

## Biosecurity Bill 2012

*Introduced into the Senate on 28 November 2012*

*Portfolio: Agriculture, Fisheries and Forestry*

### Committee view

1.1 The committee considers that in general the bill can be seen as pursuing the legitimate goal of protecting public health, but notes that some provisions raise human rights concerns. In particular, the committee seeks clarification on the civil penalty provisions and their compatibility with the right to a fair hearing and the right not to incriminate oneself.

1.2 The committee also notes the importance of transparency and reporting on the use of biosecurity control orders, but considers that there are sufficient safeguards to justify the limitations on individual rights.

### Overview

1.3 This bill is Introduced together with the Inspector-General of Biosecurity Bill 2012 (discussed below), and introduces a comprehensive legislative framework for managing security risks to Australia. It replaces the *Quarantine Act 1908* to:

- provide a modern regulatory framework to manage biosecurity risks, the risk of contagion of a listed human disease, the risk of listed human disease entering Australian territory, risks related to ballast water, biosecurity emergencies and human biosecurity emergencies; and
- give effect to Australia's international rights and obligations, including the World Health Organization's International Health Regulations and Agreement on the Application of Sanitary and Phytosanitary Measures, and the Convention on Biological Diversity.

### Compatibility with human rights

1.4 This bill is accompanied by a self-contained and extremely detailed statement of compatibility.<sup>1</sup>

1.5 The statement of compatibility sets out in detail those rights the enjoyment of which the bill is intended to promote: these include the right to life (article 6 of the International Covenant on Civil and Political Rights (ICCPR)), the right to health (article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)), the right to an adequate standard of living, including adequate food and water (article 11 of ICESCR), and the right to enjoy and benefit from culture and (article 15 of ICESCR).

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1 At pp. 77-101 of the explanatory memorandum.

1.6 The wide-ranging nature of the legislation means that it permits restrictions on the enjoyment of a significant number of important rights,<sup>2</sup> including freedom of movement (article 12 of the ICCPR), the right against arbitrary detention (article 9 of the ICCPR), fair trial rights (article 14 of the ICCPR) and the right to privacy (article 17 of the ICCPR).

1.7 The bill enacts a whole regulatory regime relating to biosecurity which builds on and replaces pre-existing provisions in some of the fields covered, such as quarantine law, and addresses new areas. The bill contains many dozens of provisions that may encroach on one or more human right. The consideration here addresses a number of the major human rights issues that arise.

### *Managing risks to human health (Chapter 2)*

1.8 Chapter 2 of the bill deals with managing risks to human health, by authorising measures that may be taken in relation to serious communicable diseases (listed human diseases). A listed human disease is one which the Director of Human Biosecurity has determined may be communicable and cause significant harm to human health (clause 41).

1.9 The exercise of powers and the imposition of biosecurity measures under Chapter 2 are subject to the requirement in clause 33 that a person making a decision to exercise a power or to impose a biosecurity measure on an individual must be satisfied of all of the following:<sup>3</sup>

- that the circumstances are sufficiently serious to justify the exercise of the power or the imposition of the measure;
- that the exercise or measure is likely to be effective in or to contribute to managing the biosecurity risk, and is appropriate and adapted to the risk;
- the exercise of the power (or the manner of its exercise) or the imposition (and the manner of its imposition) is no more restrictive or intrusive than is required in the circumstances; and
- that the power or measure is exercised or imposed only for the period that is necessary.

1.10 Further safeguards are contained in clause 34 (no measure may interfere 'with [the treatment of] any urgent or life-threatening medical needs of the individual'. There are also procedural protections in relation to children or 'incapable persons'.

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2 Listed at p. 78 of the explanatory memorandum and discussed below.

3 Set out in clause 33(2).

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*Imposition of entry and exit requirements*

1.11 The bill authorises the setting of requirements for persons entering or exiting Australia, in order to prevent a listed human disease from entering Australia or establishing itself or spreading in Australia, or to prevent such a disease from spreading to another country. The measures may include requiring the operator of a vessel or aircraft to provide relevant information, or requiring travellers to answer questions or provide a declaration about vaccination, their state of health, their previous travel, and to be screened for a listed disease.<sup>4</sup> These provisions may encroach on the rights to privacy, and freedom of movement.

