Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012

Introduced into the House of Representatives on 28 November 2012; passed both Houses on 28 February 2013
Portfolio: Resources and Energy
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 3/13, tabled on 13 March 2013
Responses dated: 27 February 2013 and 26 April 2013

Summary of committee view

2.55 The committee thanks the former Minister for his response. In relation to the issue of reverse onus provisions and the right to be presumed innocent, the committee has no further comments.

2.56 The committee considers that some of the civil penalty provisions in the bill may be properly characterised as 'criminal' in nature. As such, the committee has concerns that where a person may be subject to a pecuniary penalty for a civil penalty contravention in addition to punishment under a criminal offence for the same or substantially the same conduct, this may be inconsistent with the right not to be tried or punished twice for the same offence.

Background

2.57 This bill amended the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to strengthen the regulatory regime of that Act. In particular, the bill responds to the June 2010 Report of the Montara Commission of Inquiry, which followed a blowout in 2009 at the Montara Wellhead Platform off the northern coast of Western Australia.

2.58 The bill inserted dozens of new civil penalty provisions into the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. Most of these were parallel to existing criminal offences. The civil penalty provisions provide for the imposition of pecuniary penalties ranging from 50 penalty units to 1,000 penalty units.[1] The maximum penalties that may be imposed in relation to criminal offences range from 50 penalty units to 6 months' imprisonment or 60 penalty units (or both). A number of criminal offences provide only for the imposition of fines.

2.59 The committee initially sought further information from the Minister about the compatibility of the reverse onus offences and civil penalty provisions in the bill

1 See new subsection 569(6B) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

with the fair trial rights in article 14 of the International Covenant on Civil and Political Rights (ICCPR).

2.60 The Minister responded on 27 February 2013 (the response is attached). The committee noted that the Minister's response did not address the issue of whether the reverse onus offences in the bill were compatible with human rights and requested that the Minister provide this information to the committee. The committee also decided to defer finalising its views on the fair trial implications of the civil penalty provisions in the bill to enable closer examination of the issues in light of the information provided.[2]

2.61 The Minister provided information in response to the committee's inquiries in relation to reverse onus provisions in a letter dated 26 April 2013, which is also attached.

Committee's response

2.62 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.

Reverse onus provisions

2.63 The committee thanks the former Minister for his response in relation to the reverse onus provisions and in light of the detailed justification offered has no further comments on this aspect of the bill.

Civil penalty provisions

2.64 The committee thanks the former Minister for Resources and Energy and Minister for Tourism for his detailed response in which he set out the background to the development of the civil penalty regime.[3] The committee recognises that the approach adopted in the legislation draws on the work of the Australian Law Reform Commission (ALRC) in its 2002 report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[4] However, the committee notes that, in its

2 PJCHR, *Third Report of 2013*, p. 153.

3 Letter from the Minister for Resources and Energy and Minister for Tourism, the Hon Martin Ferguson AM MP to the Hon Harry Jenkins MP, 27 February 2013, pp 1-2: see PJCHR, *Third Report of 2013*, p 155.

4 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002.

otherwise comprehensive report, the ALRC did not consider the relevant human rights issues in any detail against the relevant international standards.

2.65 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.

2.66 *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'.

2.67 *Nature of the civil penalty:* The committee notes that the context in which these provisions have been introduced is a regulatory one, namely that the purpose of the legislation is 'a high hazard industry, where non-compliance with legislative requirements can result in incidents that have the potential to cause major environmental damage'.[5] The provisions are thus addressed to the safe and efficient operation of the industry in a manner which reduces the risk of environmental harm. Even though the imposition of a pecuniary penalty (as opposed to enforcement by way of an injunction) may be viewed as punitive, most of the civil penalty provisions can be seen as primarily regulatory in nature, particularly those which are accompanied by relatively small penalties.

2.68 *Severity of the penalty:* However, where significant penalties are imposed, this may be sufficient to justify characterising the penalty as criminal. The committee recognises that those subject to these penalties will, for the most part, be sizeable corporations and that substantial pecuniary penalties might therefore be required to act as a deterrent and would not necessarily be viewed as punitive.[6] At the same time, the committee notes that individuals may also be subject to such penalties. The imposition of pecuniary penalties in the order of 400 penalty units ($68,000)[7] might be seen as sufficiently severe to constitute a 'criminal penalty'; the maximum civil penalty of 1,000 penalty units ($170,000)[8] would appear to do so more clearly.

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5 Letter from the Minister for Resources and Energy, Minister for Small Business and Minister for Tourism, the Hon Gary Gray AO MP to the Hon Harry Jenkins MP, 26 April 2013, p 1.

