

# Chapter 1

## New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 11 May to 4 June 2015, legislative instruments received from 10 April to 14 May 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

### **Bills not raising human rights concerns**

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Airports Amendment Bill 2015;
- Appropriation (Parliamentary Departments) Bill (No. 1) 2015-2016;
- Crimes Legislation Amendment (Penalty Unit) Bill 2015;
- Energy Grants and Other Legislation Amendment (Ethanol and Biodiesel) Bill 2015;
- Excise Tariff Amendment (Ethanol and Biodiesel) Bill 2015;
- Export Charges (Collection) Bill 2015;
- Export Charges (Imposition—Customs) Bill 2015;

- Export Charges (Imposition—Excise) Bill 2015;
- Export Charges (Imposition—General) Bill 2015;
- Imported Food Charges (Collection) Bill 2015;
- Imported Food Charges (Imposition—Customs) Bill 2015;
- Imported Food Charges (Imposition—Excise) Bill 2015;
- Imported Food Charges (Imposition—General) Bill 2015;
- Iron Ore Supply and Demand (Commission of Inquiry) Bill 2015;
- Medical Research Future Fund (Consequential Amendments) Bill 2015;
- Medical Research Future Fund Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 3) Bill 2015;
- Tax and Superannuation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 1) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 2) Bill 2015; and
- Water Amendment Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015;
- Australian Small Business and Family Enterprise Ombudsman Bill 2015;
- Customs Amendment (Australian Trusted Trader Programme) Bill 2015;
- Freedom of Information Amendment (Requests and Reasons) Bill 2015;
- Marriage Amendment (Marriage Equality) Bill 2015;
- National Health Amendment (Pharmaceutical Benefits) Bill 2015;
- Passports Legislation Amendment (Integrity) Bill 2015;
- Private Health Insurance (Collapsed Insurer Levy) Amendment Bill 2015;
- Private Health Insurance (National Joint Replacement Register Levy) Amendment Bill 2015;
- Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015;
- Private Health Insurance (Prudential Supervision) Bill 2015;

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- Private Health Insurance (Risk Equalisation Levy) Amendment Bill 2015;
  - Private Health Insurance Supervisory Levy Imposition Bill 2015;
  - Renewable Energy (Electricity) Amendment Bill 2015;
  - Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015 and
  - Superannuation Guarantee (Administration) Amendment Bill 2015.

### **Instruments not raising human rights concerns**

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>1</sup> Instruments raising human rights concerns are identified in this chapter.

1.10 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.

### **Appropriation bills**

1.11 The following appropriation bills were introduced during the relevant period:

- Appropriation Bill (No. 1) 2015-2016;
- Appropriation Bill (No. 2) 2015-2016;
- Appropriation Bill (No. 5) 2014-2015; and
- Appropriation Bill (No. 6) 2014-2015.

1.12 In light of the Minister for Finance's view as to the extent to which appropriation bills may be subject to human rights assessments (see page 13), the committee makes no further comment on these bills.

### **Deferred bills and instruments**

1.13 The committee has deferred its consideration of the following bills and instruments:

- Criminal Code Amendment (Animal Protection) Bill 2015 (deferred 3 March 2015);
- Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015;

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1 See Parliament of Australia website, 'Journals of the Senate', [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

- Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015; and
- Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551].

1.14 As previously noted, the committee continues to defer a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.<sup>2</sup>

1.15 The committee also continues to defer a number of instruments in connection with its ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime.<sup>3</sup>

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2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015).

3 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015).

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## Social Services Legislation Amendment (No. 2) Bill 2015

*Portfolio: Social Services*

*Introduced: House of Representatives, 28 May 2015*

### **Purpose**

1.16 The Social Services Legislation Amendment (No. 2) Bill 2015 (the bill) seeks to amend the current income management programme and continue it for two years and to make amendments in relation to aged care.

1.17 In particular, the bill seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- abolish certain incentive payments relating to income management;
- amend how a person is determined to be a 'vulnerable welfare payment recipient' so that a person will no longer be assessed on a case-by-case basis for referral by a Centrelink worker, but will automatically be subject to income management if they meet certain criteria, which will be specified by the Minister for Social Services in a legislative instrument;
- remove reference to 'dependent child' and substitute reference to the person being 'a child for whom the person is the principal carer';
- amend the basis on which a person can seek an exemption from income management, revising the test from how many hours a person has worked to how much welfare the person has been paid during the relevant period; and
- introduce greater flexibility to deal with persons whose income management account has been credited or debited in error, and provide that in certain circumstances the recipient will owe a debt to the Commonwealth.

