Chapter 2

Concluded matters

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

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

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

Portfolio: Justice
Introduced: House of Representatives, 17 July 2014

Purpose

2.3 The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the bill) contains a number of amendments to the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995*, *Customs Act 1901*, *Financial Transaction Reports Act 1988*, *International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*. These include:

- introducing an offence of importing all substances that have a psychoactive effect;
- introducing an offence of importing a substance which is represented to be a serious drug alternative;
- granting Australian Customs and Border Protection officers powers with respect to these new offences;
- introducing new international firearms and firearm parts trafficking offences and mandatory minimum sentences;
- extending existing cross-border disposal or acquisition firearms offences;
- introducing procedures in relation to the international transfer of prisoners regime within Australia;
- clarifying that certain slavery offences have universal jurisdiction;
- validating access by the Australian Federal Police (AFP) to certain investigatory powers in designated State airports from 19 March until 17 May 2014; and
- correcting an error in the definition of a minimum marketable quantity in respect of a drug analogue of one or more listed border controlled drugs.

Background

2.4 The committee first reported on the bill in its *Tenth Report of the 44th Parliament*.[1] The committee sought further information from the Minister for Justice with regards to the engagement of the bill with the right to a fair trial and fair hearing rights, the prohibition against retrospective criminal laws, the right to security of the person and freedom from arbitrary detention, the right to life, the prohibition on torture, cruel, inhuman and degrading treatment or punishment and the right to an effective remedy. It also considered that Schedule 4 of the bill promoted human rights, including the prohibition against slavery and forced labour and the right to an effective remedy.

2.5 The committee considered the Minister for Justice's response in its *Fifteenth Report of the 44th Parliament*.[2] It considered that certain measures in the bill are compatible with human rights, while others are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial. However, the committee sought further information regarding the new offence of importing 'psychoactive substance' and the validation of conduct by the AFP in airport investigations.

2.6 The bill finally passed both Houses of Parliament on 23 February 2015.

Committee view on compatibility

Schedule 1 - Import ban on psychoactive substances

New offence of importing 'psychoactive substance'

Prohibition against retrospective criminal laws – quality of law

2.7 The committee requested further advice from the Minister for Justice as to:

- whether the term 'psychoactive substance' could be more specifically defined;
- whether more precise terms than 'significant disturbance' could be used in the definition of what constitutes a 'psychoactive effect', and
- whether non-exhaustive terms such as 'including' be could be omitted from the definition of what constitutes a 'psychoactive effect'.

Minister's response

> The Government does not propose to amend the definitions of 'psychoactive substance' or 'psychoactive effect'. The Government considers that the definitions are sufficiently certain for human rights

1 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 9-31.

2 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 24-43.

standards and meet the standards of the quality of law test for human rights purposes.

As outlined in my letter of 30 September 2014, this measure is designed to capture so-called 'legal highs' or 'new psychoactive substances', which are those substances that are developed specifically to induce the same effect in humans as illicit drugs but are not captured by the existing criminal laws which proscribe substances by chemical structure. The United Nations Office on Drugs and Crime's 2013 World Drug Report noted that, by mid-2012, the number of different new psychoactive substances detected throughout the world had exceeded the 234 substances currently controlled under international conventions. The number of previously undetected new psychoactive substances continues to rise. The Report also noted that there is an almost limitless array of these sorts of chemical combinations.

The Government acknowledges that there are a large number of substances with a legitimate use which could induce the same effect as an illicit drug when consumed by humans. However, these are specifically excluded from the measure. In particular, the measure excludes the following: foods, therapeutic goods, tobacco, plants, fungi, industrial chemicals, agricultural chemicals and veterinary chemicals. In a practical sense, these exclusions mean that the definitions of 'psychoactive substance' and 'psychoactive effect' will apply very narrowly to a small, specific and definite range of substances that do not have a legitimate use. If a person is importing a substance for a legitimate use, he or she will not have to be concerned about the definitions of 'psychoactive substance' or 'psychoactive effect'.

