Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 27 May – 6 June 2013

Human rights and civil penalties

Eighth Report of 2013

June 2013

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Membership of the committee

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Senator the Hon Kim Carr	Victoria, ALP
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Senator the Hon. Ursula Stephens	New South Wales, ALP
Mr Dan Tehan MP	Wannon, Victoria, LP
Senator Penny Wright	South Australia, AG
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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of all forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 27 May to 6 June 2013. The report also sets out the committee's comments on four responses to the committee's comments on civil penalty provisions made in previous reports.

Bills introduced 27 May to 6 June 2013

The committee considered 37 bills, 35 of which were introduced with a statement of compatibility. The committee has identified seven bills that it considers require further examination and for which it will seek further information. The committee's comments on these bills are set out in this report.

28 of the bills considered do not require further scrutiny as they do not appear to give rise to human rights concerns. Some of these bills do not engage human rights, some engage and promote rights and a number engage and limit rights, but are accompanied by statements of compatibility that set out an adequate justification for each of these limitations. A further two private Members' bills may engage rights and the committee leaves open the option of examining these bills further in the event that these bills proceed to further stages of debate.[1]

Bills introduced without statements of compatibility

The Broadcasting Services Amendment (Advertising for Sports Betting Bill 2013 [No. 2] and the Constitution Alteration (Local Government) 2013 were not accompanied by a statement of compatibility. The committee considers that neither bill gives rise to human rights concerns, but will write to the proponent of each bill regarding the decision not to provide a statement of compatibility.

The Constitution Alteration (Local Government) 2013 seeks to establish the process for a referendum to amend section 96 of the Australian Constitution to make specific provision for the Commonwealth to grant financial assistance to local government bodies. The Explanatory Memorandum that accompanied the bill states that the proposed legislation is not within the scope of the *Human Rights (Parliamentary Scrutiny) Act 2011* and therefore does not require a statement of compatibility under that Act. The committee appreciates that a bill to alter the Constitution has some important differences from other bills considered by the Parliament, particularly with regard to the procedure for its approval and commencement. However, the committee notes that amendments to the Constitution resulting from the procedure

1 Live Animal Export Restriction Prohibition Bill 2013, introduced by Mr Wilkie MP and Australian Ownership Bill 2013, introduced by Mr Katter MP.

set out in section 128 of the Constitution are described as Acts in their long titles,[2] as is this bill, even though they may be cited without including the word 'Act' in the citation.[3] As no further explanation has been provided in the explanatory memorandum, the committee will write to the Attorney-General seeking clarification as to why a statement of compatibility was not provided with this bill.

Examples of clearly expressed statements of compatibility

The committee notes that a number of the bills considered have been introduced with well-reasoned statements of compatibility which have greatly assisted the committee. The statement provided with the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 is exemplary. While the committee has raised some questions in relation to certain aspects of the bill, for the most part any limitations in the bill have been adequately explained in the statement of compatibility which has enabled the committee to conclude that these particular provisions do not raise human rights concerns.

The Charities Bill 2013 and consequential bill introduces a statutory definition of a 'charity' that does not extend to organisations engaged in or promoting activities that are unlawful, contrary to public policy or is for the purpose of promoting or opposing a political party or candidate. The bill is accompanied by a statement of compatibility that provides a clear explanation of why the measures are a necessary, reasonable and proportionate limitation on the rights to freedom of speech and political participation. The Migration Amendment (Offshore Resources Activity) Bill 2013 is another example of a statement of compatibility that provides a clearly expressed justification for the limitations on rights implemented through that bill.

Promotion of rights

A number of the bills considered in this report promote rights.[4] The committee wishes to make specific comment on the Privacy Amendment (Privacy Alerts) Bill 2013 and the Homelessness Bill 2013, and the related consequential bill.[5]

The Privacy Amendment (Privacy Alerts) Bill 2013 requires entities regulated by the Privacy Act to notify affected individuals and the Australian Information Commissioner where there has been unauthorised access to, or disclosure of, personal information, or where personal information is lost in circumstances that

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2 See, for example, the Constitution Alteration (Aboriginals) 1967, Act No 55 of 1967, the long title of which is 'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population'.

3 See, for example, Constitution Alteration (Aboriginals) 1967, section 1.

4 See, for example, Australian Capital Territory Water Management Legislation Amendment Bill 2013, Early Years Quality fund Special Account Bill 2013, and Social Security Amendment (Supporting More Australians Into Work) Bill 2013.

5 Homelessness (Consequential Amendments) Bill 2013.

could give rise to unauthorised loss or disclosure. The committee welcomes this response to concerns regarding the risks associated with the storage of large amounts of personal information in electronic form raised by the Australian Law Reform Commission in its 2008 report[6] which advances the right to privacy.

The committee notes that the Homelessness Bill 2013 is aspirational in nature as no rights are created. The committee endorses the commitment to increase recognition and awareness of people experiencing or at risk of homelessness, as housing is an important right under the International Covenant on Economic, Social and Cultural Rights. The committee notes, however, that the bill does not create a legislative right to housing as recommended by the United Nations Committee on Economic, Social and Cultural Rights.[7]

Human rights compatibility and civil penalty provisions

Since commencing its work in August 2012, the committee has noted a number of bills containing civil penalty provisions and has sought clarification regarding the consistency of these provisions with the guarantees relating to criminal proceedings contained in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

In this report, the committee has set out its comments on the civil penalty provisions in four such bills, indicating the type of analysis that it considers may be appropriate to include in statements of compatibility accompanying bills that introduce or incorporate civil penalty regimes. The committee thanks the Ministers concerned for their detailed responses to the committee's comments and for their forbearance while the committee gave detailed consideration to this issue. The committee has concluded that the civil penalty provisions in two of the bills are unlikely to be considered criminal.[8] The remaining two bills contain civil penalty provisions that the committee considers may properly be characterised as 'criminal' in nature.[9] As such the committee has expressed concerns that where a person may be subject to a pecuniary penalty for a civil penalty contravention in addition to punishment under a

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6 Australian Law Reform Commission Report 108, 'For Your Information: Australian Privacy Law and Practice' 2008,

7 CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/AUS/CO/4, 42nd session, Geneva, para 11 (22 May 2009). For an earlier recommendation to similar effect, see CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc E/2001/22, para 379 (2001). See CESCR, *General Comment No. 4: The Right to Adequate Housing (art 11)*, 6th sess, UN Doc E/1992/23 (13 December 1991).

8 Australian Sports Anti-Doping Authority Amendment Bill 2013, pp 41- 49; Biosecurity Bill 2012, pp 50 - 56.

9 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012, pp 23 - 40; Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012, pp 57 - 67.

criminal offence for the same or substantially the same conduct, this may be inconsistent with the right not to be tried twice for the same offence (article 14(7) of the ICCPR).

To assist those involved in policy development, drafting and human rights scrutiny of these types of provisions, the committee has developed an interim practice note setting out its understanding of the human rights law position. *Practice Note 2* forms Appendix 2 to this report.

Mr Harry Jenkins MP
Chair

Part 1

Bills introduced
27 May – 6 June 2013

Bills requiring further information to determine human rights compatibility

Australian Citizenship Amendment (Special Residence Requirements) Bill 2013

Introduced into the House of Representatives on 30 May 2013
Portfolio: Immigration and Citizenship

Summary of committee view

1.1 The committee seeks further information as to whether the Ministerial discretion to revoke a person's citizenship is consistent with the right to a fair hearing, the right of a child to a nationality and the requirement to act in the best interests of a child.

Overview

1.2 This bill seeks to amend the *Australian Citizenship Act 2007* to grant the Minister a non-compellable, non-delegable discretion to waive the residence requirements for citizenship in certain circumstances. The bill also seeks to give the Minister the personal discretion to revoke citizenship granted under this power, if the person does not comply with obligations to be ordinarily resident in Australia for two years (including 180 days of physical presence) following their grant of citizenship. This includes the power to revoke a child's citizenship if citizenship had been approved as a consequence of the discretion being applied in favour of their parent.

Compatibility with human rights

1.3 The bill is accompanied by a detailed self-contained statement of compatibility which sets out that the bill engages the right to freedom of movement, the right to non-discrimination and a child's rights to acquire a nationality.

Freedom of movement and right to a fair hearing

1.4 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of movement, which includes the right not to be arbitrarily deprived of the right to enter one's own country. The statement of compatibility identifies that this right is engaged as the Minister is granted the discretion to revoke a person's citizenship if residence requirements are not complied with. The statement notes that as this is a discretion, 'the Minister can take into account the circumstances of the case before deciding whether or not to revoke the person's citizenship' and notes the safeguard that citizenship must not be revoked if it would render a person stateless. The statement of compatibility states

that 'in light of the benefit provided to the person, it is reasonable, necessary and proportionate to provide the Minister with the power to revoke citizenship'.[1]

1.5 There does not appear to be any review mechanism for a person whose citizenship has been personally revoked by the Minister, as the ability to seek review before the Administrative Appeals Tribunal has not been included in section 52 of the *Australian Citizenship Act 2007*. There is also no requirement for the Minister to give the person whose citizenship is to be revoked an opportunity to put forward their case.

1.6 The committee notes the comment in the statement of compatibility that as it is a discretion, the Minister can take into account the individual circumstances of the case. However, as it is a personal, non-compellable Ministerial discretion, the Minister could equally choose *not* to take into account individual circumstances. A Ministerial discretion, in and of itself, cannot be taken to be a safeguard to ensure compliance with human rights. The UN Human Rights Committee has stated, in relation to the right to freedom of movement, that any restriction on this right 'should use precise criteria and may not confer unfettered discretion on those charged with their execution'.[2]

Children's rights

1.7 Similarly, the Minister can revoke the citizenship of a child who was granted citizenship because their parent was granted citizenship under the discretionary power. Under article 24(3) of the ICCPR and article 7(1) of the Convention on the Rights of the Child (CRC), a child has the right to acquire a nationality. The CRC provides (article 3) that in all actions concerning children, the best interests of the child shall be a primary consideration. The statement of compatibility notes that the best interests of the child may be outweighed by countervailing considerations, including the ability of the State to prescribe citizenship criteria. It goes on to note:

> Children would not unreasonably lose their citizenship through the new revocation provision as it is a discretion, allowing individual circumstances to be taken into account. In particular, the Minister would take into account the best interests of the child in the process of deciding whether or not to exercise the discretion to revoke.[3]

1.8 As already noted, a Ministerial discretion, in and of itself, does not constitute a safeguard. As there is nothing in the legislation requiring the Minister to consider the best interests of the child when revoking citizenship, it is not clear to the

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1 Statement of compatibility, p. 4.

2 UN Human Rights Committee, General Comment No. 27: Freedom of Movement, 2 November 1999, para 13.

3 Statement of compatibility, p. 5.

committee that these provisions would be consistent with the right of a child to a nationality and their right to a fair hearing.

1.9 The committee intends to write to the Minister for Immigration and Citizenship to ask whether the Ministerial discretion to revoke a person's citizenship is consistent with the right to a fair hearing in article 14(1) of the ICCPR and, in relation to children, to the right of a child to a nationality and the requirement to act in the child's best interests.

Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013

Introduced into the House of Representatives on 29 May 2013
Portfolio: Attorney-General

Summary of committee view

1.10 The committee thanks the Attorney-General for providing a comprehensive and well-reasoned statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role.

1.11 The committee seeks further information as to what protections are in place to ensure an unrepresented person is able to fully test the evidence against them if they are prohibited from cross-examining certain witnesses against them, including whether additional provision for legal assistance will be made available in these circumstances.

1.12 The committee seeks further information as to why it is necessary to reverse the burden of proof with the creation of an exception to an existing offence.

Overview

1.13 This bill seeks to amend a number of Acts with the intention of improving and clarifying aspects of Commonwealth criminal law. In particular, the bill proposes amendments:

- to expand the jurisdiction of the Australian Commission for Law Enforcement Integrity to enable the Integrity Commissioner to investigate corruption issues within the Australian Transaction Reports and Analysis Centre (AUSTRAC) (Schedule 1);
- to expand protections available for vulnerable witnesses in Commonwealth criminal proceedings (particularly victims of slavery and human-trafficking offences) and for the use of victim impact statements in the sentencing of federal offenders (Schedule 2);
- relating to investigating, prosecuting and sentencing for people smuggling offences, including removing the use of wrist x-rays as a prescribed age determination process; requiring the prosecution to prove age; ensuring time spent in immigration detention or on remand is recognised in sentencing; and enabling the use of evidentiary certificates to establish prima facie evidence of facts relating to the interception of people smuggling vessels (Schedule 3);
- to strengthen the anti-money laundering and counter-terrorism financing legislative framework, by providing greater privacy protections; giving access to AUSTRAC data to two new agencies;

enabling AUSTRAC to conduct internal reviews (in addition to existing external review); and strengthening certain offences (Schedule 4).

- to facilitate assistance to the United Nations Mechanism for International Criminal Tribunals (which was established in 2010 to complete the work of the international criminal tribunals for the Former Yugoslavia and Rwanda) (Schedule 5);
- to the *Australian Federal Police Act 1979* to reflect current governance arrangements and to the *Telecommunications (Interception and Access) Act 1979* to update cross-references to Victorian legislation (Schedule 6).

Compatibility with human rights

1.14 The bill is accompanied by a lengthy and detailed statement of compatibility that identifies that the bill engages, promotes and limits a number of human rights, including the right to privacy, the presumption of innocence, the right to a fair hearing and the right to be treated with dignity when deprived of liberty. The committee notes that the statement sets out in helpful detail how each right is engaged, and where it limits a right it explains what the objective being sought is and how such a limitation may be seen to be proportionate to that objective.

1.15 The committee thanks the Attorney-General for providing such a comprehensive and well-reasoned statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role.

1.16 The committee considers that, except in relation to those issues set out below, any limitations in the bill have been adequately explained in the statement of compatibility and as such do not appear to raise human rights concerns.

Right to examine witnesses

1.17 Article 14(3)(e) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence has the right to examine, or have examined, the witnesses against them. Schedule 2 of the bill proposes restricting unrepresented defendants from cross-examining vulnerable persons (such as victims of slavery or trafficking or witnesses recognised by the court to be 'special witnesses').[4] The committee appreciates that this is intended to protect vulnerable witnesses and does not limit the ability of the defendant's legal representative from testing evidence. However, the committee is concerned that if a

4 See item 26 of Schedule 2 (read in conjunction with the amendment inserted by item 27).

person is not legally represented this provision may limit the defendant's ability to effectively examine the witnesses against them.[5]

1.18 The committee intends to write to the Attorney-General to ask what protections are in place to ensure an unrepresented person is able to fully test the evidence against them if they are prohibited from cross-examining certain witnesses against them, including whether additional provision for legal assistance will be made available in these circumstances.

Presumption of innocence

1.19 New item 24 of Schedule 4 of the bill creates an exception to an existing offence to ensure a regulated business does not commit an offence by providing a designated service to an individual using a false identity 'if the customer's use of that name is justified, or excused, by or under a law'. The defendant bears an evidential burden in relation to this exception. The statement of compatibility recognises that offences which reverse the burden of proof may limit the right to the presumption of innocence contained in article 14(2) of the ICCPR. However, the statement does not go on to explain why there is a need for the evidential burden to be reversed in this instance.

1.20 The committee intends to write to the Attorney-General to ask why it is necessary to reverse the burden of proof with the creation of the exception to an existing offence in item 24 of Schedule 4.

5 The committee notes article 14(3)(d) of the ICCPR provides for the right of a person to have access to legal assistance (including without payment if the person does not have sufficient means to pay) and the High Court in *Dietrich v The Queen* (1992) 177 CLR 292 has held that the common law requires that in some cases, in the interests of a fair trial, it may be necessary to require legal representation for a trial to proceed.

Intellectual Property Laws Amendment Bill 2013

Introduced into the House of Representatives on 30 May 2013
Portfolio: Industry, Innovation, Climate Change, Science, Research and Tertiary Education

Summary of committee view

1.21 The committee seeks clarification as to whether a person whose patent is affected by Crown use receives compensation and/or can seek review of this use, and whether the Crown use provisions are consistent with the right to benefit from one's scientific production.

1.22 The committee seeks clarification as to whether the disclosure of personal information to New Zealand officials is consistent with the right to privacy.

Overview

1.23 This bill seeks to amend several areas of Australia's intellectual property legislative framework. It is intended to introduce improvements across the system to increase efficiency and effectiveness. In particular, the bill

- modifies the Crown use provisions in the *Patents Act 1990* to strengthen the circumstances around when Crown use may apply;
- implements the Protocol amending the *World Health Organization Agreement on Trade-related aspects of Intellectual Property* to allow Australian generic medicine producers to manufacture and export patented pharmaceuticals to countries experiencing a health crisis;
- provides plant owners with quicker and cheaper alternatives to enforcing their rights in federal courts;
- provides for a single application and examination process for Trans-Tasman patents.

Compatibility with human rights

1.24 The bill is accompanied by a self-contained statement of compatibility that states that the bill promotes the right to health as it enables the export of generic versions of patented medicines to developing countries that are experiencing serious public health issues. It notes that patent owners of affected pharmaceutical product will be compensated.

Right to benefit from scientific production

1.25 Article 15 of the International Covenant on Economic, Social and Cultural Rights provides for a right of everyone to 'benefit from the production of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. The committee notes that Schedule 1 to the bill seeks to amend the *Patents Act 1990* to strengthen provisions which permit the Commonwealth or a State (or their authorised person) to exploit an invention

described in a pending patent application or granted patent without the need for authorisation by the owner – known as 'Crown use'. The explanatory memorandum explains that this 'provides a safeguard to ensure the patent system does not impede governments from acting in the public interest'.

1.26 The committee notes that the application of the right in article 15 does not necessarily coincide with intellectual property rights under Australian law, and that this right must be balanced with the right of everyone to enjoy the benefits of scientific progress. The committee notes that enabling governments to act in the public interest is an important and legitimate objective. However, the committee notes that the statement of compatibility does not refer to this right, and as such, the committee is unable to fully assess the human compatibility of this provision. In particular, it is not clear to the committee whether the person whose patented invention is used receives any compensation for this use or is able to seek any review of the use.

1.27 The committee intends to write to the Minister for Climate Change, Industry and Innovation to seek clarification as to whether a person whose patent is affected by Crown use receives compensation and/or can seek review of this use, and whether the Crown use provisions are consistent with the right to benefit from one's scientific production under article 15 of the ICESCR.

Right to privacy

1.28 Schedule 5 of the bill introduces a process for patents from Australia and New Zealand to have a single application and examination process and will allow for a single trans-Tasman patent attorney regime, including common qualifications for registration. Item 16 of Schedule 5 amends section 183 of the *Patents Act 1990* to allow for the disclosure of information (including personal information) by the Designated Manager to the Register of Companies of New Zealand or a New Zealand delegate. No information is given in the statement of compatibility as to what safeguards are in place once personal information is disclosed to officials in New Zealand.

1.29 The committee intends to write to the Minister for Climate Change, Industry and Innovation to seek clarification as to whether the disclosure of information to New Zealand officials is consistent with the right to privacy under article 17 of the International Covenant on Civil and Political Rights.

Parliamentary Service Amendment (Freedom of Information) Bill 2013

Introduced into the House of Representatives on 29 May 2013
Portfolio: Leader of the House

Summary of committee view

1.30 The committee seeks clarification as to why it is necessary to provide a complete exemption for parliamentary departments and officers from the application of the *Freedom of Information Act 1982* and whether this is proportionate to the objective of protecting the integrity of parliamentary processes and the confidentiality of advice.

Overview

1.31 This bill seeks to amend the *Parliamentary Service Act 1999* to provide that a Department of the Parliament, or a person who holds or performs the duty of an office established under that Act, is not a 'prescribed authority' for the purposes of the *Freedom of Information Act 1982* (FOI Act). This would exempt parliamentary departments and office holders under the Act from the application of the FOI Act. The bill provides that the FOI Act is taken to have effect as if each parliamentary department and office holder had never been taken to be a prescribed authority since 1999 (from the date of application of the *Parliamentary Service Act 1999).*

1.32 The bill is intended to correct a recently discovered but unintended consequence of the *Parliamentary Service Act 1999* which inadvertently applied the FOI Act to the Department of the Senate, Department of the House of Representatives and the Department of Parliamentary Services. When the Parliamentary Budget Office was created it was specifically exempted from the operation of the FOI Act and is not affected by this bill. The committee notes that a review of the operation of the FOI Act is currently being undertaken by Dr Allan Hawke AC, which includes examining the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act. The report was due to be provided to government by 30 April 2013, but has yet to be tabled in Parliament.[6]

Compatibility with human rights

1.33 The bill is accompanied by a self-contained statement of compatibility which states that the bill engages the right to freedom of expression, including the right to receive information, in article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR provides:

6 See Review of Freedom of Information Laws, including the terms of reference, available at: http://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

1.34 This right is not absolute and may be limited; article 19(3) provides:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

1.35 The statement of compatibility states that in exempting all parliamentary departments and officers from the application of the FOI Act, while this may limit the right to receive information, this limitation 'is reasonable and proportionate to its objective of protecting the integrity of the parliamentary service'.[7] In particular, the statement notes:

> The Bill protects public order by facilitating public administration, as it protects the integrity of the parliamentary departments. …
>
> By its very nature, much of this advice is provided on a confidential basis to senators and members to inform their parliamentary work and deliberations, and to assist them in carrying out their constitutional duties as members of Parliament …
>
> Although some exemptions within the FOI Act may apply to documents held by the parliamentary departments, there is no certainty that such exemptions would apply to all FOI requests. In the absence of an exemption from the FOI Act to ensure confidentiality, senators and members may be reluctant to request such advice, leading to a deleterious effect on the work of the Parliament. Additionally, arguably such advice should not be subject to the FOI Act because FOI disclosure could lead to such advice becoming part of the political process, thereby potentially jeopardising the ability of parliamentary officers to carry out their legislative responsibility of providing "non-partisan and impartial" advice and services to members of parliament.[8]

1.36 The committee accepts that the bill seeks to achieve a legitimate objective of protecting the integrity of the parliamentary process and the necessary confidentiality of advice provided to senators and members. The committee also considers that, in exempting the application of the FOI Act, there is a rational

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7 Statement of compatibility, p. 4.

