Biosecurity Bill 2012

Introduced into the Senate on 28 November 2012; before Senate
Portfolio: Agriculture, Fisheries and Forestry
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 6/13, tabled on 15 May 2013
Responses dated: 21 March 2013 (Minister for Health) and 2 May 2013 (Minister for Agriculture, Fisheries and Forestry)

Summary of committee view

2.41 The committee thanks the Minister for Agriculture, Fisheries and Forestry for his response. The committee is satisfied that the provisions in this bill are unlikely to be considered 'criminal' within the meaning of article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Background

2.42 This bill was introduced together with the Inspector-General of Biosecurity Bill 2012 and seeks to establish 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.

2.43 The committee raised a number of concerns about proposed new subsection 45(4), which provided 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, gave rise to human rights concerns (in particular so far as the presumption of innocence and the right to a fair hearing are concerned).

2.44 The Minister for Health responded on this matter,[1] and the committee considered the Minister's response, thanking her for the undertaking to review the provision in the light of the committee's concerns, as it appeared to be broader than first intended. The committee made no further comment on this aspect of the bill.[2]

1 The Minister's response appears at PJCHR, *Sixth Report of 2013*, p 179.

2 PJCHR, *Sixth Report of 2013*, paras 3.1-3.10.

2.45 In its *First Report of 2013* the committee also raised two issues relating to the civil penalty provisions of the bill:

(a) why it was considered that civil penalty provisions under the bill were not 'criminal charges' for the purposes of article 14 of the International Covenant on Civil and Political Rights (ICCPR); and

(b) even if the civil penalty contraventions were 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.[3]

2.46 The bill introduces a significant number of civil penalty provisions, many of which have corresponding criminal offences. The maximum penalties for civil penalty contraventions range from 30 penalty units ($5,100) to 120 penalty units ($20,400). The bill distinguishes between the scale of penalties that may be imposed for civil penalty contraventions and those that may be imposed in relation to criminal offences: many of the criminal penalties involve imprisonment and/or a fine, and none impose a maximum penalty less than the maximum pecuniary penalty for civil penalties.

2.47 The Minister for Agriculture, Fisheries and Forestry responded in a letter dated 2 May 2013, which is attached.

Committee's response

2.48 The committee thanks the Minister for his response. Following the adoption of its interim *Practice Note 2* on civil penalties, the committee has taken the opportunity in its comments on this bill to indicate the types of issues that it would like to see addressed in statements of compatibility accompanying bills that introduce or incorporate civil penalties regimes, as set out below.

2.49 *Classification of the provision under domestic law*: The committee notes that the civil penalty provisions are classified as 'civil' under domestic law and procedures to enforce the civil penalties are to be governed by the rules and procedures relating to civil proceedings. As the committee has noted in its interim *Practice Note 2*, the classification under domestic law and the consequences are relevant but given relatively little weight when the domestic law classifies a provision as 'civil'.

2.50 *Nature of the civil penalty:* The committee notes that the context in which these provisions have been introduced is a regulatory one, namely the regulation of managing biosecurity risks.

2.51 Proposed new section 536 sets out the procedure for obtaining a civil penalty order. Subsection 536(6) provides that a court, in determining the pecuniary

3 PJCHR, *First Report of 2013*, para 1.104.

penalty may take into account all relevant matters, including in relation to individuals the nature and extent of the contravention; the nature and extent of any loss or damage suffered because of the contravention; the circumstances in which the contravention took place; whether the person has previously been found by a court to have engaged in any similar conduct. This provision indicates that there are punitive elements involving an assessment of culpability in the imposition of a civil penalty order, as well as other elements. However, given the regulatory context, the committee is not of the opinion that this would lead to the conclusion that they involve the imposition of a criminal penalty

2.52 *Severity of the penalty*: Where significant penalties are imposed, this may be sufficient to justify characterising the penalty as criminal. In assessing the severity of a penalty, the maximum penalty is taken into account. As noted above, the maximum penalty for contravention of a civil penalty that may be awarded by a court is 30 penalty units ($5,100) to 120 penalty units ($20,400). While these penalties involve significant sums of money for individuals, the committee is not of the opinion that of themselves they are sufficient to lead to the conclusion that they involve the imposition of a criminal penalty.