There is no alternative method of achieving the Bill's aims that will not involve similarly broad definitions. It is not possible to narrow or more specifically define the terms 'psychoactive substance' or 'psychoactive effect' without fundamentally undermining the purpose and utility of the legislation. Ireland and New South Wales have taken a similar route and used similar definitions of 'psychoactive substance' and 'psychoactive effect'. New Zealand has set up a mechanism under the Psychoactive Substances Act 2013 that would ultimately allow the importation and sale of authorised psychoactive substances, but it does not define psychoactive effect and leaves it open to a broad interpretation.

The Australian Government has adopted a definition that excludes substances that have only a minor effect on a person's central nervous system- that is, substances that do not result in hallucinations, significant disturbances or significant changes to a person's motor function, thinking, behaviour, perception, awareness or mood. Beyond this, it is not possible to use more specific or precise terms to capture an amorphous and ever-changing set of substances whose only unifying feature is that they are intended to be consumed as alternatives to other illicit drugs.

> Other jurisdictions have chosen different ways to ban psychoactive substances based on their intended use, rather than their effect. While a ban based solely on the presentation of a substance may offer greater certainty for importers, it would be inadequate to deal with the realities at the border. Typically, the Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police (AFP) will encounter new psychoactive substances as unmarked or mislabelled pills, powders or liquids. In such circumstances, it will not be possible for the officer examining the substance to immediately and conclusively determine that it is intended to ultimately be used as an alternative to an illicit drug. An effect-based ban (like that in proposed section 320.2) must accompany a presentation or purpose-based ban (like that in proposed section 320.3) in order for ACBPS and AFP officers to be able to effectively stop, seize, and destroy new psychoactive substances and, if appropriate, prosecute the importers.
>
> A broad definition of 'psychoactive substance' is necessary for the Bill to achieve its aim of preventing largely unknown and untested chemical substances being imported as alternative versions of illicit drugs. When put in the context of the exclusions in subsection 320.2(2), the law is sufficiently specific for individuals who import goods, particularly chemicals, to understand their obligations under it.[3]

Committee response

2.8 **The committee thanks the Minister for Justice for his response. The response has constructively and comprehensively addressed the matters raised by the committee in relation to the new offence of importing psychoactive substances. The committee therefore considers that the new offence of importing psychoactive substances is compatible with the prohibition against retrospective criminal laws and the quality of law test. The committee has concluded its examination of this aspect of the bill.**

Schedule 2 – Firearm Trafficking Offences

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

Right to security of the person and freedom from arbitrary detention, and right to a fair trial and fair hearing rights

2.9 In its *Fifteenth Report of the 44th Parliament* the committee considered that the mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

3 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 1-2.

2.10 In the event that the mandatory minimum sentencing provisions are retained, the committee recommended the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

Minister's response

> Consistent with my previous response, the Government considers that mandatory minimum penalties for firearms trafficking are reasonable and necessary to deter people from diverting firearms into the illicit market, where they can be accessed by criminals and used in the commission of serious and violent crimes. As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will be proportionate to the offence they commit and is entirely at the discretion of the sentencing judge.
>
> The introduction of mandatory minimum penalties for these provisions was an election commitment and reflects the seriousness with which the Government takes gun-related crime. The Australian Government is not the only government which has taken this view, with the Queensland and United Kingdom governments also introducing mandatory minimum sentences for firearms trafficking, and a number of other counties establishing mandatory minimums for other firearms-related offences (including illegal possession).
>
> I note that the validity of mandatory minimum penalties for aggravated people smuggling offences in the Migration Act were upheld as constitutionally valid in the High Court matter of *Magaming v The Queen* [2013] HCA 40. The appellant's argument that the imposition of these penalties was 'arbitrary' and 'non-judicial' was not successful.[4]
>
> In response to concerns raised by the Committee in its Tenth Report of the 44th Parliament, I have agreed to amend the Explanatory Memorandum for the Bill to note that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This further demonstrates the Government's commitment to limiting any encroachment on judicial discretion.[5]

Committee response

2.11 **The committee thanks the Minister for Justice for his response.**

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4 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3.