8 Statement of compatibility, p. 4.

connection between the limitation and the objective. However, it is not clear to the committee why it is necessary to exclude parliamentary departments or officers from the entire application of the FOI Act. The statement of compatibility notes that some exemptions in the FOI Act may apply to documents held by parliamentary departments, but that this may not apply to all FOI requests. It is unclear to the committee why it is necessary to exclude all documents held by parliamentary departments from the FOI Act, rather than strengthen the existing exemptions. The committee notes that this is the approach taken in the United Kingdom, where parliamentary departments are subject to freedom of information laws, but there are exemptions, for example, for parliamentary privilege.[9]

1.37 The committee notes that the Leader of the House, in introducing the bill, stated that this bill 'is an interim measure to preserve the right of the Parliament to make a deliberate decision about the FOI status' of the various departments and noted that there may be alternative approaches, giving the courts as an example whereby the separation of powers is respected 'by the application of the FOI Act to documents of an administrative character only'.[10] However, while the intention may be that the bill may be an interim step only, there is nothing on the face of the legislation that limits it in this way.

1.38 The committee intends to write to the Leader of the House to seek clarification as to why it is necessary to provide a complete exemption for parliamentary departments and officers from the application of the FOI Act and whether this is proportionate to the objective of protecting the integrity of parliamentary processes and the confidentiality of advice.

9 The UK *Freedom of Information Act 2000*, lists the House of Commons and the House of Lords as public authorities, but has exemptions for parliamentary privilege (s 34); information that could prejudice public affairs (in the opinion of the Speaker or Clerk) (s 36); personal data (s 40); material provided in confidence (s 41) etc.

10 See Second Reading Speech of Mr Albanese, Leader of the House, 29 May 2013.

Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013

Introduced into the House of Representatives on 29 May 2013
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Summary of committee view

1.39 The committee seeks further information as to whether compulsorily directing how social security payments are to be spent is consistent with the right to privacy, and why it is necessary to enable deductions from a person's social security benefits for up to 12 months *after* a person has satisfied their debt for the amount of rent or household utilities.

1.40 The committee also seeks further information as to whether the compulsory deduction of social security payments from public housing tenants, but not from other social security recipients (who may also be in rent/mortgage arrears) is consistent with the right to non-discrimination.

Overview

1.41 This bill seeks to amend the *Social Security (Administration) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to enable public housing providers to apply to the Secretary of the Department of Human Services to authorise the compulsory deduction of rent and household utility payments from certain social security and family benefit payments, if a person's payments under their lease are in arrears above a prescribed minimum.

1.42 Under the bill, the Minister will have the power to specify someone as a 'public housing lessor' (and therefore as someone able to apply for the deductions to be made) only if satisfied that the public housing lessor has appropriate processes in place to enable review of decisions relating to amounts due and payable and in dealing with matters relating to leases of accommodation.[11] Before an order for a deduction can be made, the person must owe an amount that exceeds the prescribed minimum (yet to be specified) and the public housing lessor must have taken reasonable action to recover the amount.[12] An order for these deductions will cease if the person leaves the accommodation, the request is cancelled, or the debt is paid, however, even once the debt is paid the compulsory deduction can continue for an additional 12 months (as long as the person affected is notified and given an opportunity to make representations to the lessor about this).[13]

11 See clause 3.

12 See clause 6.

13 See clause 10 together with clause 7.

Compatibility with human rights

1.43 The bill is accompanied by a self-contained statement of compatibility that states that the bill engages the right to social security,[14] the right to an adequate standard of living,[15] the right to self-determination[16] and the right to privacy.[17] It concludes:

> The Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013 is compatible with human rights. The Housing Payment Deduction Scheme will advance the protection of human rights by ensuring that a proportion of social welfare payments are spent on housing costs for people who are having difficulty meeting their obligations under their public housing leases and risking their tenancies. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of preventing evictions due to arrears and debt, which may force a person, and their children, into homelessness.[18]

1.44 The statement of compatibility states that the objective of the scheme is to reduce the capacity of individuals and families living in public housing, to accumulate large amounts of arrears, which could put them at risk of eviction and possible homelessness. It notes that the Secretary 'currently deducts public housing rent and other costs from persons' social welfare payments, and pays amounts to public housing authorities with the customer's consent, under the (voluntary) Rent Deduction Scheme'.[19] The difference with this scheme is that the deductions will be made compulsorily.

1.45 The statement of compatibility provides no evidence as to the current rate of people in public housing who are in arrears with their rent or household utility payments and how many may be at risk of eviction, and possible homelessness. However, the explanatory memorandum notes that State Housing Authorities advise there are around 600 evictions from public housing a year due to non-payment of rent, and many more leave each year owing rent.[20]

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14 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 26 of the Convention on the Rights of the Child (CRC).

15 Article 11 of the ICESCR and article 27 of the CRC.

16 Article 1 of the ICESCR.

17 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

18 Statement of compatibility, p. 4.

19 Statement of compatibility, p. 1.

20 Explanatory memorandum, p. 1.

Right to privacy

1.46 The statement of compatibility recognises that the bill engages the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR), but confines its discussion of this to the information provided by a requesting public housing lessor for the purpose of administering the scheme. The committee notes that the right to privacy may not be limited solely to the right to respect for private and personal information. While privacy is a difficult term to define, is has been said that:

> Privacy can be defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals.[21]

1.47 The committee considers that compulsorily directing how social security payments are to be spent engages, in addition to the right to social security, the right to privacy, insofar as it interferes with the personal autonomy of public housing tenants to choose how to spend their benefits. This is not an absolute right and can be limited provided that the limitation is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

1.48 The committee intends to write to the Minister for Housing and Homelessness to seek further information as to:

(a) whether compulsorily directing how social security payments are to be spent is consistent with the right to privacy and the right to social security; and

(b) why it is necessary to enable deductions from a person's social security benefits for up to 12 months *after* a person has satisfied their debt for the amount of rent or household utilities.[22]

Non-discrimination

1.49 The committee notes that the bill applies only to public housing tenants and does not apply to persons renting privately or persons owing mortgages, who may also be in arrears with their rent/mortgage and are in receipt of social security benefits. Article 26 of the ICCPR prohibits discrimination on any ground and article 2

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21 See *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, Human Rights Council, A/HRC/23/40, 17 April 2013, pp 6-7, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

22 As provided for by clauses 7 and 10(1)(e).

requires that the rights recognised in the ICCPR are to be granted without distinction of any kind. To be consistent with the rights to equality and non-discrimination, differential treatment must be demonstrated to have an objective and reasonable justification.

1.50 The committee intends to write to the Minister for Housing and Homelessness to seek further information as to whether the compulsory deduction of social security payments from public housing tenants, but not from other social security recipients (who may also be in rent/mortgage arrears), is consistent with the right to non-discrimination.

Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013

Introduced into the House of Representatives on 29 May 2013
Portfolio: Treasury

Summary of committee view

1.51 The committee seeks further information as to why it is necessary to reduce the superannuation benefits of high income earning Australian Defence Force members and how this is consistent with the right to social security.

Overview

1.52 This bill seeks to facilitate the MySuper reforms (relating to the governance of superannuation) by providing income tax relief to superannuation funds where there is a mandatory transfer of default members' account balances to a MySuper product in another superannuation fund, thereby ensuring members are not financially disadvantaged.

1.53 It also seeks to enable amounts under the Defence Force Retirement and Death Benefits (DFRDB) scheme to be paid by the Commonwealth Superannuation Corporation and to adjust benefits under that scheme to reflect those payments.

Compatibility with human rights

1.54 The bill is accompanied by a statement of compatibility for the two Schedules of the bill. The statement in relation to Schedule 1 states that it is compatible with human rights as it promotes the right to an adequate standard of living by increasing the retirement savings of individuals. The committee notes that as the Schedule deals with superannuation it is likely to also engage and promote the right to social security under article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.55 The statement of compatibility states that Schedule 2 does not engage any rights and so is compatible with rights. However, the committee notes that the effect of the amendments in this Schedule allow a lump sum to be paid from a superannuation interest in the DFRDB scheme to meet a debt account discharge liability for Australian Defence Force members of the scheme who are very high income earners. As a result of this the member's superannuation benefits, including any reversionary pension to be paid to a surviving spouse of a deceased member, is reduced. No reason is given as to why this is necessary, how much the benefits may be reduced by, and whether this is consistent with the right to social security under article 9 of the ICESCR.

1.56 The committee intends to write to the Minister for Financial Services and Superannuation to ask why it is necessary to reduce the superannuation benefits of high income earning Australian Defence Force members and how this is consistent with the right to social security under article 9 of the ICESCR.

Tax Laws Amendment (2013 Measure No. 2) Bill 2013

Introduced into the House of Representatives on 29 May 2013
Portfolio: Treasury

Summary of committee view

1.57 The committee considers that Schedule 3 of the bill engages the right to work and, in introducing a civil penalty, requires examination of whether the penalty is 'criminal' in nature. The committee has concluded that the bill does not give rise to human rights concerns but intends to write to the Treasurer to bring these matters to his attention and notes it would assist the committee in future if further analysis is set out in the statement of compatibility.

Overview

1.58 This bill seeks to amend a number of taxation laws to:

- require certain large entities to pay Pay As You Go instalments monthly (Schedule 1);
- provide a tax incentive for entities that carry on a nationally significant infrastructure project (Schedule 2);
- create a regulatory framework for tax (financial) advice (Schedules 3 and 4);
- increase transparency of the business tax system by requiring the publication of certain taxation data (Schedule 5);
- apportion expenditure for petroleum projects (Schedule 6);
- remove the capital gains tax discount for foreign resident and temporary resident individuals (Schedule 7);
- exempt from income tax, payments made under the Defence Abuse Reparation Scheme (Schedule 8);
- ensure certain services and other things supplied to a participant as part of a National disability Insurance Scheme plan are GST-free (Schedule 9);
- update the list of specifically listed deductible gift recipients (Schedule 10);
- make a number of amendments, including clarifying the treatment of native title benefits distributed through charities (Schedule 11).

Compatibility with human rights

1.59 The bill is accompanied by separate statements of compatibility for each Schedule of the bill. The committee is satisfied that Schedules 1, 2, 4, 6, 8 and 10 do not, as stated in the statements of compatibility, engage human rights, and that

Schedules 9 and 11 may promote human rights. The committee considers that Schedules 5 and 7 appear to engage and limit the right to privacy and the right to non-discrimination respectively, but that these limitations have been adequately justified in the statement of compatibility.

Schedule 3

1.60 The committee notes that government amendments agreed to in the House of Representatives removed Schedules 3 and 4 to the bill. However, the committee notes that the framework set out in these schedules, creating a regulatory framework for tax (financial) advice services, were referred to the Parliamentary Joint Committee on Corporations and Financial Services. As the content of these schedules may be re-introduced following that Committee's report, the committee sets out its views on the human rights implications of the bill as originally introduced.

