

Part 1

Bills introduced 9–11 October 2012

The committee has commented on the following bills

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Committee view

1.2 The committee considers that the provisions in the bill relating to the serious drug offences framework are unlikely to raise human rights concerns.

1.3 While the committee considers that the absolute liability and strict liability provisions in schedule 2 of the bill are unlikely to raise human rights concerns, the committee seeks further information from the Attorney-General with regard to the reverse burden offences in subsections 372.1A(5) and 376.3(3) before forming a view on their compatibility with the presumption of innocence in article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR).

1.4 The committee considers that the requirement to provide information in schedule 2 of the bill is unlikely to raise issues of incompatibility with the right to privacy in article 17 of ICCPR.

1.5 The committee seeks further information from the Attorney-General on a range of issues in schedule 3 of the bill to assist its consideration of the compatibility of the bill with human rights.

Purpose of the bill

1.6 This bill amends the *Australian Federal Police Act 1979*, *Crimes Act 1914*, *Crimes (Superannuation Benefits) Act 1989*, *Criminal Code Act 1995*, *Customs Act 1901*, and *Law Enforcement Integrity Commissioner Act 2006* to:

- facilitate flexibility in the Commonwealth's serious drug offences framework to be able to respond quickly to new and emerging substances;
- expand the scope of existing identity crime offences, as well as enact new offences for the use of a carriage service in order to obtain and/or deal with identification information;
- create new offences relating to air travel and the use of false identities;

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- improve the operation of the Law Enforcement Integrity Commissioner Act 2006;
- clarify that superannuation orders can be made in relation to all periods of a person's employment as a Commonwealth employee, not only the period in which a corruption offence occurred, and
- increase the value of a penalty unit and introduce a requirement for the triennial review of the penalty unit.

1.7 The committee notes that the bill is accompanied by a detailed statement of compatibility that sets out the relevant information in a helpful and accessible way.

Compatibility with human rights

Serious drug offences framework

1.8 Schedule 1 of the bill will move the lists of substances to which the Commonwealth's serious drug offences apply to regulations, provide for a single emergency determination mechanism for listing substances, and refine the criteria that must be satisfied before a determination is made to list a substance.

1.9 The statement of compatibility states that these amendments do not engage any human rights.

1.10 **The committee considers that the amendments are unlikely to raise human rights concerns but notes that their overarching public health and safety objectives could be viewed to broadly promote the right to health in article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the right to life in article 6 of the International Covenant on Civil and Political Rights (ICCPR), particularly where the substance creates a risk of death or serious harm.**

Identity crime offences

Presumption of innocence

1.11 New section 372.1A in part 1 of schedule 2 of the bill creates a new offence of using a carriage service, such as the internet or a mobile phone, to obtain and/or deal in identification information where a person intends to commit, or facilitate the commission of a Commonwealth, State, Territory or foreign indictable offence.

1.12 The statement of compatibility states that the new offence provision engages the presumption of innocence in article 14(2) of ICCPR because it applies absolute liability to the elements of the offence relating to whether the person deals or obtains identification information 'using a carriage service' and whether the offence is an indictable offence against the law of the Commonwealth, a State or a

Territory or a foreign indictable offence. The application of absolute liability engages the presumption of innocence because it allows for a physical element of an offence to be established without the need to prove fault.

1.13 The statement explains that the application of absolute liability to these elements is justifiable because they are jurisdictional elements that go towards the Commonwealth's power to legislate and do not relate to the substance of the offence or the culpability of the defendant.

1.14 The committee considers that the application of absolute liability to the jurisdictional elements of the offence is unlikely to raise issues of incompatibility with article 14(2) of ICCPR.

1.15 New subsection 372.1A(5) provides that if the prosecution proves beyond reasonable doubt that a person has obtained or dealt with identification information, 'then it is presumed, unless the person proves to the contrary, that the person used a carriage service to deal with or obtain that information'.

1.16 The statement of compatibility acknowledges that this provision engages the presumption of innocence in article 14(2) of ICCPR because the defendant bears a legal burden of proof in relation to establishing that a carriage service was not used.

1.17 Generally, to be consistent with the presumption of innocence, the prosecution must prove each element of a criminal offence beyond reasonable doubt. Laws which shift the burden of proof to the defendant will engage the presumption of innocence because a defendant's failure to discharge a burden of proof or to prove or establish the absence of an element of an offence may permit their conviction despite reasonable doubt as to their guilt.

1.18 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 objective being sought and maintain the defendant's right to a defence. In other words, the reverse burden must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim.

1.19 The statement explains that the legal burden is justifiable in this instance for the following reasons:

- The element of using a carriage service is not an element that goes to the substance of the offence, or to the person's culpability, but is a jurisdictional element that provides the relevant connection to the Commonwealth's constitutional power. The prosecution will still retain the burden of proving beyond a reasonable doubt that the person obtained or dealt with identification information for the purpose of committing an indictable offence.

- It is more practical for the defendant to prove a carriage service was not used than for the prosecution to prove that it was used. The statement explains that 'it can be extremely difficult for the prosecution to show that it was the defendant who physically accessed the particular websites to obtain the information found on the computer' because 'often the evidence that a carriage service was used to engage in the conduct is entirely circumstantial'.