5 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3.

2.12 As noted previously, in order for detention not to be arbitrary in international law it must be reasonable, necessary and proportionate in all the circumstances.[6] This is why it is important for human rights purposes to allow courts the discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances. Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.[7]

2.13 The minister has stated in his previous response to the committee that, as the mandatory minimum sentencing provisions do not impose a minimum non-parole period, the provisions preserve a level of judicial discretion.[8] However, mandatory minimum sentences may be seen by courts as a 'sentencing guidepost', which is to say the appropriate sentence for the least serious case.[9] Additionally, courts may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence.[10] As the application of minimum non-parole periods may be interpreted quite strictly, there is the potential for such provisions to seriously constrain judicial discretion even with respect to the minimum non-parole period.

2.14 **In light of these considerations, the committee reiterates its recommendation that the provision be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence. This would ensure that the scope of the discretion available to judges would be clear on the face of the provision itself, and thereby minimise the potential for disproportionate sentences that may be incompatible with the right not to be arbitrarily detained and the right to a fair trial.**

2.15 **The committee welcomes the minister's undertaking to amend the explanatory memorandum (EM) to provide that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ**

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6 See for example, *Gorji-Dinka v Cameroon* (2005), 1134/2002, UN doc CCPR/C/83/D/1134/2002 [5.1]; *Van Alphen v The Netherlands* (1990) 305/1988, UN doc CCPR/C/39/D/305/1988 [5.8]; *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4].

7 See for example, Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

8 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 31.

9 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 31.

10 This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

significantly from the head sentence'.[11] The committee considers that this step is likely to provide some protection of judicial discretion in sentencing, and thanks the minister for his considered engagement with the committee in relation to this issue and the human rights compatibility of the bill more generally.

Schedule 5 – Validating airport investigations

Validation of conduct by the Australian Federal Police (AFP) in airport investigations

Multiple rights

2.16 In its *Tenth Report of the 44th Parliament*, the committee sought the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to security of the person and freedom from arbitrary detention, the prohibition against retrospective criminal laws, the right to an effective remedy and the right to a fair trial and fair hearing rights. In its *Fifteenth Report of the 44th Parliament* the committee requested the further advice of the Minister for Justice as to:

- whether unauthorised powers were exercised (such that there is a need to retrospectively validate such powers);
- if so, what powers were exercised (to see whether that the general nature of the validation is proportionate); and
- what specific other powers existed at the time under which the conduct was or could have been carried out (to see if there is a need to retrospectively validate such power and if such validation is proportionate).

Minister's response

> As outlined in my previous response, the *Commonwealth Places (Application of Laws) Act 1970* allows the Australian Federal Police (the AFP) to utilise investigative powers available under Part 1AA and 1D of the *Crimes Act 1914* to investigate state offences which occur at Commonwealth places that are designated state airports. As the *Commonwealth Places (Application of Laws) Regulation 1998* (the Regulations) was inadvertently repealed for a period of time, the AFP was unaware of the need to confine itself to alternative powers, which may have been available, for a portion of the repeal period. Statistics are not available to identify the specific powers relied upon during this period.
>
> Alternative powers were available to the AFP to investigate state offences at designated state airports, including under section 9 of the *Australian Federal Police Act 1979*. These alternative powers may give rise to a separate procedure and practice from the *Crimes Act 1914* powers. Since 2011 when the Regulations were amended to allow the AFP to use

11 See Revised Explanatory Memorandum (REM), 15.

investigative powers under the *Crimes Act 1914* in designated state airports, the AFP has used these investigation powers notwithstanding the availability of alternative powers. Retrospective validation of the use of *Crimes Act 1914* powers between 19 March 2014 and 16 May 2014 would eliminate any uncertainty which may arise.