1.61 The statement of compatibility notes that Schedule 3, in requiring that all persons who give tax advice in relation to financial affairs must be registered, engages the right to freedom of expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR), as it ensures only appropriately qualified and registered persons can provide such advice. It also notes that a public register of entities who are regulated to provide tax advice engages the right to privacy (article 17 of the ICCPR), but that it does not include intrinsically personal information about an individual and the measure is necessary as a customer protection mechanism.

1.62 The committee notes that regulation of financial tax advisers would also appear to engage the right to work under article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The committee notes that the reasons given in the statement in relation to the above rights would appear to justify any limitation on the right to work:

> These limitations operate to protect consumers from inadequate or inappropriate advice and reasonably require professionals seeking to provide that advice to be appropriately trained and registered to provide consumers with confidence in the advice they receive.[23]

1.63 The committee notes that it would have been helpful for the committee's analysis of this bill if the right to work had also been identified in the statement of compatibility, and any limitation justified.

1.64 The committee also notes that Schedule 3 inserts a number of new civil penalty provisions into the *Tax Agent Services Act 2009*, which already includes a civil penalty regime. The committee notes its advice in its interim *Practice Note 2* that civil penalty provisions may engage rights if the penalties are 'criminal' in effect. The committee has set out its position that it would be helpful if statements of

23 Statement of compatibility to Schedule 3, p. 118.

compatibility were to address the issues set out in the interim Practice Note whenever a bill incorporates or applies civil penalty provisions.

1.65 In assessing whether a civil penalty provision is 'criminal' under human rights law, the committee looks at: (a) the classification of the penalty under domestic law; (b) the nature of the penalty provision (punitive or deterrent, as opposed to protective or compensatory); and (c) the severity of the penalty.

1.66 *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'.

1.67 *The nature of the sanction or penalty:* The committee notes that the civil penalty regime in the *Tax Agent Services Act 2009*, which the amendments to the bill add to, appear to be punitive and deterrent. However, the context in which they are introduced appears to be regulatory, to ensure only appropriately qualified and registered persons provide this type of tax advice.

1.68 *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. The maximum penalty for contravention of the civil penalty in the bill that may be awarded by a court is 250 penalty units for an individual ($42,500).

1.69 While these penalties involve significant sums of money for individuals, the committee is not persuaded that of themselves they are sufficient to lead to the conclusion that they involve the imposition of a criminal penalty. Taking into account the cumulative effect of the nature and severity of the penalty, the committee does not consider that this would lead to the classification of these civil penalties as 'criminal'.

1.70 The committee intends to write to the Treasurer to bring the matters set out above to his attention, and to note that it would assist the committee in future if this analysis is set out in the statement of compatibility.

Part 2

Human rights and civil penalties

Human Rights Compatibility and Civil Penalties

Since it commenced its work, the committee has considered a number of bills containing civil penalty provisions and has sought clarification as to whether these provisions and the procedures for their enforcement are consistent with guarantees relating to criminal proceedings contained in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). Pending its more detailed study of the issue, the committee deferred final consideration of a number of bills which give rise to these issues. The committee's comments on these aspects of the bills appear in this section.

The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note (in Appendix 2 to this report). This Practice Note is intended to provide guidance to those involved in policy development, drafting and human rights scrutiny of these types of provisions.

The interim *Practice Note 2* draws attention to the principal criteria employed in assessing whether a civil penalty provision is 'criminal': (a) the classification of the penalty under domestic law; (b) the nature of the penalty provision (punitive or deterrent, as opposed to protective or compensatory); and (c) the severity of the penalty.

The committee would find it helpful for the performance of its function of assessing human rights compatibility if statements of compatibility were to address the issues set out in the interim *Practice Note 2*. The committee has indicated in its comments on the bills considered here the type of analysis that may be appropriate in a statement of compatibility accompanying a bill that proposes introducing or incorporating a civil penalty regime.

The committee recognises that the topic is a complex one and that the issue should be the subject of continuing dialogue with government.

Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012; before Senate
Portfolio: Agriculture, Fisheries and Forestry
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 3/13, tabled on 13 March 2013
Response dated: 27 February 2013

Summary of committee view

2.1 The committee thanks the Minister for his detailed response. The information provided adequately addresses the committee's concerns about the compatibility of the monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and of the reverse onus provisions with the right to be presumed innocent in article 14(2) of the ICCPR.

2.2 The committee considers that some of the civil penalty provisions in the bill may best be properly characterised as 'criminal' in nature, particularly where the maximum pecuniary penalty imposed by a civil penalty provision is triple the maximum fine that may be imposed for the corresponding criminal offence. As such, the committee has concerns that, where a person may be subject to a pecuniary penalty for a civil penalty 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 under article 14(7) of the ICCPR.

Background

2.3 This bill proposes reforms to the system of regulation of agricultural and veterinary ('agvet') chemicals, to improve the efficiency of the current regulatory arrangements and provide greater certainty that chemicals approved for use in Australia are safe.

2.4 The committee sought further information from the Minister about the compatibility of monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and whether provisions imposing a civil penalty and reverse onus offences are consistent with the fair trial rights in article 14 of the ICCPR.

2.5 The Minister responded by letter dated 27 February 2013.[1] In its *Third Report of 2013*, the committee thanked the Minister for his response and stated that it had

1 PJCHR, *Third Report of 2013*, p 97.

decided to defer finalising its views on the human rights compatibility of the bill to enable closer examination of the issues in light of the information provided in the Minister's response.

2.6 The Minister's response is attached.

Committee's response

2.7 The committee thanks the Minister for his detailed 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.

Right to privacy and reverse onus provisions

2.8 The committee considers that the information provided by the Minister adequately addresses the committee's concerns about the compatibility of the monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and of the reverse onus provisions with article 14(2) of the ICCPR.

Civil penalty provisions

2.9 The committee notes with appreciation the detailed discussion of issues relating to civil penalty provisions in the Minister's letter.[2] The Minister's letter noted that:

> The financial incentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool than sole reliance on criminal proceedings or criminal convictions, as the stigma of a criminal conviction can have impacts beyond the particular offence (for example, exclusion from future business opportunities). The use of civil penalty orders also reflects the practices of other areas of (particularly, corporate) regulation under Commonwealth legislation. The provisions in the Bill that relate to civil penalties are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95). They are also consistent with the Regulatory Powers (Standard Provisions) Bill 2012.[3]

2 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, pp 9-10: see PJCHR, *Third Report of 2013*, pp 139-140.

3 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p. 9 (footnote omitted): see PJCHR, *Third Report of 2013*, pp 139.

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

2.11 The bill provides that existing offence provisions are also to be civil penalty provisions. The maximum penalties for criminal offences that have corresponding civil penalty provisions under the bill range from 30 penalty units ($5,100) to 300 penalty units ($51,000).

2.12 *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'.

2.13 *Nature of the civil penalty:* The committee notes that the context in which these provisions have been introduced is a regulatory one, being the regulation of agvet chemicals. New section 69EJ sets out the procedure for obtaining a civil penalty order, which provides that a court, in determining the pecuniary 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; and the extent to which the person has cooperated with the authorities. 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.

2.14 *Severity of the penalty:* Where significant penalties are imposed, this may be sufficient to justify characterising the penalty as criminal. New subsection 145AA(2) provides that the penalty for contravention of civil penalty must not exceed three times the amount of the maximum monetary penalty that could be imposed by a court on conviction for an offence constituted by the same conduct.

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

2.15 This means that the pecuniary penalties that may be imposed by a court on individuals under some provisions[5] could reach the level of 900 penalty units ($153,000). This is a significant penalty and may be viewed as rising to the level of severity sufficient to be 'criminal' even in a regulatory context.

2.16 *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'.

2.17 The committee considers that those civil penalty provisions which have a parallel criminal offence and for which the maximum civil pecuniary penalty is three times more than the maximum fine for the criminal offences (where a fine is the only punishment provided for the offence), might reasonably be characterised as 'criminal'. As a result, proceedings for their enforcement would therefore be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR, including the right to be presumed innocent and not to be tried or punished twice for the same offence.

Right to be presumed innocent

2.18 If a civil penalty provision is characterised as 'criminal', then article 14 will apply, including the right to be presumed innocent until proven guilty according to law, on the criminal standard of proof. The Minister's letter notes:

> For civil penalty provisions, the standard of proof placed on the prosecuting regulator is derived from the civil standard – the balance of probabilities – but can rise depending on the seriousness of the offence. The degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. This approach has been enshrined in legislation in section 140 of the *Evidence Act 1995* (Cth)…'.[6]

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5 See, eg, provisions of the AgVet Code contained in the *Agricultural and Veterinary Chemicals Code Act 1994*.

6 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, pp 8-9: see PJCHR, *Third Report of 2013*, pp 138-139.

Section 140 of the *Evidence Act 1995* provides:

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

2.19 The committee notes the Minister's comments in this regard. It acknowledges that the issue of enhanced scrutiny of evidence in some civil matters is a complex point and will continue to give consideration to this issue.

Double jeopardy

2.20 As the committee noted in its earlier comments, proposed new sections 69EJH (to the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act)) and section 145B (to the *Agricultural and Veterinary Chemicals Code Act 1994)* provide that if a person has first been convicted of a corresponding offence, a court may not subsequently make a civil penalty order against the person in relation to the same, or substantially the same, conduct as that constituting the criminal contravention. However, the bill provides that criminal proceedings may be commenced against a person for conduct that is the same or substantially the same as conduct that would constitute contravention of a civil penalty provision, even if a civil penalty order has been made against the person in relation to that conduct.

2.21 The Minister's letter notes this, but draws attention to proposed new sections 145BC of the Agvet Code and 69EJK of the Admin Act which provide that evidence given in civil proceedings is not admissible in criminal proceedings (other than those relating to the falsity of the evidence). The committee noted in its initial comments that it was not clear whether the practical effect of these provisions was to rule out the possibility of such a criminal conviction where a civil penalty order has already been made.[7] The Minister maintains that the 'sum effect of these provisions is to prevent a person from being subject to a civil penalty order and found guilty of an offence based on the same or substantially the same conduct.'[8]

2.22 However, at the same time the Minister's letter notes that 'criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.'[9] This clearly leaves open the possibility that a person may be punished twice for the same conduct, even if the conviction can only be based on independently sourced material and not evidence admitted at the civil penalty proceedings. This may raise human

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(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

7 PJCHR, *First Report of 2013*, para 1.37

8 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p 10: see PJCHR, *Third Report of 2013*, p 140.

9 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p 10: see PJCHR, *Third Report of 2013*, p 140.

rights compatibility issues under article 14(7) of the ICCPR, which provides for the right not to be tried or punished twice for the same conduct.

2.23 The committee notes the detailed explanation provided by the Minister of the background to and rationale for 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.

2.24 However, the committee is still concerned that, where the maximum pecuniary penalty imposed by a civil penalty provision is triple the maximum fine that may be imposed for the corresponding criminal offence, such civil penalty provisions might reasonably be characterised as 'criminal' when they involve pecuniary penalties of up to 900 penalty units. As a result, proceedings for their enforcement would be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR.

2.25 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,[10] this may be inconsistent with the right not to be tried or punished twice for the same offence.