1.20 Before forming a view on the compatibility of this provision with article 14 (2) of ICCPR and noting that the offence carries a maximum penalty of 5 years imprisonment, the committee proposes to seek clarification from the Attorney-General as to whether an evidential burden may offer a less restrictive alternative for achieving the provision's purpose.

False identity and air travel

1.21 Part 2 of schedule 2 of the bill creates new offences for using false identities for the purposes of air travel.

1.22 The amendments also give police new powers to request identity information at airports such as a person's name and address or evidence of identity, subject to a threshold test. At constitutional airports, the constable must reasonably suspect that the person has committed, is committing or intends to commit a Commonwealth, State or Territory offence punishable by imprisonment of 12 months or more. At airports that are not constitutional airports, the reasonable suspicion must relate to a Commonwealth offence punishable by imprisonment of 12 months or more.

Presumption of innocence

1.23 The statement of compatibility identifies that the offence provisions engage the presumption of innocence in article 14(2) of ICCPR because, similar to identity offences in new section 372.1A, discussed above, absolute liability is applied to the jurisdictional elements of the offence.

1.24 The committee considers that the application of absolute liability to the jurisdictional elements of the offence is unlikely to raise issues of incompatibility with article 14(2) of ICCPR.

1.25 The statement also notes that strict liability attaches to two elements of the offence of not providing identity information to a constable when requested to do so (new section 3UN). These elements are that the request was made in accordance with the requirements of the legislation and that the constable complied with his or her obligations.

1.26 The statement explains that the application of strict liability 'in these circumstances is appropriate as the defendant's knowledge of those issues is not

relevant to their culpability. However, the general defence of mistake of fact will be available to the defendant.'

1.27 The committee considers that the application of strict liability to these elements of the offence is unlikely to raise issues of incompatibility with article 14(2) of ICCPR.

1.28 Finally, the statement notes that new subsection 376.3(3) will insert a new presumption relating to the requirement in subsections 376.3(1) and 376.3(2) that the relevant criminal conduct was engaged in using a carriage service. The presumption will provide that, in relation to the element of the offence that a carriage service was used, if the prosecution proves beyond a reasonable doubt that the person engaged in the relevant criminal conduct, then it is presumed that, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

1.29 In effect, this provision engages the presumption of innocence in article 14(2) of ICCPR because the defendant bears a legal burden of proof in relation to establishing that a carriage service was not used. A similar issue was discussed in relation to new subsection 372.1A(5) above.

1.30 Before forming a view on the compatibility of this provision with article 14 (2) of ICCPR and noting that the offence carries a maximum penalty of 12 months imprisonment, the committee proposes to seek clarification from the Attorney-General as to whether an evidential burden may offer a less restrictive alternative for achieving the provision's purpose.

Right to privacy

1.31 The statement acknowledges that the requirement to provide identification information to a constable under new section 3UN(1) engages the right to privacy in article 17 of ICCPR.

1.32 The statement sets out a detailed justification for the necessity of the powers and points to the inclusion of appropriate safeguards to ensure that the powers are connected to the objective and are no more restrictive than necessary. In particular, the power requires a threshold to be met before it can be exercised; the provisions will not operate as a de facto requirement to carry identification; the person must be informed of the consequences of not complying with the request; and a non-uniformed constable must show proof of identity before exercising the power.

1.33 The committee considers that these powers are unlikely to raise issues of incompatibility with article 17 of ICCPR, as any interference with privacy would appear to be necessary to achieve the stated objective of investigating the

commission of these offences, which can be considered to be a legitimate objective. Further, the provisions appear to be drafted with sufficient precision and contain appropriate safeguards to ensure that the degree of interference is proportionate to that objective.

Integrity Commissioner's functions

1.34 Part 1 of schedule 3 of the bill clarifies the function of the Integrity Commissioner with respect to detection and prevention of corruption, widens the Integrity Commissioner's scope to consider corruption issues relating to the Australian Commission for Law Enforcement Integrity (ACLEI) and enables the Integrity Commissioner to delegate the power to conduct public inquiries to an Assistant Integrity Commissioner.

1.35 The statement of compatibility states that these amendments do not engage any human rights.

1.36 The committee considers that the amendments are unlikely to raise any human rights concerns.

Penalty units

1.37 The amendments in part 2 of schedule 3 will adjust the value of the penalty unit in the *Crimes Act 1914*, which regulates value of monetary penalties for criminal offences in Commonwealth legislation. The adjustment will increase the value of the penalty unit for Commonwealth criminal offences from \$110 to \$170 to accommodate increases in the Consumer Price Index (CPI) since the value of the penalty unit was last adjusted in 1997. The amendments also provide for the regular review of the value of the penalty unit in the future.