Accordingly, retrospective validation of certain powers for a limited time period under Schedule 5 of the Bill is a reasonable, necessary and proportionate measure to achieve a legitimate objective, so as to ensure consistent application of appropriate security and policing at Commonwealth airports. It is necessary to avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.[12]

Committee response

2.17 **The committee thanks the Minister for Justice for his response. The committee considers that, to the extent that applied state laws and investigative powers are otherwise compatible with human rights, the retrospective validation of conduct by the Australian Federal Police in airport investigations is likely to be compatible with human rights.**

2.18 **However, as previously noted by the committee, the *Commonwealth Places (Application of Laws) Act 1970* (CP Act) allows state laws to be applied to a 'Commonwealth Place,' such as airports, regardless of whether or not those laws comply with human rights. The committee concluded that the CP Act is likely to be incompatible with human rights, and made a number of recommendations to ensure that it would not operate to apply any state laws that are themselves incompatible with human rights.[13] The committee has concluded its examination of this aspect of the bill.**

12 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3-4.

13 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* 2-5; Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* 95 – 99.

Federal Courts Legislation Amendment Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 27 November 2014

Purpose

2.19 The Federal Courts Legislation Amendment Bill 2014 (the bill) seeks to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to:

- provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant;
- confer jurisdiction on the Federal Circuit Court of Australia (FCCA) in relation to certain tenancy disputes;
- enable additional jurisdiction in relation to tenancy disputes to which the Commonwealth is a party to be conferred on the Federal Circuit Court of Australia by delegated legislation; and
- allow for delegated legislation to be made to modify the applicable state and territory law where appropriate, and to clarify the jurisdiction and the enforcement of an exercise of that jurisdiction.

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

Background

2.21 The committee reported on the bill in its *Eighteenth Report of the 44th Parliament*.[1]

Conferral of jurisdiction on the Federal Circuit Court for tenancy disputes

Fair hearing rights

2.22 The committee considered that the proposed conferral of jurisdiction on the Federal Circuit Court of Australia in relation to certain tenancy disputes where the Commonwealth is a lessor or lessee may engage fair hearing rights. The committee sought the advice of the Attorney-General as to whether the conferral of jurisdiction on the Federal Circuit Court of Australia for tenancy disputes is compatible with fair hearing rights, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 37-39.

- whether the measure is a reasonable and proportionate way to achieve its stated objective.

Minister's response

It is my view that the relevant provisions in the Bill are compatible with the right to a fair hearing. They provide tenants involved in a Commonwealth tenancy dispute with an appropriate forum to have those disputes heard and determined.

Jurisdiction is being conferred on the FCC in order to ensure that tenancy disputes involving the Commonwealth can be resolved in the least time-consuming and expensive way. State and territory law directs residential tenancy matters to state and territory tribunals. However, state and territory tribunals that are not 'courts' within the meaning of Chapter III of the Constitution cannot exercise federal judicial power, which can give rise to jurisdictional arguments when the Commonwealth is a party to a tenancy dispute.

Conferring jurisdiction on the FCC to hear certain Commonwealth tenancy disputes will provide an appropriate forum in a Chapter III court for these matters to be heard. The only current alternative to resolve residential tenancy disputes involving the Commonwealth would be for a tenant to bring action in a superior state court or, in some circumstances, the Federal Court, which is a much more costly and time-consuming endeavour for users, than the FCC.

I understand that concerns have been raised about application of the protections that exist for lessees under state and territory law. It is important to note that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction. This position is intended to be clarified through legislative instruments made under proposed paragraph 10AA(3)(b) of the Bill.

The intention of the Bill is not to remove any of these important protections, but simply to introduce a new option for resolving Commonwealth tenancy disputes in a low-cost and easily accessible forum where jurisdictional arguments would not require consideration.