1.12 A failure to comply with requirements imposed under clauses 43 and 44 may give rise to liability to a civil penalty.<sup>5</sup> Clause 45(4) provides that an individual may contravene certain paragraphs of clauses 43 and 44 and thereby be subject to a civil penalty of up to 30 penalty units, 'even if the individual is not able to comply with the requirement.' The bill provides an example in a note to clause 45(4):

An individual who has not received a specified vaccination may contravene subsection (1) or (3) because the individual is not able to comply with a requirement to provide a declaration or evidence that the individual has received that vaccination.

1.13 There is an issue (dealt with below) as to whether some or all of the civil penalty provisions amount to 'criminal' provisions within the meaning of article 14 of the ICCPR. If so, the guarantees applicable to criminal proceedings, including the presumption of innocence, would apply. The imposition of liability for a failure to do an act which it is not possible for a person to do, would appear to be inconsistent with the presumption of innocence.

**1.14 The committee considers that in general these provisions permitting the imposition of entry and exit requirements can be viewed as adopted for the legitimate purposes of the protection of public health and the implementation of Australia's international obligations (including those under the World Health Organization's International Health Regulations), and that the substantive and procedural safeguards provided for in the bill mean that the exercise of the powers conferred would be consistent with human rights.**

**1.15 However, the committee:**

- (a) notes that clause 45(4), which provides that a person may be held liable for a civil penalty contravention for failure to comply with a requirement with which it is not possible for the person to comply,**

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4 Clauses 43 and 44.

5 Clause 45.

**give rise to human rights concerns (in particular so far as the presumption of innocence and the right to a fair hearing are concerned); and**

- (b) seeks clarification as to the justification for this subclause, both on the basis that such a civil penalty contravention involves a ‘criminal charge’ within the meaning of article 14 of the ICCPR and on the basis that it is not considered ‘criminal’ in nature.**

#### *Human Biosecurity Control Orders*

1.16 More intrusive measures are authorised by those provisions which permit the imposition of a human biosecurity control order (HBCO) on a person who may have a listed human disease. The imposition of such measures is subject to the general principles set out in clause 33 (above), as well as a number of other requirements.

1.17 Subclause 58(2) provides that a human biosecurity control order may be imposed on an individual only if an authorised officer is satisfied that:

(a) the individual has one or more signs or symptoms of a listed human disease; or

(b) the individual has been exposed to:

(i) a listed human disease; or

(ii) another individual who has one or more signs or symptoms of a listed human disease; or

(c) the individual has failed to comply with an entry requirement in subsection 43(6) in relation to a listed human disease.

1.18 The person must be provided with a written copy of the order which must set out in detail the reasons for the making of the order, each of the measures imposed and the justification for them, the period for which the order is in force, as well as the rights of the person to seek review of the order.<sup>6</sup>

1.19 An HBCO may require a person to do or not do a number of things, including:<sup>7</sup>

- providing contact detail and maintaining contact;
- to go to and remain at the individual’s residence for a specific period;

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6 Clauses 59 to 61.

7 Clauses 83 to 91.

- not to visit a specific place or class of place where there is an increased risk of contraction of a specified listed human disease;
- not to come into close proximity with a specified class of individuals, if there is an increased risk that individuals in that class might contract the disease;
- to wear specific clothing or equipment that is designed to prevent a disease from emerging or spreading;
- to undergo decontamination procedures;
- to undergo a medical examination to determine whether the person has a listed human disease, and to provide body samples for diagnosis;
- to receive a specific vaccination or a specified form of treatment; or
- to receive medication.

1.20 The bill provides that force must not be used against an individual to require the person to comply with any of the measures imposed under clauses 83 to 91.<sup>8</sup> Medical examinations, the taking of body samples, vaccination or treatment, and the administration of medication are required to be carried out in a manner consistent with appropriate medical standards and other relevant professional standards.<sup>9</sup> A person may be required not to leave Australia on an outgoing vessel, and a Customs officer may prevent a person from leaving, and may use necessary and reasonable force to prevent a person boarding an aircraft or vessel.<sup>10</sup> A person may be required to remain isolated at a specific medical facility;<sup>11</sup> the decision may be reviewed internally and by the Administrative Appeals Tribunal.<sup>12</sup> If the person refuses to remain isolated, he or she may be detained if there is a significant risk of contagion,<sup>13</sup> and necessary and reasonable force may be used<sup>14</sup>.

1.21 The measures permitted by the bill potentially involve serious encroachments on a number of human rights – the right to liberty and security of the person (article 9, ICCPR), the right to privacy (article 17, ICCPR), liberty of movement (article 12, ICCPR), freedom of association (article 18, ICCPR), and the right to health (article 13, ICESCR), are among the most important.