1.38 The statement of compatibility states that these amendments do not engage any human rights.

1.39 The committee considers that the amendments are unlikely to raise any human rights concerns.

Superannuation forfeiture and recovery orders

1.40 The *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979* provide for the forfeiture and recovery of employer funded superannuation benefits that are payable or have been paid to Commonwealth employees who have been convicted of corruption offences and sentenced to more than 12 months imprisonment. According to the statement of compatibility, the purpose of the scheme is to implement 'the public policy objective of ensuring that superannuation benefits are not paid from public monies to Commonwealth

employees convicted of corruption offences committed in the course of their employment’.

1.41 Part 3 of schedule 3 of the bill amends these Acts to provide that a superannuation recovery or forfeiture order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, not just the period of employment in which the corruption offence was committed.

1.42 According to the statement of compatibility, the amendments seek to 'ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment'. The statement claims that:

The [original] scheme was not intended to operate so that the forfeiture and recovery of employer funded contributions and benefits is restricted to the particular period of employment in which an employee committed a corruption offence. ...

Until recently, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment. Therefore, Commonwealth employees convicted of a 'corruption offence' and sentenced to more than 12 months' imprisonment would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme.

1.43 Items 14 and 15 of schedule 3 provide that the amendments will apply to offences that were committed before or after commencement of the provisions, but only where an application for a superannuation order is made in relation to those offences on or after the commencement date.

Rights in work

1.44 The statement of compatibility states that the amendments engage article 7 of ICESCR:

Article 7(a) provides for the right of everyone to the enjoyment of just and favourable conditions of work, including remuneration which provides all workers with fair wages and a decent living for themselves and their families. Superannuation benefits are not mentioned explicitly in the treaty. However, payment of superannuation benefits is a form of remuneration for Commonwealth employees.

1.45 The statement states that the amendments 'limit the rights of Commonwealth employees, who are convicted of corruption offences and sentenced

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to more than 12 months' imprisonment, to access certain remuneration by requiring the forfeiture and recovery of employer funded superannuation benefits'.

1.46 The statement justifies the limitation on the basis that :

- the amendments are aimed at clarifying the operation of a long-standing legislative scheme, which is narrowly targeted at employees who have committed serious corruption offences;
- the amendments ensure equitable treatment, in that employees who have one continuous period of employment will not be treated less favourably than employees who have had several separate periods of employment; and
- the employee's own contributions are not subject to forfeiture or recovery and the orders are automatically revoked if the person's conviction is later quashed, or the person's sentence is reduced or otherwise changed so that it no longer meets the condition precedent of 12 months' imprisonment.

1.47 The committee notes that the amendments would expand the operation of the existing scheme to cover all periods of employment and not just the period during which the offence was committed. This is not an insignificant change and potentially involves a substantial financial detriment for some individuals and their dependents. The statement claims that the scheme was always intended to work in this way and that employees have had an expectation that they would lose their entire employer funded superannuation contributions under the existing scheme. However, it does not provide any information to support these assertions. It is also not apparent why such clarification is considered to be necessary – for example, has there been a specific finding that the current scheme only applies in relation to the period in which the offence was committed?

Prohibition against retrospective penalties

1.48 A related concern is that the changes have a degree of retrospective effect because the provisions are not confined to new convictions but will also apply to convictions which occurred prior to the commencement of the bill. Some employees may therefore be subject to an increased financial liability on the basis of a prior conviction.

1.49 The statement does not address whether these amendments may impact on the right against retrospective penalties in article 15(1) of ICCPR. The approach under international and comparative human rights law is to look at the substance and the effect of the proceedings, rather than their label. Therefore, it is possible for a civil regime which subjects a person to a high penalty and is intended to be punitive or deterrent in nature to constitute a 'criminal penalty' for the purpose of this right.

Right to social security and related rights

1.50 These amendments are likely to engage the right to social security as superannuation benefits are likely to fall within the scope of 'social security' for the purposes of article 9 of ICESCR. The statement of compatibility does not address the impact these changes may have on article 9 of ICESCR.

1.51 A related question also arises in terms of the potential impact these amendments may have on the right to privacy in article 17 of ICCPR (which includes protection of the home and family) and the rights of family and children (recognised in articles 23 and 24 of ICCPR and the Convention on the Rights of the Child) particularly where the increased financial liability suffered may risk a person's family home or their ability to meet their family's basic needs.

1.52 Before forming a view on whether these provisions are compatible with human rights, the committee proposes to write to the Attorney-General to seek further information on the following matters:

- **Why it is considered necessary to clarify the current law and the basis for considering that employees have had the expectation that they would lose their entire employer funded superannuation contributions under the existing scheme.**
- **Whether the amendments are consistent with the prohibition against retrospective penalties in article 15(1) of ICCPR.**
- **Whether the amendments are consistent with the right to social security in article 9 of ICESCR, including what, if any, impact they may have on the right to privacy and the rights of family and children. For example, can a court take into account the effect of a forfeiture or recovery order on a family and children in the course of application proceedings?**
- **Whether these measures may amount to a disproportionate limitation on rights, given that a person (and consequently their dependents) would lose their entire employer funded superannuation contributions and not just the contributions relating to the period during which the offence was committed.**
- **Whether the affected individual will be notified and have the opportunity to be heard before a forfeiture or recovery is made.**