2.53 *Nature and severity combined:* As the committee commented in its interim *Practice Note 2*, it may be appropriate to take into account the cumulative effect of the nature and severity of the penalty if it is not clear that either the nature or the severity of a penalty considered separately leads to the conclusion that it is 'criminal'. In this case the committee does not consider that the cumulative effect of the nature and severity of the penalties imposed would lead to their being characterised as 'criminal for the purposes of human rights law.

2.54 The committee considers that the civil penalty provisions in the bill are unlikely to be classified as criminal for the purposes of human rights law, given they operate in a regulatory context and, while they impose not insubstantial pecuniary penalties, they are not of a level of severity that would justify classification as 'criminal'.

The Hon Tanya Plibersek MP
Minister for Health

Mr Harry Jenkins MP
Chair, Parliamentary Joint Committee on Human Rights
PO Box 6100
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CANBERRA ACT 2600

Dear Mr Jenkins

You recently wrote to Minister Ludwig seeking advice and clarification on a number of matters raised in the examination of the Biosecurity Bill 2012 (The 'Bill') in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Bill is jointly administered in the Agriculture, Fisheries and Forestry portfolio and the Health portfolio. As Minister with responsibility for human health under the Bill, I am responding to the matter that was raised in relation to human health at 1.72 of the First Report by the Parliamentary Joint Committee on Human Rights of 2013. I understand Minister Ludwig is responding to all other matters raised by the Committee.

Clause 45 of the Bill specifies that civil penalties may apply in relation to individuals or operators of overseas aircraft or vessels that fail to comply with certain entry or exit requirements. Entry and exit requirements are specified in a determination by the Health Minister. Clause 45(4) is intended to clarify, in particular, that a civil penalty may apply if an individual has not received a specified vaccination, and is therefore unable to provide a declaration or evidence to that effect.

After further consideration, this provision now appears to be broader than first intended. In light of the concerns raised by the Committee, this provision will be reviewed.

I thank the Committee for bringing this issue to my attention, and trust this information will address the concerns of the Committee.

Yours sincerely

Tanya Plibersek

Tanya Plibersek
21.3.13

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Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2013-00845

The Hon. Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Jenkins

Thank you for your letter of 6 February 2013, on behalf of the Parliamentary Joint Committee on Human Rights, about the Biosecurity Bill 2012 (the Bill). In your letter you asked for clarification on a number of matters in relation to the Bill. These matters are identified in the First Report of 2013 (the Report) which accompanied your letter to me.

As you are aware, when made, I would co-administer the Bill with the Minister for Health. The Report provided by the Committee identified a number of issues that relate to human biosecurity and these will be addressed by the Minister for Health. I have sent a copy of this letter to the Hon. Tanya Plibersek MP, Minister for Health.

Right not to incriminate oneself

Paragraph 1.97 of the Report seeks clarification as to why the protection afforded by clause 545 of the Bill 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.

The limitation in clause 545 is a technical oversight and I agree with the Committee's view that this protection should also be afforded to criminal proceedings under a law of a state or territory. It is my intention to introduce a government amendment to the Bill so that clause 545 applies to criminal proceedings under a law of the Commonwealth or a state or territory.

Paragraph 1.97 of the Report also seeks clarification on the relationship between clauses 545 and 661 of the Bill. Clause 661 of the Bill removes a person's right to rely on the privilege against self-incrimination in relation to specific information gathering provisions of the Bill. The provisions to which clause 661 apply are operationally focussed and facilitate the ability of biosecurity officials to have timely access to information relating to potential or existing biosecurity threats.

By contrast, clause 545 of the Bill relates to the admissibility of evidence given in a civil proceeding when criminal proceedings have been instituted. In this regard it is not necessary for clauses 545 and 661 to complement each other as they apply to different situations. Clause 661 applies to operational activities before legal proceedings have been contemplated

and clause 545 applies only when criminal proceedings have been instituted. Further, any evidence potentially adduced through the abrogation of the privilege against self-incrimination under clause 661 will be subject to a use/derivative use immunity and not admissible as evidence in a proceeding instituted under the Biosecurity Bill to the extent that these immunities apply.