1.18 The bill also seeks to amend the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to cease the payment of residential care subsidies for care recipients during a period of leave taken before entering a residential care service. This will mean that during a period of up to seven days before a person enters into residential care (when a spot is being reserved for them) the care recipient will no longer receive government subsidies or supplements during the period when the person is not receiving care. The aged care provider will not be able to recoup any lost residential care subsidy from the care recipient as a result of this measure.

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

## **Background**

1.20 The committee has previously conducted an inquiry into the *Stronger Futures in the Northern Territory Act 2012* and related legislation,<sup>1</sup> including in relation to income management, and is currently undertaking a new examination into the legislation.

### ***Income management***

1.21 The income management regime engages multiple human rights, in particular the right to a private life, the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living.<sup>2</sup> In examining the proportionality of the income management measures, the committee is particularly concerned by the proposal in this bill to change the basis on which a person will become subject to income management. The bill proposes moving away from an individual assessment of a person's vulnerabilities towards an automatic application of income management for certain classes of people, to be specified in a legislative instrument. The explanatory memorandum and statement of compatibility do not explain what the criteria is likely to be for the automatic application of income management, nor does the statement of compatibility provide any justification as to whether this change, in moving away from individual assessments, is compatible with a number of human rights.

**1.22 The committee is currently undertaking a broader inquiry: *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and intends to report on this in 2015. The committee will defer its consideration of this bill as part of its broader inquiry.**

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1 Parliamentary Joint Committee on Human Rights, *Stronger Futures in the Northern Territory Act 2012 and related legislation, Eleventh Report of 2013* (June 2013).

2 See articles 17 and 26 of the International Covenant on Civil and Political Rights and articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights.

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## Defence Trade Controls Amendment Bill 2015

*Portfolio: Defence*

*Introduced: House of Representatives, 26 February 2015*

### **Purpose**

1.23 The Defence Trade Controls Amendment Bill 2015 (the bill) seeks to amend the *Defence Trade Controls Act 2012* (the Act) to:

- delay the commencement of offence provisions by 12 months to ensure that stakeholders have sufficient time to implement appropriate compliance and licensing measures;
- provide for new offences or amend existing offences relating to export controls;
- require approvals only for sensitive military publications and remove controls on dual-use publications;
- require permits only for brokering of sensitive military items and remove controls on most dual-use brokering, subject to international obligations and national security interests; and
- provide for review of the Act, initially two years after the commencement of section 10, and for the minister to table a copy of the review report in each House of Parliament.

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

### **Background**

1.25 The committee previously considered the bill in its *Twentieth Report of the 44<sup>th</sup> Parliament*, and requested further information from the Minister for Defence as to whether the reverse evidential burdens contained within the bill were a proportionate limitation on the right to a fair trial (presumption of innocence).<sup>1</sup>

1.26 The bill finally passed both Houses of Parliament on 18 March 2015, and received Royal Assent on 2 April 2015.

### **Reverse evidential burdens**

1.27 The bill seeks to amend a number of existing offences to introduce statutory exceptions to those offences. These exceptions would reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case.

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1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 10-14.

1.28 The committee considers that reversing the burden of proof engages and limits the right to be presumed innocent.

***Right to a fair trial (presumption of innocence)***

1.29 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.30 An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.31 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must be reasonable, necessary and proportionate to that aim.

***Compatibility of the measure with the right to a fair trial (presumption of innocence)***

1.32 The statement of compatibility notes that the bill includes a number of defences that reverse the onus of proof and so limit the right to be presumed innocent.

1.33 In its previous analysis the committee accepted that the offences in the Act and the amendments in the bill seek to achieve the legitimate objective of enhancing the export control regime which supports Australia's defence, security and international obligations. However, it noted concerns that not all of the reverse burden provisions may be proportionate to achieving that objective.

1.34 The committee also noted that while some aspects of the exceptions appear to be properly characterised as falling within the particular knowledge of the defendant, it is not clear that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences.

1.35 The committee therefore sought the advice of the Minister for Defence as to whether the limitation on the presumption of innocence is a reasonable and proportionate measure to achieve the stated objective.