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8 Clause 93

9 Clause 92.

10 Clauses 94 and 99.

11 Clause 95.

12 Clauses 73 and 74.

13 Clause 101.

14 Clause 102.

*Permissibility of the restrictions on the enjoyment of rights arising from human biosecurity control orders*

1.22 In order to justify these encroachments, it must be shown that the measures are adopted in pursuance of a legitimate objective, and that they are necessary to the achievement of that goal, proportionate, and that less restrictive alternatives are not available.

1.23 The objectives of ensuring that serious communicable diseases do not enter Australia or establish themselves or spread here, or that such diseases do not spread from Australia to other countries, are clearly legitimate and important objectives. The types of measures that may be included in a HBCO appear to bear a rational relation to the achievement of those goals in general terms, and the requirements of the general principles appear to ensure that as a matter of law, such measures will only be imposed when necessary and where a less restrictive alternative is not available. Other safeguards are provided for, such as the prohibition of the use of force (other than in very limited circumstances) and the requirement to abide by appropriate professional standards in the carrying out of certain measures, as well as the provision of avenues for review under the Act, the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*. Further safeguards are contained in clause 34 (no measure may interfere ‘with [medical treatment of] any urgent or life-threatening medical needs of the individual’). There are also procedural protections in relation to children or ‘incapable persons’, and provision for ensuring that foreign nationals who are subject to such measures are guaranteed the right to seek consular assistance (clause 100).

1.24 The measures also engage the right not to be subject to torture or to cruel, inhuman or degrading treatment, guaranteed by article 7 of the ICCPR and the provisions of the Convention against Torture. This right is not subject to permissible limitations but is considered an absolute right. The safeguards in the bill relating to the (non-) use of force, the requirement to observe relevant medical and other professional standards and the principles in clause 33, as well as the provision for external review, make it clear that torture or other ill treatment would not be permissible under the statute; detention or isolation for the purpose of protecting against communicable diseases in accordance with the statutory scheme would not in itself violate the guarantee. Nonetheless, where there is the possibility of compulsion in relation to medical examination or treatment, or of isolation or detention, concerns about the observance of the right are enlivened. It is important that the provisions relating to oversight of such activities be closely adhered to, in order to ensure that there is no violation of these rights.

**1.25 The committee considers that, while the bill authorises serious encroachments on the rights of individuals through the use of human biosecurity control orders, the preconditions to the exercise of the powers, the principles that must be observed in their exercise, the limitations on the use of force, and the**

availability of external review, mean that the measures authorised can in general be justified as necessary and proportionate restrictions on the rights mentioned above, or are otherwise consistent with Australia's obligations.

**1.26 The committee notes the importance of transparency and reporting on the use made of these powers, in order to ensure that they are being used appropriately and in accordance with human rights principles.**

*Other measures – entry of goods, vessels and treatment of ballast water and wastes*

1.27 Chapter 3 of the bill contains an extensive range of measures in relation to the entry of goods intended to ensure that they do not lead to the introduction into Australia of diseases or pests. These provisions provide officers with the powers to seek information and take steps to ensure that goods that pose a risk are identified and dealt with; a number of offence provisions and civil penalty provisions support the relevant obligations and powers. Chapter 4 of the bill contains a similar range of provisions relating to conveyances such as aircraft and vessels entering Australian territory, while Chapter 5 contains a range of provisions relating to the treatment of ships' ballast water and sediment.

**1.28 The committee considers that in general these provisions in Chapters 3, 4 and 5 of the bill pursue the legitimate goal of protecting Australia from the entry of disease and pests and can be justified as necessary and proportionate measures to achieve that goal. The committee notes, however, that some provisions in these Chapters give rise to human rights concerns that arise elsewhere under the bill, for example the nature of civil penalty provisions, and the right not to incriminate oneself, which are dealt with under those headings below.**

*Managing biosecurity control risks (Chapter 6)*

1.29 Chapter 6 contains a series of provisions which are designed to assist in the identification of the entry into Australia of a disease or pest that has the potential to cause harm to human, animal or plant health, to the environment or economic consequences, to provide for an assessment of the relevant biosecurity risk.

