 SOC, p. 2.

39 SOC, p. 2.

40 SOC, p. 3; ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 6.

1.129 As the cashless debit card trial applies to anyone below the age of 35 residing in the trial location who receives the specified social security payments, there are serious doubts as to whether the measures are the least rights restrictive way of achieving the objective. In relation to the bill, this concern is heightened insofar as the trial applies not only to persons whose usual place of residence 'is or becomes' within the Bundaberg and Hervey Bay area, but also applies to a person whose usual place of residence *was* within the area.⁴¹ By comparison, the income management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.⁴² The committee has previously stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.⁴³

1.130 The statement of compatibility identifies that the bill includes several safeguards to protect persons whose mental, physical and emotional wellbeing may be at serious risk if they participate in the scheme. This includes the requirement that the secretary determine that a person no longer be a trial participant if satisfied that being a trial participant is seriously risking a person's mental, physical or emotional wellbeing.⁴⁴ However, this safeguard is qualified in the bill, as the secretary is not required to make inquiries on this matter but is only required to take action once being made aware of the relevant facts.⁴⁵ It is not clear how the secretary would be made aware of whether a person's participation in the trial is impacting a person's mental, physical and emotional wellbeing.

1.131 The compulsory nature of the cashless debit card trial also raises questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'.⁴⁶ The application of the cashless debit card scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial, would appear to be a less rights restrictive way to achieve the trial's objectives. This was not discussed in the statement of compatibility.

41 Proposed section 124PGA(1)(a).

42 See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48.

43 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 47.

44 SOC, pp. 5-6.

45 Proposed section 124PGA(5) of the bill.

46 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 52.

Committee comment

1.132 The preceding analysis indicates that the expansion of the cashless debit card trial to the Bundaberg and Hervey Bay area engages and limits the right to social security, the right to privacy and family and the right to equality and non-discrimination.

1.133 The committee seeks the advice of the minister as to:

- how the measures are effective to achieve the stated objectives (including whether there is evidence in relation to how the measures will be effective to achieve the objectives of 'reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time');
- how the limitation on human rights is proportionate to achieve the stated objectives, including:
 - why it is necessary for persons whose usual place of residence was the Bundaberg or Hervey Bay area to be included within the definition of 'trial participant'; and
 - whether the use of the cashless debit card could be restricted to instances where there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location, or where individuals opt-in on a voluntary basis.

Amendments to provisions relating to participant's use of funds from restrictable payments

1.134 The Social Security (Administration) Act presently permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.⁴⁷ Currently, section 124PM provides that a person who receives a 'restrictable payment'⁴⁸ may use the restricted portion of the payment to purchase goods or services other than alcoholic beverages or gambling,⁴⁹ and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.⁵⁰

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

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

49 Section 124PM(a).

50 Section 124PM(b).

1.135 The 2018 bill includes an amendment to section 124PM which will come into effect if the proposed amendments to section 124PM in the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (Housing Affordability Bill) have commenced at the time these amendments commence.⁵¹ The Housing Affordability Bill proposes to repeal section 124PM and replace it, the effect of which (according to the explanatory memorandum to that bill) would be to remove what is currently section 124PM(b) (which refers to the person being able to use the unrestricted portion at their discretion) so as to allow for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary.⁵²

1.136 The proposed amendment would repeal section 124PM and substitute it with the following provision:

A person who receives a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to obtain goods or services, other than:

(a) alcoholic beverages; or

(b) gambling; or

(c) a cash-like product that could be used to obtain alcoholic beverages or gambling.

1.137 The effect of this amendment would be to expand the restriction on participants' use of funds to include 'cash-like' products that could be used to obtain alcoholic beverages or gambling,⁵³ and retain the proposed deletion of current section 124PM(b) which allows persons to use the unrestricted portion of the payment, as paid to the person, at the person's discretion.

1.138 There is also a proposed amendment to section 124PM(a) that is in similar terms which would apply in the event that the Housing Affordability Bill has not commenced (in other words, section 124PM(b) would remain unchanged if that bill has not commenced).⁵⁴

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

1.139 In its *Report 1 of 2018*, the committee considered that the proposed amendment to section 124PM in the Housing Affordability Bill may be incompatible

51 See item 20, proposed section 124PM and explanatory memorandum, p. 10.

52 Explanatory Memorandum to the *Social Services Legislation Amendment (Housing Affordability) Bill 2017*, 6.

53 'Cash-like' products are defined in proposed section 124PQA to include '(a) a gift card, store card, voucher or similar article (whether in a physical or electronic form); (b) a money order, postal order or similar order (whether in a physical or electronic form); (c) digital currency'.

54 See Item 17, proposed paragraph 124PM(a).

with the right to equality and non-discrimination.⁵⁵ This is because in allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the Housing Affordability Bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit, and may limit, or entirely preclude, a person's discretionary income if they are subject to both the proposed automatic rent deduction scheme and the cashless debit card trial. As the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates, giving rise to *prima facie* indirect discrimination.

1.140 To the extent that the bill retains the deletion of the reference to a person's unrestricted portion and allows for automatic rent deductions from the unrestricted portion of a cashless debit card participant's welfare payment, the concerns expressed in the committee's previous report apply equally to the proposed amendment in the bill.

Committee comment

1.141 The committee notes that, as set out in *Report 1 of 2018*, it previously considered that the proposed amendments to section 124PM introduced by the **Social Services Legislation Amendment (Housing Affordability) Bill 2017** may be incompatible with the right to equality and non-discrimination.