**Minister's response**

Noting that the Bill requires the defendant to carry an evidential burden of proof with regard to the new exceptions, the Report queries whether the Bill is consistent with Article 14(2) of the International Covenant on Civil and Political Rights which protects the right of the defendant to be presumed innocent. The Bill's explanatory memorandum justifies these reversals on the grounds that the evidence that would need to be raised would either be solely within the defendant's knowledge or it would be



more reasonable, more practical and less burdensome for the defendant to establish the facts. Although the Committee agrees that this explanation holds true in some circumstances, it has asked for my further advice as to whether the limitation is reasonable and proportionate to achieve the Bill's stated objective.

While I acknowledge that the Bill does reverse the onus of proof for the introduced exceptions, these reversals are within reasonable limits, considering the importance of the Bill's objective, the lower standard of proof that the defendant bears, and that the defendant's right to a defence is maintained. The objective of the legislation, to stop proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs, will be strengthened by exceptions that shift the onus to the defendant. To discharge the onus, a defendant need only produce evidence that suggests a reasonable possibility that the exception applies. Noting that a defendant who wishes to rely on an exception should have conducted compliance checks to satisfy themselves that their activity falls within the exception, it is reasonable to expect the defendant to produce evidence of these checks to discharge the onus.

Reversing the onus for the defences within the Bill does not erode the defendant's right to a defence, is within reasonable limits and, given the important counter-proliferation objective of the Bill, is a proportionate measure to achieve the Bill's stated objective.<sup>2</sup>

### Committee response

1.36 **The committee thanks the Minister for Defence for his response.** The committee notes that its original request for further information was focused on the construction of the offence provision and in particular whether the applicable exceptions could be characterised as falling within the particular knowledge of the defendant (such as whether the defendant made the supply orally). It was not clear to the committee that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences. In particular, it was not apparent that the following would be particularly within the knowledge of the defendant, to such an extent, as to make it reasonable in all the circumstances to reverse the burden of proof. Rather, such matters would appear more likely to be within the government's particular knowledge and expertise:

- that the supply is within the scope of Part 2 of the Defence and Strategic Goods List, which is a list formulated by the minister;<sup>3</sup>

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2 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 21 April 2015) 1.

3 See item 21 of the bill.

- that there is no notice in force in relation to the supplier and the technology;<sup>4</sup>
- that a country is a participating state for the purposes of the Wassenaar Arrangement; a participant in the Australia Group; a partner in the Missile Technology Control Regime; and a participant in the Nuclear Suppliers Group;<sup>5</sup>
- that a country is specified in a legislative instrument;<sup>6</sup> and
- that the supply is made under or in connection with a contract specified in a legislative instrument.<sup>7</sup>

1.37 In addition, reversing the burden of proof in the following instances would appear to require the defendant to prove an element of the offence, which should more properly fall on the prosecution:

- proving that the supply of DGSL technology is not the provision of access to that technology;<sup>8</sup> and
- proving that the supply is not for a military end-use nor for use in a Weapons of Mass Destruction Program.<sup>9</sup>

1.38 Unfortunately, the minister's response does not deal with the specifics of the exceptions and therefore doesn't provide specific information to support a conclusion that they are justified. Instead the response deals with the offence provision more generally and reiterates how a reverse burden offence works in practice. The committee also notes the minister's comment regarding a defendant having a responsibility to satisfy themselves that their activity falls within an exception. While this may appear reasonable in itself, it doesn't address why the requirement to undertake due diligence is sufficient to warrant reversing the burden of proof and it doesn't support a conclusion that such matters are within the particular knowledge of the defendant.

**1.39 The committee considers that the measures reversing the burden of proof in relation to the proposed new statutory exceptions (defences) limit the right to be presumed innocent. As set out above, the minister's response does not justify that limitation for the purposes of international human rights law, in particular that it is reasonable to reverse the burden of proof in relation to all elements of the**

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4 See item 21 of the bill.

5 See item 41 of the bill, proposed new subsection 15(4).

6 See item 41 of the bill, proposed new subsection 15(4).

7 See item 41 of the bill, proposed new subsection 15(4B).

8 See item 17 of the bill.

9 See item 17 of the bill.

**defence. Accordingly, the committee seeks further information from the Minister for Defence as to why it is necessary and proportionate to reverse the burden of proof in the cases outlined at paragraph [1.36] to [1.37] above.**