1.30 A relevant biosecurity officer may enter any premises in Australian territory to exercise powers which include identifying whether a disease or pest is present, to identify the disease or pest, and to assess the level of biosecurity risk.<sup>15</sup> These powers are exercisable where the officer suspects on reasonable grounds that a disease or pest may be present and that it may pose an unacceptable level of biosecurity risk.<sup>16</sup> However, an officer may not enter the premises without the consent of the occupier or without a biosecurity risk assessment warrant, which may

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15 Clause 314.

16 Clause 313.

only be issued if there are reasonable grounds for suspecting that a disease or pest may be present in or on goods on the premises, or the premises themselves, may pose an unacceptable level of biosecurity risk, and it is reasonably necessary that one or more biosecurity officers should have access to the premises to exercise powers to establish whether the disease or pest is present in or on the goods or premises, to identify the disease or pest, and to assess the level of biosecurity risk.<sup>17</sup>

1.31 A number of other powers of entry are provided for by the bill. These are in general subject to the issue of an applicable warrant.<sup>18</sup> The statement of compatibility maintains that these powers are necessary to collect information or to determine the existence of a potential biological risk, and that the exercise of the powers is conditioned upon the need to show reasonable grounds that the exercise of the power is necessary.

1.32 Chapter 6, Part 4 provides for a series of powers to make biological control orders to deal with situations in which a disease or pest is reasonably suspected to be present in goods and poses an unacceptable level of biosecurity risk.

#### *Biosecurity emergencies (Chapter 8)*

1.33 Chapter 8 provides for powers to deal with the establishment or spread of a declared disease or pest in Australia during a biosecurity emergency. Such an emergency may be declared if the Minister is satisfied that a disease or pest is posing a severe and immediate threat, or is causing harm, on a nationally significant scale to animal or plant health, the environment, or economic activities related to animals, plants or the environment, and the declaration is necessary to prevent or control the establishment or spread of the disease or pest in Australian territory.<sup>19</sup> Subject to the comments made below in relation to civil penalty provisions, overall the powers appear on their face to be appropriately tailored to the needs of such an emergency.

#### *Monitoring and investigation powers and entry onto premises*

1.34 Chapters 9 and 10 of the bill set out a range of powers that are intended to facilitate the monitoring of the implementation of the bill and investigation of contraventions of the bill. These include the power to enter onto premises to monitor implementation, either by consent or pursuant to monitoring warrants, as well as to enter on premises to investigate suspected violations pursuant to investigation warrants. To the extent that entry is permitted pursuant to warrants, or in response to emergencies, the provisions appear to be consistent with human rights.

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17 Clause 511, table 2.

18 Clause 511 sets out preconditions for the issue of the various warrants.

19 Clause 441.



### *Right not to incriminate oneself*

1.35 The bill contains a number of provisions which require information to be provided, questions to be answered, or documents to be produced, and that a failure to do so is an offence or a civil penalty contravention. Clause 661(1) explicitly provides that a person is not excused from providing information, answering a question or producing a document on the ground that to do so might tend to incriminate the person or render them liable to a penalty. This engages the right of a person not to incriminate oneself in article 14(3)(g) of the ICCPR as regards criminal charges and arguably also the right to a fair hearing under article 14(1) of the ICCPR in relation to non-criminal contraventions.

1.36 However, clause 661(2) provides, in relation to an individual, for both use immunity and derivative use immunity so that the answer, information or document or any information, document or thing obtained as a direct or indirect consequence of their provision, are not admissible against the individual in any criminal or civil proceedings (with limited exceptions relating to the provision of false or misleading documents). Clause 661(3) further provides that apart from the limitation in clause 661(1), nothing in the Act affects the right of a person to refuse to answer a question, provide information or produce a document on the grounds that it might tend to incriminate the person.

**1.37 The committee considers that, in light of the provision of use and derivative use immunity in relation to information or documents produced pursuant to the power conferred, and the fact that the immunity applies both to criminal and civil proceedings against the person compelled to respond, these provisions are not inconsistent with the right not to incriminate oneself (article 14(3)(g), ICCPR) and the right to a fair hearing (article 14(1), ICCPR).**

1.38 Clause 545 provides that evidence of information given or documents produced is not admissible in criminal proceedings under a law of the Commonwealth if the evidence or documents were produced ‘in proceedings against the individual for an alleged contravention of a civil penalty provision (whether or not the order was made) that is the same, or substantially the same, as the conduct alleged to constitute the contravention.’

1.39 Clauses 545 and 661 overlap in certain respects and it is not clear that they are entirely consistent with each other. For example, clause 545 would appear to permit information provided in the context of civil penalty proceedings under the bill to be admissible in civil penalty or criminal proceedings under State or Territory law.