10 See, for example, sections 69EJH of the Admin Act and section 145B of the AgVet Act.

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2013-01120

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

Dear Mr Jenkins

Thank you for your letter of 6 February 2013 regarding consideration of the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 by the Joint Parliamentary Committee on Human Rights (the committee).

The committee sought clarification of a number of matters in the Bill and its associated explanatory material. To assist the committee, I have included additional information in Attachment 1. The contact officer in the department for any further information on this Bill is Marc Kelly and he may be contacted on 6272 5485 or marc.kelly@daff.gov.au.

I consider that the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Thank you for seeking clarification of these matters and I look forward to receiving the committee's further views on the Bill.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

27 February 2013

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120

Attachment

Information for the Joint Parliamentary Committee on Human Rights for the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

General clarification

The Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 (the Bill) makes amendments to the *Agricultural and Veterinary Chemicals Act 1994* (Agvet Act), *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act), the *Agricultural and Veterinary Chemicals Code Act 1994* (Code Act), including the Schedule to that Act (Agvet Code) and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Collection Act) (collectively called agvet chemical legislation).

As noted by the Joint Parliamentary Committee on Human Rights (the committee) the Bill promotes the right to health and a healthy environment, by regulating agricultural and veterinary chemicals (agvet chemicals). Agvet chemicals are designed to destroy pests and weeds, and prevent or cure diseases. They may be dangerous and are typically poisonous substances that may have deleterious consequences for human health and the environment.

Given the necessity of protecting the community and the environment from the hazards of agvet chemical products, measures in the Bill may limit human rights but only as is reasonable and necessary to manage the risks associated with these chemical products.

The APVMA has been consulted in preparing this response. The explanatory material for the Bill and this response was developed with regard to the information available on assessing human rights compatibility and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* published by the Attorney-General's Department (AGD guide). While this response recognises the committee's view that previously settled conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of human rights compatible legislation and practice, current guidance has been referenced where this is relevant.

1.23 The committee:

(a) notes the powers conferred under a warrant are extensive and a major encroachment on the right to privacy, and require a clear justification as a necessary and proportionate measure;

...

Necessary and proportionate monitoring and investigation powers

Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

As noted by the committee, the Bill provides for the use of extensive investigation and monitoring powers by officers of the APVMA (including entry, search and seizure) (see amendments proposed for Part 7AA of the Admin Act and Part 9 of the Agvet Code in Schedule 3 of the Bill). These powers are consistent with those available to other Commonwealth product regulators and are consistent with powers currently available in the

Admin Act and the Agvet Code. The amendments in the Bill separate the monitoring and investigative powers, improve clarity, provide for a graduated approach to entry search and seizure, and bring agvet chemical legislation into line with other modern Commonwealth legislation of similar intent.

Entry Powers

Compliance with the Admin Act, the Collection Act and the Agvet Code is essential to protect the health and safety of human beings, animals and the environment. Under sections 69EAB and 69EB of the Admin Act and sections 131 and 132 of the Agvet Code, APVMA officers have the power to enter any premises to find out if these Acts are being complied with.

The powers in the Admin Act and the Agvet Code allow APVMA inspectors to enter residences when they are also used for commercial purposes, as long as either the occupier has consented to the entry or the entry has been made under a monitoring warrant. Sections 69ED of the Admin Act and 133 of the Agvet Code provide that consent can be withdrawn at any time by the occupier. Section 131AA also authorises APVMA inspectors to enter premises without consent or without a warrant to prevent imminent risk to persons of death, serious injury or serious illness (for example, occupiers of the premises).

While monitoring powers will limit the right to privacy, this limitation will only occur in relation to commercial premises and residential premises where they are also being used as commercial premises for the manufacture or supply of agvet chemicals. These occupiers will be aware of their need for compliance with the agvet chemical legislation in order to protect the health and safety of human beings, animals and the environment.

The Bill protects against arbitrary abuses of power as the entry, monitoring, search, seizure and information gathering powers are conditional upon consent being given by the occupier of the premises or prior authorisation under warrant, except where necessary to prevent imminent risk to persons of death, serious injury or serious illness. Where entry is based on the consent of the occupier, consent must be informed and voluntary and the occupier of premises can restrict entry by authorised persons to a particular period. Additional safeguards are provided through provisions requiring authorised persons and any persons assisting them to leave the premises if the occupier withdraws their consent.

The Bill also provides constraints on the issuing of a monitoring or investigation warrant. For example, the Bill specifies that an issuing officer of a warrant to enter premises for the purpose of monitoring or investigation must be a judicial officer. Also, in the case of an investigation warrant, an issuing officer may issue an investigation warrant only when satisfied, by oath or affirmation, that there are reasonable grounds for suspecting that there is, or may be evidential material on the premises. An issuing officer must not issue a warrant unless the issuing officer has been provided, either orally or by affidavit, with such further information as they require concerning the grounds on which the issue of the warrant is being sought. Such constraints on this power ensure adequate safeguards against arbitrary limitations on the right to privacy in the issuing of warrants.

An authorised person cannot enter premises unless their identity card and a copy of the warrant under which they are entering are shown to the occupier of the premises. APVMA inspectors may only be appointed as inspectors if they have appropriate qualifications and training. These measures provide for transparency, managerial oversight and mitigate arbitrariness and risk of abuse of the investigative powers.

Powers of APVMA Inspectors

The Bill also provides the APVMA with powers to seek and obtain information to ensure ongoing compliance with agvet chemical legislation. These powers replace the previous powers of entry, search and seizure in the Admin Act and the Agvet Code. The new powers have been included in both the Admin Act and the Agvet Code, and the powers in the Admin Act can be exercised for the purposes of the Collection Act. The exercise of these powers is also subject to warrant or consent unless there are reasonable grounds for suspecting that it is necessary to exercise the monitoring powers to prevent an imminent risk to persons of death, serious injury or serious illness.

As for authorised officers in other Commonwealth product regulatory schemes, the Bill provides for APVMA inspectors to have powers that include asking questions, seizing evidential material, including documents and electronic equipment, as well as powers to photograph, take measurements or run tests. These powers reflect the role of APVMA inspectors as the front line in protecting human health and safety, animals and the environment from risks associate with agvet chemical products, particularly in remote, rural or regional areas where agvet chemical products are used more intensively. For example, the monitoring and investigation powers include the authority to operate electronic equipment (sections 69EAD and 69EBB) and to secure evidence (section 69EAE) or seize things (section 69EBC).

Evidence may be secured for up to seven days and electronic equipment (that is not evidence) may be secured for up to 72 hours. These represent longer periods than are usually provided to other regulators and are necessary to allow the APVMA to practically exercise its investigative powers in remote, rural and regional areas of Australia where chemical products are used (for example, sections 69EAE, 69EDD). Undertaking these activities in remote areas requires APVMA inspectors (and electronic equipment experts) to travel long distances to and from implicated premises and securing authorities need to provide for these operational requirements.

Summary

Overall, the investigative powers and monitoring powers are reasonable, necessary and proportionate to achieve the legitimate objective of protecting human health and the environment. Adequate safeguards and limitations on the use of these powers in the Bill ensure that such lawful interferences are not arbitrary or at risk of abuse in practice. In addition, the APVMA is bound by the *Privacy Act 1988* (Cth) in collecting, handling and disclosing personal information and this Act confers rights designed to protect privacy. These rights and obligations are set out in 11 information privacy principles (IPPs) contained within the Privacy Act.

Self-incrimination

Article 14(3)(g) of the ICCPR protects the right to be free from self-incrimination by providing that a person may not be compelled to testify against him or herself or to confess guilt. The right to be free from self-incrimination may be subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective. Generally, an abrogation of the right against self-incrimination is more likely to be considered permissible where it is accompanied by both a use and derivative use immunity.

Answering Questions

The committee notes that an APVMA inspector is empowered to ask questions of a person or to ask the person to produce a document and that a failure to comply is an offence. If an inspector enters premises with the occupier's permission, the inspector is permitted to ask the occupier to answer questions and produce documents that relate to the inspector's reasons for entering the premises. However, as the inspector's right to be present on the premises is based on the consent of the occupier, it is not an offence to refuse to comply with an inspector's request.

The committee has indicated that no provision is made in relation to the possibility of the person incriminating themselves in answering questions put to them by an APVMA inspector. The Bill provides that an occupier may only be compelled to answer questions put to them by an APVMA inspector if an APVMA inspector enters premises under warrant (see subsections 131F(3) and 132G(3), item 285 of Schedule 3 of the Bill, as well as sections 69EAH(3) and 69EC(3), item 64 of Schedule 3 of the Bill). While compulsory questioning engages the right against self-incrimination in article 14(3)(g) of ICCPR, the privilege against self-incrimination is available to a natural person where the inspector asks questions when they enter premises under a warrant or with consent. The Bill only abrogates this privilege for a natural person when answering questions put by an inspector in the context of a section 130 notice which the committee has found is consistent with the right not to incriminate oneself (paragraph 1.27).

In the exercise of their functions, inspectors are subject to a range of obligations aimed at protecting the rights and interests of the occupiers of premises, including:

- the inspector must inform the occupier of premises that consent for access is voluntary, may be refused, subject to time limitations or withdrawn. If consent is withdrawn, the inspector and any person assisting him or her must leave the premises (for example, section 69ED, item 64 of Schedule 3 of the Bill)
- where a warrant has been obtained, the inspector must, before entering the premises, announce that he or she is authorised to enter the premises, show his or her identity card and give the occupier of the premises the opportunity to permit entry into the premises (for example, section 69EDA, item 64 of Schedule 3 of the Bill)
- when executing a warrant, the inspector must be in possession of the warrant (for example, section 69EDB, item 64 of Schedule 3 of the Bill), although persons assisting the inspector may remain on the premises while the warrant is in force, even if the APVMA inspector has left the premises
- the inspector must provide a copy of the warrant to the occupier who is present and inform him or her of the rights and responsibilities of the occupier (for example, section 69EDC, item 64 of Schedule 3 of the Bill).

Summary

The privilege against self-incrimination remains available to a natural person where the inspector asks questions when they enter premises under a warrant or with consent.

The Committee:

...

(b) seeks clarification as to whether the new licence condition requiring all licence holders to admit entry to an inspector applies to existing licence holders, and if so, what steps have been, or will be, taken to inform licence holders of this new condition;

The Australian Pesticides and Veterinary Medicines Authority has advised that existing licence conditions require access to be provided for inspectors and for transparency. New paragraph 126(4)(aa)(item 274 of Schedule 3 of the Bill) provides for this condition in the primary legislation rather than require it to be applied on a licence by licence basis. This access is necessary as it would be impractical to require a warrant for the routine monitoring that necessarily occurs for manufacturing quality and licensing purposes. This approach is also consistent with the AGD guide (licensed premises) and the approach taken for human therapeutic goods (paragraphs 40(4)(b),(c) and (d) of the *Therapeutic Goods Act 1989*)).

The Committee:

...

(c) seeks clarification as to why the threshold for the issue of a monitoring warrant is that entry is considered 'reasonably necessary' when the international standard is that an encroachment on a right should be 'necessary' if it is to be justified; and

(d) seeks clarification as to the practical difference between the powers that may be exercised under a monitoring warrant and those that may be exercised under an investigation warrant.

