

## 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.

### **Criminal Code Amendment (Private Sexual Material) Bill 2015**

*Sponsor: Tim Watts MP; Terri Butler MP*

*Introduced: House of Representatives, 12 October 2015*

#### **Purpose**

2.3 The Criminal Code Amendment (Private Sexual Material) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (Criminal Code) to criminalise what is colloquially referred to as 'revenge porn'. Specifically, the bill would introduce three new telecommunications offences that would make it an offence to:

- use a carriage service to, without consent, publish private sexual material;
- threaten to do so; or
- possess, control, produce, supply or obtain private sexual material for use through a carriage service.

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

#### **Background**

2.5 The committee previously considered the bill in its *Thirtieth Report of the 44th Parliament* (previous report) and requested further information from the legislation proponents as to the compatibility of the bill with the right to a fair trial (presumption of innocence).<sup>1</sup>

#### **Reversal of the burden of proof**

2.6 Proposed section 474.24H of the bill provides a number of exceptions to the proposed new offences introduced by the bill, including if the conduct was:

- engaged in for the public benefit;
- in relation to news, current affairs, information or a documentary (and there was no intention to cause harm);

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1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 11-13.

- by a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; or
- in the course of assisting the Children's e-Safety Commissioner or relating to content filtering technology.

2.7 These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

2.8 The committee considered in its previous report that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

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

2.9 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) of the 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.

2.10 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.11 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision. Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

### ***Compatibility of the measure with the right to a fair trial***

2.12 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides little justification for these measures.<sup>2</sup>

2.13 As set out the committee's Guidance Note 2,<sup>3</sup> reverse burden offences are likely to be compatible with the presumption of innocence where they are shown by

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2 Explanatory memorandum, paragraph 46.

the legislation proponent to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

2.14 It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's Guidance Note 1.<sup>4</sup>

2.15 The committee therefore sought the advice of the legislation proponents as to whether the proposed exceptions are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### Legislation proponent's response

Firstly, as is stated in the Explanatory Memorandum to the bill, the defences proposed in section 474.24H mirror the defences in the Criminal Code for offences relating to 'child pornography material' and 'child abuse material' along with the addition of a new defence for 'media activities' in proposed subsection 474.24H(3). It would lead to inconsistent results if an evidential burden were placed on the defendant for the other identical defences in the Criminal Code, but not for the defences for the proposed new offences in the bill.

In addition, reversing the onus of proof may be justified where it is particularly difficult for a prosecution to meet a legal burden. It may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. In regard to the defence for 'media activities', the reversal is justified because the defences goes to why the defendant engaged in the conduct (paragraph (3)(a)), the intention of the defendant (paragraph (3)(b)) and the reasonable belief of the defendant (paragraph (3)(c)), all of which are peculiarly within the knowledge of the defendant.

Further, the seriousness of a crime may justify placing a legal burden of proof on the accused. For the other defences proposed in section 474.24H, the seriousness of the offending conduct means that the defendant should

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3 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_2/guidance\\_note\\_2.pdf?la=en](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en).

4 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_2/guidance\\_note\\_2.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf).

not even consider engaging in the conduct in reliance on the defence unless they can point to evidence suggesting that defence applies.<sup>5</sup>

### **Committee response**

**2.16 The committee thanks the legislation proponent for his response.** The committee considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. **Accordingly, the committee considers that the bill is compatible with the right to a fair trial (presumption of innocence) and has concluded its examination of the bill.**

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5 See Appendix 1, Letter from Mr Tim Watts MP, to the Hon Philip Ruddock MP (received 27 November 2015) 1.

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## Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780]

*Portfolio: Attorney-General*

*Authorising legislation: Federal Court of Australia Act 1977; Family Law Act 1975; and Federal Circuit Court of Australia Act 1999*

*Last day to disallow: 20 August 2015*

### Purpose

2.17 The Federal Courts Legislation Amendment (Fees) Regulation 2015 (the regulation) amended the Federal Court and Federal Circuit Court Regulation 2012 to increase all fee categories by 10 per cent for the federal courts, except for those fees not subject to a biennial fee increase.

2.18 Schedule 2 of the regulation amended the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 10 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia; and
- establish a new fee category for the filing of an amended application.

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

### Background

2.20 On 25 June 2015, the Senate disallowed Schedule 2 of the regulation. Accordingly, the committee's analysis deals only with Schedule 1 of the regulation which continues in force.<sup>1</sup>

2.21 The committee previously considered the regulation in its *Twenty-fifth Report of the 44th Parliament* (previous report) and requested further information from the Attorney-General as to the compatibility of the regulation with the right to a fair hearing.<sup>2</sup>

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1 Note that on 9 July 2015 the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138] increased the fees for divorce; consent orders and subpoenas; and all other existing family law fee categories by an amount similar to that contained in the regulation.