For these reasons, I am of the view that the provisions in the Bill relating to Commonwealth tenancy disputes are not only compatible with fair hearing rights, but indeed promote these rights in a low-cost, easily accessible trial court which has a national presence and circuits regularly to regional areas.[2]

2 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 11 February 2015) 1-2.

Committee response

2.23 The committee thanks the Attorney-General for his prompt response. The committee notes the importance of fair hearing rights in the context of the right to housing and the importance of procedural safeguards in respect of evictions.[3] Accordingly, the committee welcomes the Attorney-General's advice that these important protections will not be removed and that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. The committee welcomes the Attorney-General's advice that a legislative instrument will be made under proposed paragraph 10AA(3)(b) of the bill to the effect that state and territory law will continue to apply to tenancy arrangements where the Commonwealth is a lessor. On this basis, the committee is assured that fair hearing rights will be protected. The committee considers that a clearer and more immediate guarantee of the protection could be provided by including it in the bill rather than relying on a future legislative instrument.

2.24 **Accordingly, the committee recommends that the bill be amended to state that the law of the relevant state or territory will apply to tenancy disputes where the Commonwealth is a lessor.**

3 Article 11, International Covenant on Economic, Social and Cultural Rights.

Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 16 July 2014

Purpose

2.25 The Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014 (the bill) seeks to amend the *Clean Energy (Income Tax Rates Amendments) Act 2011* to repeal personal income tax cuts legislated to commence on 1 July 2015.

2.26 The bill also seeks to amend the *Clean Energy (Tax Laws Amendments) Act* 2011 to repeal associated amendments to the low-income tax offset, also legislated to commence on 1 July 2015.

Background

2.27 The bill is a reintroduction of measures previously included in the following bills:

- the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013, introduced on 13 November 2013 (the third reading of that bill was negatived by the Senate on 20 March 2014 and it therefore did not proceed); and
- the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2], introduced on 23 June 2014 (the second reading of that bill was negatived by the Senate on 9 July 2014 and it therefore did not proceed).

2.28 The committee's comments on the previous bills are contained in its *First Report of the 44th Parliament*,[1] *Eighth Report of the 44th Parliament*,[2] and *Ninth Report of the 44th Parliament*.[3]

2.29 The committee commented on this bill in its *Tenth Report of the 44th Parliament*.[4]

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1 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 1.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 34-35.

3 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 13-14.

4 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 36-37.

Effect of repealing measures

Right to an adequate standard of living

2.30 The committee sought the advice of the Treasurer as to whether the bill is compatible with the right to an adequate standard of living.

Minister's response

> The Committee sought further information as to whether the Bill is compatible with the right to an adequate standard of living in article 11(1) of the International Covenant on Economic, Social and Cultural Rights.
>
> The Bill repeals the second round of Carbon Tax-related personal income tax cuts that are due to start on 1 July 2015 because that is what Labor promised prior to the last election as a budget savings measure to help to repair the budget. Since the election Labor have failed to keep their promise to the Australian people so we are introducing legislation to allow the Labor Party to keep its promise to the Australian people to fix the budget.
>
> Given the only consequence of the Bill is to preserve the currently applicable tax arrangements and it is no longer necessary to compensate taxpayers for the Labor's Carbon Tax, the Government is comfortable the proposed changes are compatible with human rights. I note the Government has scrapped Labor's carbon tax, saving the average household $550 a year.[5]

Committee response

2.31 **The committee thanks the Parliamentary Secretary to the Treasurer for his response, and considers that the bill is compatible with the right to an adequate standard of living. However, the committee draws the attention of the legislation proponent to the requirements for the preparation of statements of compatibility as set out in the committee's Guidance Note No. 1, which provides advice on how and when limitations of rights may be justified.**

Senator Dean Smith
Chair

5 See Appendix 1, Letter from the Hon. Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith (dated 17 December 2014) 1.