6 Letter from the Minister for Resources and Energy and Minister for Tourism, the Hon Martin Ferguson AM MP to the Hon Harry Jenkins MP, 27 February 2013, p 2: see PJCHR, *Third Report of 2013*, p 156.

7 See new subsection 78(3A) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

8 See new subsection 569(6B) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

2.69 *Nature and severity combined:* As the committee noted 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'.

2.70 In this context the committee considers that those civil penalty provisions which have a parallel criminal offence and for which the maximum civil pecuniary penalty is significantly more than the maximum fine for the criminal offences (where a fine is the only punishment provided for), give rise to human rights compatibility concerns.

2.71 For example, subsection 569(1) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* sets out a number of obligations which apply and subsection 569(6) provides that a person commits an offence if the person is subject to one of these requirements and they engage in conduct that breaches the requirement. The penalty for the offence is stated to be 100 penalty units. The new subsection 569(6B), inserted by the bill, provides that a person will also be liable to a civil penalty if the person contravenes a requirement under subsection 569(1). The maximum pecuniary penalty is 1,000 penalty units: ten times higher than the corresponding criminal offence penalty.

2.72 There are other provisions that are to similar effect, with maximum fines for criminal offences set at 100 penalty units while maximum civil pecuniary penalties are set, for example, at 265[9] and 525[10] penalty units. Many other provisions provide for civil penalties that are slightly more than double the maximum fine for the corresponding criminal offence.

2.73 The committee notes the detailed explanation provided by the former Minister for Resources and Energy of the background to, rationale for, and intended operation of the civil penalty provisions in the bill. The committee considers that, in light of these explanations, most of the civil penalty provisions would not be characterised as 'criminal' for the purposes of human rights law. The committee notes that it would have been helpful if these explanations had been included in the statement of compatibility that accompanied the bill.

2.74 However, the committee remains concerned that, where the maximum pecuniary penalty imposed by a civil penalty provision is many times the maximum fine that may be imposed for the corresponding criminal offence, such civil penalty provisions might reasonably be characterised as 'criminal'. As a result, proceedings for their enforcement would therefore be required to comply with the guarantees

9 See subsections 280(3) (criminal penalty) and 280(5) (civil penalty).

10 See subsections 572(4) (criminal penalty) and 572 (5A) (civil penalty).

that apply to criminal proceedings under articles 14 and 15 of the ICCPR, including the right not to be tried or punished twice for the same offence (article 14(7)).

Double jeopardy

2.75 As the committee noted in its *First Report of 2013*, the new section 611B of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* applies the provisions of the Regulatory Powers (Standard Provisions) Bill 2012[11] to the civil penalty provisions of the Act. Clause 91 of the Regulatory Powers Bill provides that if a person has been convicted of a criminal offence first, a court may not subsequently make a civil penalty order against the person in relation to the same, or substantially the same, conduct. However, clause 93 of that bill provides that criminal proceedings may be commenced against a person for conduct that is the same or substantially the same conduct, even if a civil penalty order has already been made against the person in relation to that conduct.

2.76 This raises issues under article 14(7) of the ICCPR if a civil penalty is considered 'criminal' for the purposes of human rights law. Article 14(7) provides that '[n]o 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.'

2.77 The committee has concerns that, where a civil penalty is classified as 'criminal' in nature, and where a person may be subject to a pecuniary penalty for a civil penalty contravention in addition to punishment under a criminal offence for the same or substantially the same conduct, this may be inconsistent with the right not to be tried or punished twice for the same offence.

11 As at 17 June 2013, this bill was still before the House of Representatives and had not been passed into law.

THE HON MARTIN FERGUSON AM MP

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C13/399

27 FEB 2013

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Dear Mr Jenkins Harry,

I am writing in response to comments contained in the Parliamentary Joint Committee on Human Rights' First Report of 2013 (the Committee Report) concerning the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012* (the Compliance Measures Bill). Please see below my response to the request for further advice in the Committee Report in relation to the civil penalty regime to be introduced by this Bill.

As noted in the Committee Report and in the Explanatory Memorandum to the Compliance Measures Bill, the Bill introduces a civil penalty regime to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) on the basis of recommendations contained in the *Report of the Montara Commission of Inquiry* and a subsequent review of the OPGGS Act by the Australian Government to give effect to those recommendations. The review found that there is a strong need for a greater range of enforcement mechanisms to be considered for inclusion in the offshore petroleum regulatory regime in order to encourage improved compliance outcomes, and that the offshore petroleum regulator does not currently have available sufficient compliance and enforcement mechanisms in the middle range of regulatory responses, such as civil penalties, which are available to regulators of other comparable industry sectors within Australia and under like regulatory regimes internationally.