2 Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 65-67.

### **Increased fees for federal court proceedings**

2.22 Schedule 1 of the regulation increased the costs in all fee categories by 10 per cent for all proceedings in the federal courts. This includes the costs of commencing an application or appeal and the costs for the hearing of the application or appeal.

2.23 The committee noted in its previous report that this engages and may limit the right to a fair hearing (access to justice).

### ***Right to a fair hearing***

2.24 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

2.25 The right also includes the right to have equal access to the courts, regardless of citizenship or other status. This requires that no one is to be barred from accessing courts or tribunals (although limited exceptions are allowed if based on objective and reasonable grounds such as, for example, the prevention of vexatious litigation). Effective realisation of this right may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

### ***Compatibility of the measure with the right to a fair hearing***

2.26 The statement of compatibility states that the regulation does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

2.27 However, a substantial increase in the cost of making an application to the federal courts, and in conducting a case before the courts, engages the right to a fair hearing, which includes a right to access to justice. The UN Human Rights Committee has said that the imposition of fees on the parties to proceedings that would in practice prevent their access to justice might raise concerns in relation to the right to a fair hearing.<sup>3</sup>

2.28 Whether the right is limited will depend on whether the increase in fees to access the federal courts would indiscriminately prevent access to justice. No information is provided in the statement of compatibility as to whether there is any

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3 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. 6.4.

ability for an applicant to seek to have the fees waived if the fees would effectively prevent them from accessing the federal courts.

2.29 The committee therefore sought the advice of the Attorney-General as to the effect of the measure on access to justice, and the likely limitations on the right to a fair hearing.

### **Attorney-General's response**

I acknowledge that the Committee has considered the Regulation in its *Twenty-fifth Report of the 44th Parliament* and has sought my advice about whether changes to general federal law fees pursuant to the Regulation are a limitation to access to justice, thereby raising questions about its compatibility with Article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing).

As you know, the imposition of a reasonable fee in relation to Court proceedings (or an increase to an existing fee) does not of itself constitute denial of access to justice so as to violate Article 14. I consider that this increase falls well within that principle.

As stated in the explanatory materials, changes to federal law fees under the Regulation increased all general federal law fees by 10 per cent (except for those fees not subject to a biennial fee increase), following a restructure of fee categories for public authorities and publicly listed companies filing matters, other than bankruptcy matters, in the Federal Court and Federal Circuit Court of Australia.

The changes did not, however, affect existing exemptions, deferral and waiver provisions in the *Federal Court and Federal Circuit Court Regulation 2012*. These provisions continue to apply to general federal law fees.

Division 2.3 of the Federal Court and Federal Circuit Court Regulation provides that fee exemptions are available across all general federal law fee categories, with the exception of the filing fee to register a New Zealand judgment under the *Trans-Tasman Proceedings Act 2010*. Listed categories of vulnerable users of the court, such as individuals under the age of 18 years, holders of pension, concession or health care cards and those who have been granted legal aid, are specifically exempted from paying court fees. Additionally, Division 2.3 provides a broad discretion to grant fee exemptions to individuals where payment of fees would cause financial hardship to the individual, having regard to the individual's income, day-to-day living expenses, liabilities and assets.

Division 2.4 of the Federal Court and Federal Circuit Court Regulation provides for the waiver of fees for proceedings under specific legislation, such as hearing appeals in relation to unlawful discrimination proceedings under the *Australian Human Rights Commission Act 1986* or *Fair Work Act 2009*.

Division 2.5 of the Federal Court and Federal Circuit Court Regulation provides a broad discretion to grant a deferral of payment of most general

federal law fees in circumstances where an individual urgently needs to file a document or where, considering an individual's financial circumstances, it would be oppressive or otherwise unreasonable to require payment of the fee.

I consider the availability of fee exemptions, waivers and deferrals to be an important safeguard to ensure that those facing financial hardship or other difficult circumstances are not affected by any changes to court fees. On the basis that fee exemptions, deferrals and waivers continue to apply, I do not consider that the changes to general federal law fees provided in the Regulation limit the ability of parties to access justice or the right to a fair hearing.<sup>4</sup>

### **Committee response**

**2.30 The committee thanks the Attorney-General for his response.**

**2.31 The Committee agrees that the imposition of reasonable fees in relation to Court proceedings does not, of itself, constitute denial of access to justice so as to limit the right to a fair hearing.**

**2.32 Having regard to the Attorney-General's advice as to the fee exemptions, waivers and deferrals that are available to individuals suffering financial hardship, the committee considers that the proposed increase in court fees is not so high as to indiscriminately prevent access to justice, and therefore considers the regulation is likely to be compatible with the right to a fair hearing.**

**The Hon Philip Ruddock MP**

**Chair**

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4 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 30 November 2015) 1-2.