1.142 To the extent that item 20 of the bill introduces contingent amendments to section 124PM if the **Social Services Legislation Amendment (Housing Affordability) Bill 2017** has commenced by the time the bill commences, the committee reiterates its previous comment and draws the human rights implications of section 124PM to the attention of the parliament.

Amendments to the cashless welfare arrangements through the determinations

1.143 The Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245] (the trial of cashless welfare arrangements determination) revokes and remakes previous determinations in light of the amendments introduced by the *Social Services Legislation Amendment (Cashless Debit Card) Act 2018*.⁵⁶ The measures contained in the determination include:

55 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 137.

56 Previously, the trial areas of East Kimberley and Ceduna were primarily governed by legislative instruments, but the trials are now included in the primary legislation: section 124PD of the *Social Security (Administration) Act 1999*.

- defining the class of persons who will be trial participants in the Goldfields, Ceduna and East Kimberley regions pursuant to section 124PG(2) of the Social Security Administration Act;⁵⁷
- removing the locality of Plumridge Lakes from the Goldfields trial area;
- repealing and remaking several determinations which were due to expire on 30 June 2018, extending their operation to 30 June 2019.⁵⁸

1.144 The Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] (the declinable transactions determination) sets out the kind of bank account to be maintained by participants in the cashless debit card trial, as well as setting out terms and conditions relating to the establishment, ongoing maintenance and closure of bank accounts, and declares the kind of business in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution.

Compatibility of the determinations with human rights

1.145 The determinations raise the same human rights issues as those discussed above. The statement of compatibility to each of the determinations acknowledges these rights are engaged and limited by the determinations, and raises the same justifications for human rights limitations as discussed above in relation to the bill.

1.146 The committee has previously commented upon the human rights compatibility of earlier versions of the determinations. In relation to the declinable transactions determination, the committee raised concerns as to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. The committee drew the human rights implications of the earlier version of the declinable transactions determination to the attention of parliament noting the concerns previously discussed in relation to the cashless debit card trial.⁵⁹

1.147 In relation to the trial of cashless welfare arrangements determination, the committee noted that the determination raised similar concerns to those raised in the 2016 Review of Stronger Futures measures, but since no response was received

57 See Part 2 of the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018.

58 The determination repeals and remakes the following legislative instruments: Social Security (Administration) (Trial-Community Body- Ceduna Region Community Panel) Authorisation 2016, Social Security (Administration)(Trial-Community Body- East Kimberley Regional Community Panels) Authorisation 2015, Social Security (Administration)(Trial – Excluded Voluntary Participants) Determination 2016, Social Security (Administration)(Trial - Variation of Percentage Amounts) Determination 2016.

59 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 61.

from the minister at the time of finalising the report, the committee concluded it was not possible to conclude that the determination was necessary and effective to achieve the objectives of the trials or was a proportionate limitation on human rights.⁶⁰ It is noted that the new trial of cashless welfare arrangements determination retains the provisions from the previous determination as to the class of trial participants insofar as it applies to the Ceduna and East Kimberley determinations,⁶¹ but introduces new provisions to reflect the expansion of the trial to the Goldfields region.

1.148 As discussed above, while it is accepted that the cashless debit card trial may pursue a legitimate objective, there are concerns as to whether the measures are rationally connected to this objective. To the extent the determinations rely on the ORIMA report as evidence of the effectiveness of the cashless welfare regime,⁶² the concerns discussed above in relation to the ORIMA report apply equally in relation to the determinations. It is also not clear from the statement of compatibility to the trial of cashless welfare arrangements determination how the findings of the ORIMA report are relevant to the effectiveness of the measure as it applies to the Goldfields region.

1.149 The concerns discussed above in relation to proportionality also apply in relation to the determinations. Additionally, in relation to the trial of cashless welfare arrangements determination, the determination provides that the class of persons who fall within the Goldfields area and would be subject to the cashless debit card trial includes the class of persons who 'have not reached pension age and will not reach pension age during the 12 month period commencing on 26 March 2018'.⁶³ It is not explained in the statement of compatibility the rationale for excluding persons of pension age in the Goldfields trial area but not the Ceduna or East Kimberley areas.

Committee comment

1.150 The preceding analysis indicates that the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245] and the Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] engage and limit the

60 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 124-125.

61 See Explanatory Statement, p. 1.

62 SOC to the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], 5-6; SOC to the Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251] pp. 4-5.

63 See section 8 of the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018.

right to social security, the right to privacy and family and the right to equality and non-discrimination.

1.151 The committee seeks the advice of the minister as to:

- **how the measures are effective to achieve the stated objectives (including whether there is evidence in relation to how the measures will be effective to achieve the stated objectives as they apply to the Goldfields area); and**
- **how the limitation on human rights is proportionate to achieve the stated objectives (including whether there are other, less rights restrictive measures available, and the rationale for excluding persons who have reached pension age in the Goldfields trial area but not the Ceduna or East Kimberley area).**

Bills not raising human rights concerns

1.152 Of the bills introduced into the Parliament between 18 and 21 June 2018, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Animal Export Legislation Amendment (Ending Long-haul Live Sheep Exports) Bill 2018;
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018;
- Farm Household Support Amendment Bill 2018;
- Inspector-General of Animal Welfare and Live Animal Exports Bill 2018;
- Refugee Protection Bill 2018; and
- Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018.