Overall, the use of monitoring warrants and investigation warrants provide for a graduated approach to the warrants available for monitoring compliance, gathering information and gathering evidence in investigating potential offences or contraventions. This is consistent with the contemporary approach in other Commonwealth legislation.

A monitoring warrant is used for general surveillance activities to monitor compliance or encourage compliance (for example, new section 143, item 306 of Schedule 3 of the Bill). With these warrants, the powers for inspectors are more limited than for an investigation warrant (for example, seizure is not authorised and only securing is provided for), there is a longer execution timeframe (6 months maximum) and a lower 'reasonably necessary' test applies for the judicial officer issuing the monitoring warrant. These measures are consistent with the general compliance monitoring purpose of a monitoring warrant. As compliance monitoring is an essential component of the agvet chemical regulatory system, the Bill provides for monitoring warrants to support this activity.

An investigation warrant is a more coercive power (for example, new section 143A, item 306 of Schedule 3 of the Bill). It provides for seizure of evidential material, a shorter execution timeframe (1 week maximum) and a higher 'reasonable grounds' test to apply for the judicial officer issuing the investigation warrant. As investigations of potential offences or contraventions and the gathering of evidential material are an essential component of the agvet chemical regulatory system, the Bill provides for investigation warrants to support this activity.

This approach is consistent with the AGD guide. The AGD guide, developed by the Criminal Justice Division of the Attorney-General's Department, assists officers to frame criminal offences, infringement notices and enforcement provisions that are intended to become part of Commonwealth law, including relevant principles and precedents. While the committee's approach is that previously settled conventions and guides are not determinative of human rights compatibility, it does include useful reference material and background for provisions.

Section 8.7 of the AGD guide states that a monitoring warrant regime may be appropriate where it is necessary to monitor or audit compliance with legislative requirements. A monitoring warrant differs from a search warrant (investigation warrant in the Bill), which is used to investigate suspected offences. A monitoring warrant scheme may be useful where

there is a need to monitor compliance with legislation in circumstances where no offence is suspected.

The AGD guide also states that 'A set of principles for framing monitoring warrant provisions has been followed in Commonwealth legislation for several years. This has been designed to ensure a broad range of powers is available to facilitate effective monitoring, without raising concerns about improper use of these powers. This approach should continue to be followed unless there are clear reasons for departure.'

1.38 The committee intends to write to the Minister to seek clarification as to:

(a) why the civil penalty provisions which correspond to offences constituted by the same conduct and which are subject to three times the maximum pecuniary penalty that may be imposed for the corresponding offence, should not be considered to involve 'criminal charges' under article 14 of the ICCPR and thus be required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings (including the requirement that the case against the defendant be proved beyond reasonable doubt); and

(b) whether the effect of new sections 69EJJ of the *Agricultural and Veterinary Chemicals (Administration) Act1 1992* and 145BB of the *Agricultural and Veterinary Chemicals Code Act 1994* is to permit a person to be the subject of a civil penalty order and found guilty of an offence based on the same or substantially similar conduct and, if so, whether this is consistent with the ICCPR.

....

The Committee's views raise wider issues about the use of civil penalty provisions in Commonwealth compliance and enforcement schemes and which the Bill introduces into the Agvet Code and the Admin Act (and which apply for the Collection Act). The following analysis is provided as a basis as to why these provisions are compatible with human rights.

Article 14 of the ICCPR – what constitutes a criminal charge

In interpreting the international human rights treaties, Australia considers that it should consider in good faith the views of treaty bodies established under the treaties. Although the views of the United Nations Committees, including those expressed in General Comments and Recommendations are not binding on States parties, they are generally treated as a persuasive source of guidance. In General Comment 32, the Human Rights Committee set out its views in relation to Article 14(1) of the ICCPR. It stated:

> Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity [citing Communication No. 1015/2001, *Perterer v. Austria,* para. 9.2].[1]

There is little other jurisprudence from the Human Rights Committee as to when it considers that an act designed 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 or its severity.

Australia is not a party to the *European Convention on Human Rights 1950* (Convention). As a result, it is not bound by the jurisprudence of the European Court of Human Rights (Court).

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[1] Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007.

However, we note that Article 6 of the Convention does not have the same wording as Article 14 of the ICCPR. Also, the Court has held that there are three key criteria[2] for determining whether a matter should be characterised as a criminal charge:

- the domestic classification of the offence[3]
- the nature of the offence (including whether the proceedings are instituted by a public body with statutory powers of enforcement, whether the matter has a punitive or deterrent purpose, whether the law applies to a specific group or is generally binding in nature, whether the imposition of the penalty is dependent upon a finding of guilt, how similar procedures are treated in other Council of Europe Member States and whether an offence creates a criminal record),[4] and
- the severity of the potential penalty (imposition of penalties including fines which can be commuted into a period of imprisonment in particular have been found to constitute a criminal penalty by the Court).[5]

Double jeopardy

The relevant article is 14(7) of the ICCPR:

> 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 for each country.

Under the ICCPR prohibition on double jeopardy, a person who has been convicted or acquitted of a criminal charge must not be re-tried for the same or substantially the same offence. The prohibition on double jeopardy is limited to proceedings in relation to a 'criminal charge'. 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. Accordingly, it may be possible 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.

Double jeopardy does not arise in the Bill because there is no means of commuting a civil penalty order for contravention of a civil penalty provision into a criminal sanction. A civil penalty order can only be made by a court and it is a debt payable to the Commonwealth and recoverable through debt collection activities. It does not constitute a criminal charge and no criminal record can arise from the order or non-payment of the civil penalty order.

Civil and Criminal Proceedings

For civil penalty provisions, the standard of proof placed on the prosecuting regulator is derived from the civil standard — the balance of probabilities — but can rise depending on the seriousness of the offence. The degree of satisfaction for which the civil standard of proof

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[2] *Engel and Others v the Netherlands*, Application no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976.

[3] See, for example, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984 and *Ezeh and Connors v United Kingdom*, Applications no. 39665/98 and 40086/98, 15 July 2002.

[4] See, *Jussila v Finland*, Application no. 73053/01, 23 November 2006, *Bendenoun v France*, Application no. 12547/86, 24 February 1994, *Benham v United Kingdom*, Application no. 1380/92, 10 June 1996, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984 and *Ravnsborg v Sweden*, Application no. 14220/88, 23 March 1994.

[5] *Ezeh and Connors v United Kingdom*, Applications no. 39665/98 and 40086/98, 15 July 2002, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984, and also *Lutz v Germany*, Application no. 9912/82, 25 August 1987.

calls may vary according to the gravity of the fact to be proved. This approach has been enshrined in legislation in section 140 of the *Evidence Act 1995* (Cth), which states:

> 140 (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

The Bill provides for existing offence provisions to also be civil penalty provisions, and to allow the APVMA to apply to the court for a civil penalty order against a person who has contravened a civil penalty provision. The financial disincentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool than sole reliance on criminal proceedings or criminal convictions, as the stigma of a criminal conviction can have impacts beyond the particular offence (for example, exclusion from future business opportunities). The use of civil penalty orders also reflects the practice of other areas of (particularly, corporate) regulation under Commonwealth legislation. The provisions in the Bill that relate to civil penalty provisions are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95)[1]. They are also consistent with the Regulatory Powers (Standard Provisions) Bill 2012.

Taking into account the ALRC Report and other Commonwealth legislation (including the *Evidence Act 1995*), the inclusion of civil penalty provisions and providing for civil penalty orders in agvet chemical legislation that correspond to offences for the same conduct is considered to be compatible with human rights as:

- their inclusion is aimed at furthering the purposes of the legitimate objective of protection of human health and safety, animals and the environment;
- double jeopardy does not arise because a civil penalty order for contravening a civil penalty provision cannot be commuted to a criminal sanction;
- a civil penalty order for contravening a civil penalty provision can only be made by a court and this ensures such orders are not arbitrary or at risk of abuse in practice.
- the amount of a civil penalty order is subject to safeguards with judicial determination of the amount of the order having regard to the *Evidence Act 1995*, as well as relevant matters in subsections 69EJ(5) and 145A(5), and which together ensure that such orders are not arbitrary or at risk of abuse in practice;

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[1] http://www.alrc.gov.au/report-95. Principled Regulation: Federal Civil and Administrative Penalties in Australia. The provisions in the Bill that relate to civil penalty provisions are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95) that was tabled March 2003 and considered federal regulatory and penalties schemes. While the focus was on civil and administrative penalties, it was necessary for the ALRC to consider how they differ from, and are similar to, criminal sanctions. As part of developing the report, the ALRC was required to have regard to 'Australia's obligations under international law and Australia's commitment to human rights and civil liberties'. This Report dealt with the theory of penalties and their role in government regulation. It looks at why penalties are used, how they vary and the role of fault in distinguishing between criminal sanctions and regulatory contraventions.
The ALRC 95 Report includes a detailed characterisation of civil and criminal proceedings (page 81) and included recommendations in relation to civil penalties and offences and proceedings relating to their enforcement (page 422).

- they provide for a graduated means of enforcement that reflects other Commonwealth legislation and reduces reliance on the need for criminal proceedings and the potential stigma of a criminal conviction (and its consequences).

Sections EJJ and 145BB

Proposed sections 69EJI of the Admin Act (item 66 of Schedule 3 of the Bill) and 145BA of the Agvet Code (item 308 of Schedule 3 of the Bill) stay civil proceedings, where criminal proceedings are commenced for an offence of the same conduct or substantially the same conduct. These provisions also dismiss civil proceedings where these proceedings are not resumed because the person is convicted of the offence. Similarly, sections 145B of the Agvet Code (item 308 of Schedule 3 of the Bill) and 69EJH of the Admin Act (item 66 of Schedule 3 of the Bill) prevent a civil penalty order being made against a person for the same conduct or substantially the same conduct for which the person has been convicted of an offence.

Criminal proceedings may be commenced for conduct that is the same or substantially the same as that which would constitute a contravention of a civil penalty provision even if a civil penalty order has been made. However, as provided for by sections 145BC of the Agvet Code and 69EJK of the Admin Act, any evidence given in civil proceedings is not admissible in any criminal proceedings, other than evidence relating to the falsity of evidence. This ensures that information or documents produced during civil proceedings are not relied upon to support subsequent criminal proceedings, unless they are criminal proceedings relating to falsifying evidence in civil proceedings. While it is appropriate to allow criminal proceedings after civil proceedings have ended, given the overriding importance of the criminal justice system, criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.

The sum effect of these provisions is to prevent a person from being subject to a civil penalty order and found guilty of an offence based on the same or substantially the same conduct, provided that the person did not provide false evidence in relation to previous civil proceedings and that any evidence for subsequent criminal proceedings is gathered independent of the civil proceedings. This approach is also consistent with the recommendations in the ALRC 95 report (page 422) and is compatible with human rights.

1.43 The committee intends to write to the Minister to seek clarification as to whether it is a justified encroachment on the presumption of innocence to impose a legal burden of proof on a defendant to prove that they could not be reasonably expected to know of the existence of a notice, and whether the imposition of an evidential burden would be more appropriate.