Civil penalty provisions

Paragraph 1.104 of the Report seeks clarification on whether the civil penalty provisions under the Bill are 'criminal charges' for the purposes of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

The United Nations Human Rights Committee General Comment 32 on Article 14 of the ICCPR provides that an offence, designated as civil in domestic law, may be found to constitute a criminal charge as a result of the nature of the purpose of the law, its character (for example whether it is punitive in nature) or its severity. Other than General Comment 32 there is little other international jurisprudence on this issue.

The views of United Nations Committees provide persuasive sources of guidance rather than binding obligations on Australia. The civil penalty provisions in the Bill, together with the infringement notice scheme, criminal sanctions and other administrative options, form part of a comprehensive enforcement regime that allows for appropriate action to be taken in proportion to the conduct involved. The civil penalty provisions provide an alternative enforcement mechanism to criminal prosecution and pay due regard to Article 14 of the ICCPR by providing an appropriate penalty for conduct that, whilst serious, is not significant enough to warrant criminal prosecution.

The inclusion of civil penalty provisions in the Bill allow for relatively minor contraventions of the Bill, for example a passenger arriving at an airport with undeclared food, to be punished under the civil penalty regime rather than potentially being subject to criminal prosecution and imprisonment. The civil penalty provisions provide a distinct alternative to criminal sanctions and allow suitable penalties to be imposed in proportion to the conduct involved. Like all legislated penalty provisions, the civil penalty provisions provided for in the Bill still operate to deter behaviour that would be in contravention of the Bill and to this extent are punitive. The extent to which these penalties are punitive however, will be determined on a case-by-case basis and in proportion to the type of conduct involved.

Without testing the operation of these civil penalty provisions it is not possible to determine how an international court would characterise those provisions. For the purposes of domestic operation however, the civil penalty provisions under the Bill should not be considered criminal charges and form part of an appropriate penalty regime for conduct that is in contravention of Australian law.

Double jeopardy

Paragraph 1.104 of the Report also seeks clarification on whether, even if the civil penalty provisions under the Bill are not criminal charges, whether these provisions are consistent with the ICCPR by permitting a person to be subject to two penalties for the same conduct.

The prohibition on being tried or punished again for an offence for which a person has already been finally convicted or acquitted is commonly known as the prohibition on double jeopardy and is limited to proceedings relating to a criminal charge. Despite this limitation however, the approach under international and comparative human rights law has been to look at the

substance and the effect of the proceedings themselves, rather than their label under domestic law, when determining whether a proceeding relates to a civil or criminal charge. As a result, it is possible, from an international perspective, for a civil penalty provision which subjects a person to a significantly high penalty that is intended to be punitive or deterrent in nature to constitute a 'criminal charge' for the purposes of the prohibition on double jeopardy.

As discussed previously, the civil penalty provisions contained in the Bill are a distinct penalty regime from criminal sanctions and provide a proportionate and effective mechanism to punish actions that contravene Australia's biosecurity laws. A person who is subject to a civil penalty order under the Bill cannot be sentenced to imprisonment and will only be liable to civil penalties under the Bill. Clauses 542-545 of the Bill provide a series of restrictions on when civil penalty proceedings may or may not be commenced. These clauses limit the circumstances when a new proceeding may be commenced after a civil or criminal proceeding has concluded and, at clause 543, provide for a civil proceeding to be stayed if criminal proceedings or civil proceedings under a law of a state or territory for similar or the same conduct are commenced. In addition, clause 545 of the Bill prohibits the use of evidence given in civil proceedings to be used in criminal proceedings, except in relation to false or misleading evidence given by the individual in the civil proceedings itself.

Given the operation of these clauses it is unlikely that a person convicted of a civil offence under the Bill will become subject to an additional proceeding for conduct that is the same or substantially the same as the conduct constituting the first offence unless new evidence relating to the conduct comes to light. The inclusion of these provisions is standard in a range of Commonwealth legislation and is consistent with the Regulatory Powers (Standard Provisions) Bill 2012.

Without testing the operation of these civil penalty provisions it is not possible to determine how an international court would characterise those provisions. The practical operation of these provisions however, as well as the usual operation of the rules of evidence, makes it highly unlikely that the prohibition on double jeopardy would be threatened by the operation of the civil penalty provisions of the Bill.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

2 May 2013

Cc the Hon. Tanya Plibersek MP, Minister for Health