In developing the civil penalty regime, and in particular the contraventions to which a civil penalty would apply and the appropriate level of penalty, great regard was given to the principles discussed in the Australian Law Reform Commission's (ALRC) 1995 report titled *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. Careful consideration was also given to the type and level of existing civil penalties applied for contraventions of similar provisions in comparable legislation, such as the *Work Health and Safety Act 2011* and the *Environment Protection and Biodiversity Conservation Act 1999*.

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The ALRC report discusses at length the differing purpose and rationale of civil penalties in comparison to criminal offences. In particular, the report concludes that the principle purpose of civil penalties is *deterrence*, and that this purpose may be taken into account when setting the penalty level. As a result, a civil penalty may be set at a higher level than a criminal penalty for equivalent conduct, due to the absence of other indirect effects and factors that apply to a criminal conviction beyond the penalty units applied, such as the associated stigma and reputational damage, and the potential future detrimental impact of having a criminal record. While deterrence is certainly a factor in criminal offences, punishment for morally culpable behaviour is also a significant driving factor. The availability of a civil penalty will provide a middle ground between criminal proceedings and private civil actions and the trade-off is that, while there might be a sizeable civil penalty available without the need to prove fault, there is the lack of the indirect effects of a criminal conviction.

The principle purpose of including the civil penalty regime in the OPGGS Act is to create a deterrent effect to encourage compliance by persons with their obligations under the Act. The potential for a civil penalty to apply, often with a higher penalty than applies to the equivalent criminal offence, aims to provide a financial disincentive against persons contravening their obligations under the OPGGS Act, particularly in the context of offshore petroleum operations, where compliance requires a major financial investment, and non-compliance can add considerably to the profits to be made in association with any given activity.

The majority of the civil penalty provisions being introduced into the OPGGS Act will apply, either specifically or in practice, to corporations and joint ventures, and in most cases to large multinational oil companies. As the OPGGS Act regulates well-resourced companies and operations that require a significant financial investment, a number of the criminal penalties in the OPGGS Act are arguably too low to provide any real or meaningful direct punishment or deterrent, and it is the nature of the offence as "criminal", and the indirect associated effects as described above, that provides the real and meaningful punishment and deterrent. The potential imposition of a civil penalty for a contravention of the OPGGS Act provides an additional and more serious financial incentive for corporations to comply with the requirements of the Act, including important requirements relating to work practices and environmental management.

Admittedly a few of the civil penalty provisions being introduced into the OPGGS Act could also potentially apply to individuals, rather than or in addition to corporations depending on the facts of any given situation. These provisions are discussed in more detail below. To provide context, however, I would first emphasise that civil penalties are being introduced as one of a range of graduated enforcement mechanisms, to encourage compliance and ensure that the appropriate enforcement tool can be applied in the circumstances of each case. Although each of the provisions below may lead to a civil penalty or a criminal penalty being sought by the offshore petroleum regulator, not all instances of non-compliance will warrant pursuit of a civil penalty or criminal conviction; for example, a particularly serious breach or flagrant disregard for the law would warrant proceedings for a criminal offence. In each case, therefore, the appropriate enforcement mechanism would be selected and applied accordingly, and this conscious selection decision also adds weight to the argument that the relevant civil penalty provisions are not akin to a "criminal charge".

The first category of civil penalty provisions that could apply to an individual are provisions relating to a failure to produce a document or provide information when requested to do so by the relevant regulator (subsections 509(6A), 699(5A) and 759(4A)). Two of these provisions apply to enable the regulator to obtain further information prior to making a decision that could have strong financial implications for interested parties, such as a decision to approve a transfer or dealing in relation to a petroleum title. The other enables the relevant regulator to obtain

information about offshore petroleum operations that is relevant for the proper administration of the OPGGS Act. Although the potential civil penalty that may be applied is higher than can be applied for an offence against these provisions, as discussed above, this can be justified by the absence of a criminal stigma associated with a civil penalty (so that a criminal proceeding would be pursued in the most serious cases of non-compliance), and the level of the penalty also aims to deter a person from failing to comply in a context where potentially large financial interests are at stake.