With two exceptions, the amendments in the Bill ensure minimal changes to existing offences so as not to disturb the existing provisions dealing with the evidential burden and legal burden. The exceptions are new section 45C of the Agvet Code (Schedule 3 of the Bill) and to a lesser degree new section 47E (Schedule 2 of the Bill).

Section 47E mirrors current section 54. New section 47E contains the same defence as in current section 54 with the same evidential burden for the defence. The current sections 45A and 55 have been amalgamated into new sections 45A, 45B and 45C. Just as is provided for in existing sections 45A and 55, new section 45C provides for a strict liability offence for possessing, having custody of or other dealing with a suspended or cancelled active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices which have been published. The amount of the penalty (300 penalty units) is for the same amount as the current sections 45A and 55. The defences in the existing

subsections 55(5) and (6) have been retained as subsections 45C(3) and (4). The defence and the reversal of the onus of proof in subsection 45C(4) mirrors the current defence and onus of proof in current subsection 55(6).

Subsection 45C(4) provides a defence to a defendant who has not been given a notice that he or she either did not know and could not reasonably have been expected to have known of the existence of the *Gazette* notice or that the possession etc was not in accordance with the instructions in the *Gazette* notice. This is an additional defence to the defence of honest and reasonable mistake of fact and although the defendant bears the legal burden is broader in scope. This is because it is not concerned with the requisite state of mistaken belief but is judged against the standard of what could be reasonably expected. The provision imposes the legal burden of proof on the defendant and this must be discharged on the balance of probabilities that the person did not know and could not reasonably be expected to have known of the existence of the notice.

The current and proposed defence is that the defendant did not know *and* could not reasonably be expected to have known of the existence of the notice. The Committee acknowledges that the actual knowledge of the defendant in relation to the existence of the notice 'would be peculiarly within the knowledge of the defendant' but states that whether the defendant could reasonably be expected to have known of the existence of the notice is an objective test that does not necessarily require information peculiarly within the knowledge of the defendant. The Senate Standing Committee for the Scrutiny of Bills also commented on this provision in that '...given that what a defendant may reasonably be expected to have known is not capable of clear definition ...'.

The issue turns on whether the defendant should be expected to prove, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with suspended or cancelled chemical products or constituents. The suspension or cancellation of chemical products or constituents may be necessary to achieve the legitimate objective of the protection of human health and the environment. Agvet chemical products may be dangerous poisons and are supplied by persons who are expected to have the special knowledge and special facilities to supply them.

It would not be likely that the defendant's knowledge of 'what they could reasonably be expected to have known' may be uncovered through the normal course of an investigation. In addition, the objectivity of this test will depend on the particular circumstances. More importantly, reducing the current legal burden to an evidential burden could be regarded as undermining the integrity of the agvet chemical regulatory system as it would reduce the need for suppliers to have systems in place to remain aware of the status of chemical products for supply.

While it is acknowledged that the placing of a legal burden on a defendant should be kept to a minimum, this specific circumstance of dealing with suspended or cancelled products is considered a situation where the defendant should continue to bear this burden. This is on the basis that dealing with these suspended or cancelled products may be a concern for human health and the environment and the current and proposed burden on the defendant only extends to proving, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with these products.

In summary, while subsection 45C(4) is a new section, it does not represent a new obligation or an altered regulatory burden for regulated entities or any change for any person's human rights. On this basis and recognising the defence and the reversal of the onus of proof in new subsection 45C(4) mirrors the defence and onus of proof in existing subsection 55(6), new subsection 45C(4) is considered reasonable, necessary and proportionate and is consistent

with the legitimate objective of protecting human health and the environment. It also results in the least impact on all parties to which the current and amended offence provisions relate.

Australian Sports Anti-Doping Authority Amendment Bill 2013

Introduced into the Senate on 6 February 2013; before Senate
Portfolio: Sport
PJCHR comments: Report 2/13, tabled on 13 February 2013 and Report 3/13, tabled on 13 March 2013
Response dated: 27 February 2013

Summary of committee view

2.26 The committee thanks the Minister for her detailed 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

2.27 This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to strengthen the Australian Sports Anti-Doping Authority's (ASADA) investigation functions and to enhance information sharing arrangements with other government agencies. In particular, it provides the Chief Executive Officer (CEO) of ASADA with the power to issue a disclosure notice compelling persons of interest to assist ASADA's investigations. Failure to comply with the notice subjects the person to a civil penalty. It also introduces a number of provisions relating to the enforcement of the civil penalty.

2.28 Following its initial consideration of the bill the committee wrote to the Minister to seek clarification and further information as to:

- whether the minimum guarantees in criminal proceedings apply to the bill's new civil penalty provisions and, if so, whether the new provisions allowing criminal proceedings to commence regardless of whether a civil penalty order has been made for the same conduct, are consistent with the right not to be tried or punished twice for the same offence.
- whether the bill encroached on the right not to incriminate oneself.
- whether provisions compelling any person, including the family member of an athlete, to answer questions or produce information or documents, engages the right not to be subject to arbitrary or unlawful interference with the family.
- whether restrictions on members of the Australian Sports Drug Medical Advisory Committee on whom they may liaise with, and what

discussions they may contribute to, are consistent with the rights to freedom of expression and freedom of association.[1]

2.29 The Minister responded on 27 February 2013.[2] The committee thanked the Minister for her response and expressed its continuing concern that subjecting a person to a penalty for failing to comply with a disclosure notice, without allowing for any exceptions, may interfere with the right to respect for family life. The committee suggested that consideration be given to allowing family members to raise an objection to complying with a disclosure notice if to do so may cause harm to the person or their family relationship, rather than being immediately subject to a civil penalty order.

2.30 The committee noted the Minister's response in relation to freedom of association and freedom of expression, which it considered adequately addressed the committee's concerns, and made no further comments on those aspects of the bill.

2.31 The committee deferred 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. Following the committee's adoption of its interim *Practice Note 2* on civil penalty provisions, the committee now sets out its views on the civil penalty provisions contained in the bill.

2.32 The Minister's response is attached.

Committee's response

2.33 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.

2.34 *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'.

1 See PJCHR, *Second Report of 2013*.

2 See PJCHR, *Third Report of 2013*, pp 115-119.

2.35 *The nature of the sanction or penalty:* The critical factor under this criterion is the nature of the regulatory scheme. The sports anti-doping regulatory framework applies to various classes of athletes. The UNESCO Convention, to which the legislation gives effect, includes in its scope certain classes of athletes.[3] Although the number of people covered by the anti-doping regulatory regime may be large, the committee considers that the sports anti-doping framework can be seen as falling within a regulatory or disciplinary framework which governs certain classes of persons who have voluntarily undertaken a particular activity, rather than a general prohibition directed to all or most members of the public. The question is not clear cut because the powers of the CEO under proposed new section 13A to require the production of information or documents for the purpose of the administration of the anti-doping scheme may be exercised in relation to any person, not just in relation to athletes, coaches or officials. Nonetheless, it appears likely that the powers would be used overwhelmingly in relation to those who take part in the sports sector voluntarily. Accordingly, in the committee's view an overall assessment of the legislative scheme this would mean that the nature of the civil penalty regime is not 'criminal' in nature.

2.36 *The severity of the penalty to which the person is exposed:* Even though the sports anti-doping scheme as a whole may be viewed as disciplinary or regulatory, international jurisprudence also requires that the severity of the penalty to which a person may be exposed must be assessed separately. A sufficiently severe penalty imposed under such frameworks may nonetheless be considered 'criminal', though it is accepted that where a sanction clearly falls within a disciplinary scheme a sanction 'of a severe character with far-reaching consequences for the person concerned'[4] is not necessarily of a punitive or criminal nature.

2.37 In assessing the severity of a penalty the maximum penalty is taken into account. The court, in making an order, has the discretion to award 'such pecuniary penalty for the contravention as the court determines to be appropriate'. The, maximum penalty for contravention is $5,100 for a natural person, or $25,500 for a body corporate, the discretion rests with the court as to whether to impose the maximum penalty or a lesser penalty as it determines to be appropriate.[5]

2.38 While these penalties can involve significant sums of money (in particular for individuals), the committee considers that of themselves they are not sufficient to lead to the conclusion that they involve the imposition of a criminal penalty, but may

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3 As defined by the *Australian Sports Anti-Doping Authority Regulations 2006*, section 1.06.

4 Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, 4th ed 2006), p. 546.

5 See proposed new subsection 73B(3) as inserted by item 13 of Schedule 1 to the bill.

rather be seen as of a level appropriate to promote compliance with the requirements to provide information under the anti-doping scheme.

2.39 *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.

2.40 Having considered the Minister's response, the committee is satisfied that the provisions in this bill are unlikely to constitute the determination of a 'criminal charge' within the meaning of article 14 of the ICCPR.

SENATOR THE HON KATE LUNDY

MINISTER FOR SPORT
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER ASSISTING FOR INDUSTRY AND INNOVATION
SENATOR FOR THE A.C.T

27 FEB 2013

B13/111

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear ~~Mr Jenkins~~ Harry

Thank you for your letter of 13 February 2013 regarding the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill) which amends the *Australian Sports Anti-Doping Authority Act 2006*.

I note the Parliamentary Joint Committee on Human Rights (the Committee) has assessed the Bill against Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR) and seeks clarification on a number of matters. While information on the specific matters raised is provided below, I would highlight the importance of having rigorous and effective anti-doping arrangements that seek to protect those values which sport can so powerfully convey to the broader community.

There is no place in sport for those who cheat through doping. The harmful health effects of using prohibited substances and methods is well known, along with the potential for doping to undermine the important values that sport promotes within the community (such as the spirit of cooperation, honesty, fair play and dedication). Most Australians participate in and follow a range of sports in the belief that these sports are free of doping. This can be significantly compromised and possibly irrevocably damaged if they believe athletes are not competing on their merits.

Australia's anti-doping arrangements give effect to our international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code). The Code is an internationally-accepted arrangement, which provides the framework for harmonised anti-doping policies, rules and regulations across both the global sporting movement and Governments.

Civil Penalty Orders

1.12 Whether the proposed civil penalty provisions are considered to involve 'criminal charges' under article 14 of the ICCPR and are required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings.

The imposition of a 'civil penalty' under part 8A of the Bill was assessed by the Department of Regional Australia, Local Government, Arts and Sport as a civil charge for the purposes of Article 14 of the ICCPR. This is based on consideration of those factors used under international human rights law to determine whether a civil penalty constitutes a criminal charge. These factors include: the classification of the Act in domestic law, the nature of the offence, the purpose of the penalty and the nature and severity of the penalty.

The proposed penalty provisions in the Bill are classified as civil penalties under Australian domestic law. A failure to comply with a disclosure notice that is issued by the Australian Sports Anti-Doping Authority (ASADA) Chief Executive Officer (CEO) becomes a debt payable to the Commonwealth. It does not result in a criminal conviction and the person will not have a criminal conviction recorded against them in the event that a Court determines to impose a fine for a breach of the relevant provision.

The final decision on whether a person is found to have contravened a civil penalty provision, and the decision on the amount of the penalty to be imposed, rests with the relevant court. The Bill sets out a number of factors that a court must take into account when determining a penalty (new section 73B).