**1.40 The committee intends to write to the Minister to seek clarification:**

- (a) as to why the protection afforded by clause 545 applies only to criminal proceedings under a law of the Commonwealth and does not extend to proceedings under the law of a State or Territory, and**

**(b) as to the relationship between clauses 545 and 661.**

*Civil penalty provisions*

1.41 The explanatory memorandum notes that Chapter 11 of the Bill ‘provides a framework of penalties, offences and other mechanisms to ensure that biosecurity officials have the powers necessary to appropriately respond to non-compliance with the Act’,<sup>20</sup> and further that:

Civil penalty provisions are included in the Bill to provide an alternative to prosecution for an offence. The civil penalty provisions are considered to be appropriate and effective where contraventions are of sufficient size to justify the expense and time required to take the matter to court or where because the contravention is by a corporate entity the higher financial disincentive that civil penalties provide is most likely to be useful and effective. The infringement notice scheme set out in this Chapter provides a framework to deal with instances of non-compliance with the Bill that are less severe in nature.

1.42 Under clause 535 the Director of Biosecurity or the Director of Human Biosecurity may apply to a court of competent jurisdiction for an order that a person has contravened a civil penalty provision. If the court is satisfied that the person has contravened such a provision, it may order the person to pay to the Commonwealth a pecuniary penalty.<sup>21</sup> The court may take into account a number of matters in setting the amount, including the nature and extent of the contravention and of any loss or damage that resulted, whether the person has previously engaged in similar conduct. The penalty imposed in the case of an individual is the penalty provided for by the civil penalty provision. Clause 540 provides that a court applies the civil rules of evidence and procedure when hearing applications for civil penalty orders; clause 541 states that a contravention of a civil penalty order ‘is not an offence’.

1.43 Under clause 542, where a person has been convicted of an offence or found liable to a civil penalty, a court may not also make a civil penalty order against the person for conduct that is substantially the same as the conduct constituting the offence or the earlier civil penalty contravention. However, clause 544 provides that a person who has been proceeded against for a civil penalty under the bill may also:

- be prosecuted under Commonwealth law for a criminal offence;
- be prosecuted under State or Territory law for a criminal offence; or
- be proceeded against for contravention of a civil penalty provision under a State or Territory law

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20 Explanatory memorandum, p. 20.

21 Clause 535(3).

where the conduct is the same or substantially the same as conduct that would constitute a civil penalty contravention under the bill (even if a civil penalty order has been made against the person). This appears to permit a person to be subject to two penalties (one criminal offence, one civil penalty; two civil penalties) in relation to the same conduct.

1.44 If a civil penalty provision under either Commonwealth law or a State or Territory law is characterised as a ‘criminal charge’ for the purposes of the ICCPR, permitting a person to be found liable for a civil penalty under both Commonwealth and State law, for a criminal offence under Commonwealth law and a civil penalty under State or Territory law, or for a civil penalty under Commonwealth law and a criminal offence under State or Territory law, would be inconsistent with article 14(7) of the ICCPR. This provides:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

1.45 Notwithstanding the provision in clause 541 that these civil penalty contraventions are not criminal offences, this is not determinative of the question whether the conduct and penalties are ‘criminal’ for the purposes of article 14 of the ICCPR. If they do involve the determination of a criminal charge, then the rights set out in article 14 as applicable to criminal proceedings would apply – including the requirement that the case be proved beyond reasonable doubt.

1.46 In determining whether the imposition of a penalty for particular conduct involves determination of a ‘criminal charge’, international jurisprudence has identified the following factors to be taken into account: the classification of the act in domestic law, the nature of the offence, the purpose of the penalty, and the nature and the severity of the penalty. Classification as ‘civil’ under Australian law is not determinative. Where a prohibition is general in application, where the penalty is punitive and intended to deter (rather than award compensation for loss), and any financial penalty is significant, it may well be classified as involving a ‘criminal charge’ and penalty for the purposes of article 14 of the ICCPR.

**1.47 The committee intends to write to the Minister to seek clarification as to:**

- (a) why it is considered that civil penalty provisions under the bill are not ‘criminal charges’ for the purposes of article 14 of the ICCPR; and**
- (b) even if the civil penalty contraventions are not considered ‘criminal’ for the purposes of the ICCPR, whether it is consistent with the ICCPR to permit a person to be subject to two penalties for the same conduct.**