The second category of civil penalty provisions that could apply to an individual are provisions relating to a failure by the master of a vessel to take an unauthorised vessel outside of a petroleum safety zone or the area to be avoided, or failure to allow an authorised person to board and search a vessel that is suspected to be inside a petroleum safety zone or the area to be avoided without authority (subsections 620(4) and 621(11)). Again, the penalty level for a civil penalty has been set to *deter* non-compliance with the relevant provisions. A vessel may be, for example, in a safety zone without authority in order to gain access to better fish stocks. The potential for a civil penalty provides a financial disincentive against contravening these provisions, where there is the potential for financial gains to be made from non-compliance. Also as noted above, in the most serious cases a criminal prosecution would be available, such as, for example, if persons remained in a safety zone with the deliberate intention to cause harm or damage to petroleum operations.

The final category of civil penalty provisions that could apply to an individual are provisions prohibiting conduct that hinders or obstructs an authorised person or NOPSEMA inspector in the course of undertaking lawful functions under the OPGGS Act (subsections 620(5), 621(12), subclause 6(2) of Schedule 2A and subclause 54(1A) of Schedule 3). There are examples of existing legislation which impose a civil penalty for hindering or obstructive conduct; see, for example, section 145 of the *Work Health and Safety Act 2011*, which was considered when setting the penalty levels that are to apply in the OPGGS Act. As with the provisions discussed above, the purpose of applying a civil penalty for hindering or obstructive conduct is to deter such behaviour by persons, and the penalty has been set accordingly. While the offence provision would also provide a deterrent, the option to pursue a criminal prosecution would be exercised where the obstructing or hindering conduct was serious in nature, (e.g. where a person physically and aggressively obstructed an inspector), as a purpose of the offence provision is to punish conduct that is morally egregious (as opposed to, for example, refusing to unlock a door to a room which contains operational records). In the latter case, it is expected that the prospect of a civil penalty would provide an appropriately significant financial disincentive against engaging in such conduct.

Finally, it should also be noted that civil penalties have not been applied in relation to *all* conduct which constitutes a criminal offence under the OPGGS Act, and the nature of each individual provision was taken into account in deciding whether to apply a civil penalty. Where a breach would be manifestly criminal in nature, due to, for example, a complete disregard for the safety of persons or the environment, or the provision of information that is known to be false, a civil penalty is not considered appropriate and therefore has not been applied.

For these reasons, I submit to the Committee that the civil penalty provisions being incorporated into the OPGGS Act by the amendments in the Compliance Measures Bill should not be considered to be "criminal charges" under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

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C13/703

26 APR 2013

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Dear ~~Mr Jenkins~~ Harry

Thank you for your letter of 13 March 2013 to the former Minister for Resources and Energy, the Hon Martin Ferguson AM MP, concerning the letter of 27 February 2013 sent to you by the former Minister which responded to certain concerns of the Parliamentary Joint Committee on Human Rights in relation to the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012* (the Compliance Measures Bill), and essentially seeking further information in relation to a concern outlined by the Committee that was not addressed in the 27 February 2013 letter.

In particular you have requested advice as to whether the reverse onus offences in the Compliance Measures Bill are compatible with human rights, and in particular the right to a fair trial in article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the right to be free from arbitrary deprivation of liberty in article 9(1) of the ICCPR, was not included in the letter of 27 February 2013.

Subclauses 8(1) and (3) of new Schedule 2A, which is to be inserted into the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGSA) by the amendments in the Compliance Measures Bill, will allow a National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) inspector to require a person to answer questions or produce documents or things relating to the conduct of a petroleum environmental inspection, if the inspector believes on reasonable grounds that the person is capable of answering the question or producing the document or thing. In this context, a "person" is either the titleholder; the titleholder's representative at offshore petroleum premises; or a person representing the titleholder at onshore regulated business premises.

Subclause 8(5) will make it an offence for a person to fail to comply with such a requirement, without reasonable excuse, with a maximum penalty of imprisonment for 6 months or 60 penalty units (or both).

The offshore petroleum industry is a high-hazard industry, where non-compliance with legislative requirements can result in incidents that have the potential to cause major environmental damage, such as that demonstrated by well control incidents such as the Macondo

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spill in the Gulf of Mexico. Combined with the difficulties of monitoring and inspecting remote offshore activities, the refusal by a person to answer a question or produce a document or thing related to the conduct of a petroleum environmental inspection when requested to do so by a NOPSEMA inspector would significantly hamper the regulator's ability to monitor the titleholder's compliance with applicable environmental requirements or to understand the causes of incidents that have occurred that may, if they recur, cause a major accident event leading to damage to the environment.