Reference was made to the potential penalties that may result from separate contraventions for each day the contravention of a civil penalty provision continues. The maximum penalty prescribed in the Bill (up to 30 penalty units for natural persons and up to five times that amount for a body corporate) is in accordance with the *Guide to Framing Commonwealth Offences* while the approach to the continuing contravention of a civil penalty provision is consistent with the approach adopted in other Commonwealth legislation.

Double Jeopardy

1.15 Whether the proposed new section 73K is consistent with article 14(7) of the ICCPR in allowing criminal proceedings to be brought in respect of conduct which has already been the subject of a civil penalty order.

New section 73K is considered to be consistent with article 14(7) of the ICCPR as the civil penalty provisions are not characterised as 'criminal' for the purposes of Article 14 of the ICCPR.

As civil penalty provisions are not characterised as criminal for the purposes of Article 14 there is no potential for double trial or double punishment for the same conduct under new section 73K.

Right not to Incriminate Oneself

1.22 Whether proposed new section 13(D)(2)(f) is consistent:

- *With the right not to incriminate oneself under article 14(3)(g), if such proceedings are 'criminal' under international human rights law; or*
- *With the right to a fair hearing under article 14(1) of the ICCPR, if such proceedings are 'civil' under international human rights law.*
-

As noted previously, this penalty was assessed as a civil charge for the purposes of Article 14 of the ICCPR. Accordingly, my response relates to the second dot point.

While maintaining a rigorous and effective anti-doping regime, the rights of athletes are respected. The civil proceedings under the *Australian Sports Anti-Doping Authority Act 2006* refer to the hearings that are held to determine whether a breach of anti-doping rules has occurred and the period that an athlete or athlete support person, as defined under the National Anti-Doping (NAD) Scheme, is ineligible from competing in sport. These hearings are conducted under the auspices of the athlete's national sporting organisation and in accordance with the principles of a right to fair hearing including a right to examine and cross examine witnesses and the right to be legally represented. This is undertaken through the Court of Arbitration for Sport or the individual sport tribunal.

Right not to be subject to arbitrary or unlawful interference with family life

1.32 Whether the provision imposing a civil penalty on any person for failing to comply with a disclosure notice engages the right not to be subject to arbitrary or unlawful interference with the family.

The ASADA CEO cannot arbitrarily issue a disclosure notice to any person including the family members of an athlete. In order to issue a disclosure notice, the ASADA CEO must reasonably believe that the person has information, documents or things that may be relevant to the administration of the NAD Scheme. The CEO's reasonable belief will stem from intelligence obtained by ASADA under the NAD Scheme.

To reflect the significance of this power, only the CEO or delegated Senior Executive Service Officer can issue a disclosure notice. As a matter of administrative practice the reasons which underpin the application of that discretion will be properly recorded at the time of the decision.

Moreover, the purpose of the disclosure notice is to allow the discovery of information that may establish a breach of anti-doping rules under the contract that athletes have with their sport and consequently allow for imposition of relevant sanctions under the terms of the contract. The evidence collected under a disclosure notice will not be used in any criminal prosecutions.

The NAD Scheme will be amended to ensure that appropriate protocols are put in place to protect the rights of people under the age of 18. This will include, for example, the right for the person to have their legal guardian present during an interview.
It is also noted that, under Clause 1.07 of the NAD Scheme which reflects the World Anti-Doping Code, a support person can be any person who helps an athlete to prepare for a sports competition. Family members often fulfil the role of support person to the athlete, potentially making them subject to the NAD Scheme.

Freedom of Association and Freedom of Expression
1.35 Whether restrictions on members of the ASDMAC liaising with others and contributing to deliberations or discussions are consistent with the right to freedom of expression and freedom of association in articles 19 and 22 of the ICCPR.

The purpose of this amendment is not to limit an individual's freedom of association or expression. Rather, this amendment aims to avoid any conflict of interests issues that may arise from someone having privileged knowledge gained in the course of their membership on the Australian Sports Drug Medical Advisory Committee (ASDMAC). ASDMAC performs an important function under Australia's anti-doping arrangements. It assesses and approves applications from athletes to use prohibited substances for a legitimate therapeutic purpose. This facilitates an athlete's right to access an otherwise prohibited substance or method to treat a medical condition.

The primary aim of this amendment is to ensure that an ASDMAC member does not provide information or evidence that they have gained in that role to support a person who is the subject of consideration of the Anti-Doping Rule Violation Panel (the Panel) or involved in proceedings before other bodies (e.g. a sporting tribunal) in respect of a matter over which the member would have conflicted knowledge.

The amendment also requires an ASDMAC member not to take part in any deliberations or decisions of a sporting administration body in relation to an anti-doping matter such as appearing as a witness in any proceeding before a tribunal. This amendment is designed to prevent an ASDMAC member, who may be approached in a private capacity, to provide evidence before a sporting tribunal in a case in which the member, through their role with ASDMAC, has inside knowledge.

Australian Sports Anti-Doping Authority Amendment Regulation 2012
In addition to the issues raised in your letter, I note that the Committee tabled its first report of 2013 on 6 February 2013. The report included the Committee's examination of the Australian Sports Anti-Doping Authority Amendment Regulation 2012 (the Regulations). The following is a response to a query raised by the Committee in that report:

Compatibility with Human Rights
2.11 In particular, regulations that provide that the Panel may make entries on the Register of Findings about an athlete, including their name, date of birth, and the nature of the finding against them in relation to an anti-doping rule violation, engages, and appears to limit, the right to privacy. Regulations that enable information to be made available to relevant sporting organisations and 'details of other parties that will be notified on the entry on the Register' also appear to limit this right. Information is needed to explain if this limitation is reasonable, necessary and proportionate to achieve a legitimate aim.

The Register of Findings is not publicly available. Placing a finding on the Register of Findings however, is a trigger to allow a number of notifications to be made and these are currently provided for under the NAD Scheme.

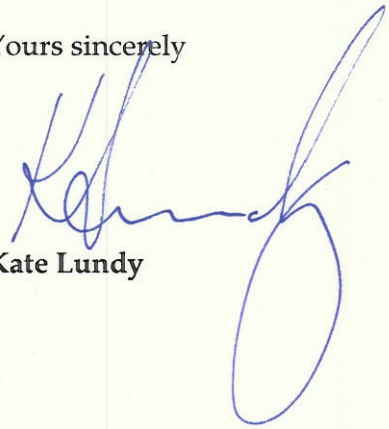
The details of a possible anti-doping rule violation recorded on the Register of Findings are referred under the privacy provisions in the NAD Scheme to the relevant sporting administration body so an Infraction Notice can be issued and a hearing arranged to determine whether or not a violation has been committed and the applicable sanction under the terms of the sporting administration body's Anti-Doping Policy.

There are also appeal provisions available to a person whose name is placed on the Register of Findings. For example, if the Panel determines to make an entry onto the Register of Findings, an athlete to whom the entry relates is entitled to appeal the Panel's decision to the Administrative Appeals Tribunal (AAT).

Clause 4.22 of the NAD Scheme sets out the circumstances where the CEO is authorised to publish information on and related to the Register of Findings. The CEO can do this only if publication is in the public interest and the matter has been finally determined by a sport or sporting tribunal including the completion of all appeal periods or the AAT has finalised the matter.

Thank you for the opportunity to provide clarification on the matters you have raised. Should you require any further assistance, please contact Ms Natasha Cole, Assistant Secretary, National Integrity in Sport Unit, on 6210 2705 or by email at natasha.cole@pmc.gov.au.

Yours sincerely



Kate Lundy

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
Parliament House
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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CANBERRA ACT 2600

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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
Parliament House
CANBERRA ACT 2600

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

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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MINISTER FOR TOURISM

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C13/399

27 FEB 2013

The Hon Harry Jenkins MP
Chair
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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).

THE HON GARY GRAY AO MP

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C13/703

26 APR 2013

The Hon Harry Jenkins MP
Chair
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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

Appendix 1

Bills unlikely to raise human rights concerns

Bills unlikely to raise human rights concerns

The following bills do not give rise to any human rights concerns:

1 African Development Bank Bill 2013

2 Australian Capital Territory Water Management Legislation Amendment Bill 2013

3 Australian Education (Consequential and Transitional Provisions) Bill 2013

4 Banking Amendment (Unclaimed Money) Bill 2013

5 Charities Bill 2013

6 Charities (Consequential Amendments and Transitional Provisions) Bill 2013

7 Competition and Consumer Amendment Bill 2013

8 Customs Amendment (Anti-Dumping Measures) Bill 2013

9 Customs Tariff (Anti-Dumping) Amendment Bill 2013

10 Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013

11 DisabilityCare Australia Fund (Consequential Amendments) Bill 2013

12 Early Years Quality Fund Special Account Bill 2013

13 Homelessness Bill 2013

14 Homelessness (Consequential Amendments) Bill 2013

15 Imported Food Warning Labels Bill 2013

16 Infrastructure (Priority Funding) Amendment Bill

17 International Interests in Mobile Equipment (Cape Town Convention) Bill 2013

18 International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Bill 2013

19 Migration Amendment (Offshore Resources Activity) Bill 2013

20 Migration Amendment (Temporary Sponsored Visas) Bill 2013

21 Privacy Amendment (Privacy Alerts) Bill 2013

22 Public Interest Disclosure (Consequential Amendments) Bill 2013

23 Social Security Amendment (Supporting More Australians Into Work) Bill 2013

24 Sugar Research and Development Services Bill 2013

25 Sugar Research and Development Services (Consequential Amendments and Transitional Provisions) Bill 2013

26 Voice for Animals (Independent Office of Animal Welfare) Bill 2013

The following bills do not give rise to any human rights concerns, but were not accompanied by a statement of compatibility:

1 Broadcasting Services Amendment (Advertising for Sports Betting) Bill 2013 [No .2]

2 Constitution Alteration (Local Government) 2013

The following private Members' bills may engage rights and if the bills proceed to further stages of debate the committee may request further information to allow it to fully assess these bills:

1 Australian Ownership Bill 2013

2 Live Animal Export Restriction and Prohibition Bill 2013

Appendix 2

Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 2 (interim)

Civil Penalties

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[2] These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.[3]

1.6 The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as 'non-criminal' in domestic law, this is never determinative and requires its nature and severity to be also assessed.

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as 'civil' under domestic law, it may nonetheless be classified as 'criminal' under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty 'criminal', their cumulative effect may be sufficient to allow classification of the penalty as 'criminal'.

When is a civil penalty provision 'criminal'?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as 'civil' under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) The nature of the penalty

1.12 The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;[5]
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as 'disciplinary' rather than as 'criminal').

c) The severity of the penalty

1.13 In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment.

The consequences of a conclusion that a civil penalty is 'criminal'

1.14 If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR.

The committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal' and should be addressed in the statement of compatibility where appropriate.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. **In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right 'not to be compelled to testify against himself or to confess guilt' in criminal proceedings. **Civil penalty provisions that are considered 'criminal' and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.[7] If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 Article 14(7) of the ICCPR provides that no one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. **If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. 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.

Article 15

1. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.