

Customs Amendment (Miscellaneous Measures) Bill 2012

Introduced into the House of Representatives on 28 November 2012; passed both Houses on 14 March 2013

Portfolio: Home Affairs

PJCHR comments: [Report 1/13](#), tabled on 6 February 2013 and [Report 3/13](#), tabled on 13 March 2013

Response received: 19 April 2013

Summary of committee view

3.1 The committee thanks the Minister for his response and notes that the bill has already been passed by the Parliament.

3.2 The committee considers that the imposition of strict liability for bringing child pornography and child abuse material into Australia is likely to be consistent with the presumption of innocence. The committee is unable to conclude whether the application of strict liability to other 'restricted goods' will be compatible with the presumption of innocence as the details about such goods will be contained in future regulations.

Background

3.3 The bill amended the *Customs Act 1901* to introduce a new strict liability offence for bringing into Australia a new category of goods known as 'restricted goods' with regulations to prescribe what is prohibited. The offence imposes a maximum penalty of 1,000 penalty units (or \$170,000).

3.4 The statement of compatibility stated that this imposed a civil penalty provision – however, the bill itself made it clear that the provision introduced a criminal offence.

3.5 In its *First Report of 2013* the committee sought clarification from the Minister as to whether the strict liability offence was compatible with the presumption of innocence under article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

3.6 The Minister responded on 28 February 2013 stating that the strict liability offence did not engage the presumption of innocence. The committee responded in its *Third Report of 2013* noting that the response appeared to be based on a misunderstanding of the nature and scope of the presumption of innocence and the criminal context of strict liability offences, and asked again whether the strict liability offence was justifiable (that is, whether it pursues a legitimate objective and is reasonable, necessary and proportionate to that objective).

3.7 The Minister's response is attached.

Committee's response

3.8 The committee notes that the strict liability offence is aimed at prohibiting goods which have been prescribed in regulations from being imported into Australia and that the Minister proposes to have child pornography and child abuse material initially prescribed as restricted goods. The committee accepts that the application of a strict liability offence carrying a maximum penalty of 1,000 penalty units in these circumstances may be considered a reasonable and proportionate measure adopted in the pursuit of a legitimate goal, consistent with the presumption of innocence in article 14(2) of the ICCPR.

3.9 The committee notes that additional goods may only be prescribed as 'restricted goods' by regulation if they are subject to Australia's international treaty obligations and are a matter of international concern.¹ The committee accepts that this approach provides 'some flexibility in regulating goods consistent with international treaty obligations and matters of international concern without the need for legislative amendment'.² However, the committee notes that it is not able to make a final assessment of the compatibility of applying the new strict liability offence to other goods until the necessary details are provided by the relevant regulations.

3.10 The committee notes that the bill has already been passed by the Parliament.

1 New sub-section 233BABAE (4) of the bill.

2 Explanatory memorandum, page 5.



THE HON JASON CLARE MP

Cabinet Secretary
Minister for Home Affairs
Minister for Justice

Ministerial number: 107287

Mr Harry Jenkins MP
Chair, Parliamentary Joint Committee on Human Rights
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Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

I write in response to your letter dated 13 March 2013, in which you sought further clarification about the new strict liability offence proposed in Schedule 1 to the Customs Amendment (Miscellaneous Measures) Bill 2012 (the Miscellaneous Measures Bill). The clarification was raised in the Committee's Third Report of 2013. I note that the Miscellaneous Measures Bill passed the Parliament on 14 March and is currently awaiting the Royal Assent.

Specifically, the Committee sought further information as to whether the new strict liability offence of bringing restricted goods into Australia is compatible with the presumption of innocence under article 14(2) of the International Covenant on Civil and Political Rights (ICCPR). I am advised that a strict liability offence will not necessarily violate the presumption of innocence if it pursues a legitimate aim and is reasonable, necessary and proportionate to that aim.

I consider that the above offence pursues a legitimate aim. This offence is aimed at stopping people bringing into Australia goods that would be prohibited imports if they were imported. As the Explanatory Memorandum notes, without this new offence an officer of Customs would otherwise have no powers in relation to such goods other than securing the goods and returning them to the owner when they depart from Australia. I propose to have child pornography and child abuse material initially prescribed as restricted goods. Therefore, if an officer of Customs detects that child pornography has been brought into Australia, they will now have the powers to seize this material without a warrant and prevent its further distribution and use.

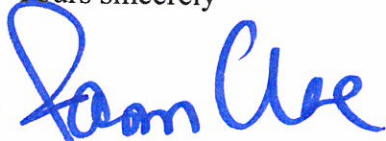
Given the aim which the offence proposes to pursue, I consider that the strict liability nature of the offence is reasonable and proportionate to achieving the above aim. Not having to prove fault in these circumstances will provide a strong deterrent to undertaking this activity. Strict liability is also necessary to ensure the integrity of this new offence and regulatory regime of which it is part, which would be weakened if the prosecution had to prove fault. This new offence complements the existing offence of importing a prohibited import which is

also a strict liability offence. Therefore in order to maintain the integrity of the aims that these complementary offences seek to pursue, it is necessary that they be consistent in their application and both be offences of strict liability.

A defendant will always have the defence of honest and reasonable mistake of fact available under section 9.2 of the *Criminal Code Act 1995*, which is an evidential burden only. For these reasons, I consider that the new strict liability offence is not inconsistent with the presumption of innocence set out in article 14(2) of the ICCPR.

The officer responsible for this matter in Customs and Border Protection is Wayne Lodge, who can be contacted on 02 6275 6386.

Yours sincerely



Jason Clare