NOPSEMA faces substantial practical and technical difficulties in obtaining information about offshore petroleum activities for the purpose of monitoring compliance and in investigating the causes of incidents. Offshore operations are extremely technologically complex. They take place far from land, and in the case of well operations, far below the seabed, making physical inspection difficult or impossible for an inspector. In many cases, the inspector's best recourse is to ask questions of those carrying out the operations or to have them produce operational records detailing, for example, maintenance schedules. In particular, establishing the titleholder's standards of compliance over time can be a particular challenge, especially if records are incomplete. In an environment where compliance requires a major financial investment and where non-compliance can add considerably to the profits to be made, an inspector should have full powers to establish the facts and investigate whether there has been non-compliance, supported by enforcement mechanisms set at a level that will encourage persons to comply with reasonable requests from an inspector to answer questions or produce documents or things. The potential for application of a penalty of 6 months imprisonment is necessary to ensure that persons are made aware of the seriousness of a failure to comply with the requirement to answer questions or produce documents or things, and to afford a sufficient deterrence against non-compliance given the potentially serious consequences of a failure to comply and also recognising the difficulties for a NOPSEMA inspector to otherwise obtain the required information.

I note also that the fault element for an offence against clause 8 of Schedule 2A is intention or recklessness. Intentionally failing to answer a question or produce a document or thing in relation to the conduct of a petroleum environmental inspection is serious misconduct given the potentially severe consequences associated with an inability for a NOPSEMA inspector to determine compliance by a person with their environmental obligations or the cause of particular incidents. In this context, application of a maximum penalty of 6 months imprisonment is reasonable and appropriate.

The obligation to answer questions or produce documents in clause 8 of Schedule 2A does not apply generally, but to a petroleum titleholder (usually an oil company); the titleholder's nominated representative at offshore premises; or a person representing the titleholder at onshore regulated business premises. Clause 8 is therefore proportionate as it is directed at persons who would have particular knowledge relating to the titleholder's operations, or the ability to ensure compliance with a request to answer a question a produce a document or thing.

Although a potential penalty up to a maximum of 6 months imprisonment may be applied for a failure to comply with clause 8 of Schedule 2A, the application of a reasonable excuse defence will ensure that a person cannot be imprisoned if they have a reasonable justification for failing to comply with the request for information by a NOPSEMA inspector, and is therefore designed to protect an accused person. As noted by the Committee, the defendant bears an evidential burden in relation to this matter. The burden is placed on the defendant because, given the remote and technical nature of offshore petroleum operations, the circumstances constituting grounds for the reasonable justification are likely to be exclusively within the knowledge of the defendant.

While it would certainly seem difficult to justify a *legal* burden on a defendant in relation to this matter, given the potential for a penalty of imprisonment, an *evidential* burden that only requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the reasonable justification exists is reasonable and proportionate in the context of all of the circumstances, including the legitimate aim of the provision as described above.

Finally, I would also note that new clause 8 of Schedule 2A is consistent with an existing provision of the OPGGSA, which provides NOPSEMA inspectors with a power to require a person to answer questions or produce documents or things in relation to the conduct of an OHS inspection, and also imposes a maximum penalty of 6 months imprisonment if the person refuses to do so without reasonable excuse – see clause 74 of Schedule 3.

In summary, a maximum penalty of 6 months imprisonment for a failure to comply with clause 8 of new Schedule 2A is necessary to ensure that the legitimate aim of that clause, which is to ensure that NOPSEMA inspectors have access to information to determine compliance by persons with their legislative obligations, can be achieved, in a context where non-compliance with those obligations creates risks of significant environmental damage, and the inspector may not have any other means of obtaining the relevant information. A defence has been included, however, to protect an accused person by ensuring they cannot be imprisoned for a failure to comply with a request to answer a question or produce a document or thing if they have a reasonable excuse. Although there is an evidential burden on the defendant in relation to this matter, the reversal of the burden in relation to this defence is necessary as the information and circumstances will be peculiarly within the knowledge of the defendant, given the remote and technical nature of offshore petroleum operations. In all the circumstances, therefore, the maximum penalty for non-compliance with clause 8 is proportionate to the seriousness of the offence, and placing an evidential burden on the defendant in relation to the reasonable excuse defence is also necessary, reasonable and proportionate. For these reasons, clause 8 of Schedule 2A is consistent with the right to a fair trial in article 14 of the ICCPR and the right to be free from arbitrary deprivation of liberty in article 9(1) of the ICCPR.

Of course, as is required during the development of legislative amendments, my Department consulted with the Attorney-General's Department, including the criminal law and human rights areas, to ensure that the amendments were consistent with Australian Government policy.

I trust that this additional information will be sufficient to address the Committee's concerns.

Yours sincerely

Gary Gray