

Chapter 2 - Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Defence Trade Controls Amendment Bill 2015

Portfolio: Defence

Introduced: House of Representatives, 26 February 2015

Purpose

2.3 The Defence Trade Controls Amendment Bill 2015 (the bill) seeks to amend the *Defence Trade Controls Act 2012* (the Act) to:

- delay the commencement of offence provisions by 12 months to ensure that stakeholders have sufficient time to implement appropriate compliance and licensing measures;
- provide for new offences or amend existing offences relating to export controls;
- require approvals only for sensitive military publications and remove controls on dual-use publications;
- require permits only for brokering of sensitive military items and remove controls on most dual-use brokering, subject to international obligations and national security interests; and
- provide for review of the Act, initially two years after the commencement of section 10, and for the minister to table a copy of the review report in each House of Parliament.

2.4 Measures raising human rights concerns or issues are set out below.

Background

2.5 The committee previously considered the bill in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the reverse evidential burdens contained within the bill were a proportionate limitation on the right to a fair trial (presumption of innocence).¹

2.6 The bill finally passed both Houses of Parliament on 18 March 2015, and received Royal Assent on 2 April 2015.

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 10-14.

2.7 The committee then considered the Minister for Defence's response in its *Twenty-third Report of the 44th Parliament*, and requested further information as to why it is necessary and proportionate to reverse the burden of proof in a number of cases.²

Reverse evidential burdens

2.8 The bill amended a number of existing offences to introduce statutory exceptions to those offences. These exceptions reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case.

2.9 The committee previously considered that reversing the burden of proof engages and limits the right to be presumed innocent.

Right to a fair trial (presumption of innocence)

2.10 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.11 An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.12 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must be reasonable, necessary and proportionate to that aim.

Compatibility of the measure with the right to a fair trial (presumption of innocence)

2.13 The statement of compatibility notes that the bill limits the right to be presumed innocent.³

2.14 In its previous analysis the committee accepted that the offences in the Act and the amendments in the bill seek to achieve the legitimate objective of enhancing the export control regime which supports Australia's defence, security and international obligations. However, it noted concerns that not all of the reverse burden provisions may be proportionate to achieving that objective.

2.15 The committee also noted that while some aspects of the exceptions appear to be properly characterised as falling within the particular knowledge of the

2 Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) 7-11.

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 44.

defendant, it is not clear that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences.

2.16 The minister's response did not justify the limitation for all of the specified matters. In particular, the committee considered that the minister had not addressed how the following matters would be particularly within the knowledge of the defendant, to such an extent, as to make it reasonable in all the circumstances to reverse the burden of proof. The committee considered that these matters would appear more likely to be within the government's particular knowledge and expertise:

- that the supply is within the scope of Part 2 of the Defence and Strategic Goods List, which is a list formulated by the minister;⁴
- that there is no notice in force in relation to the supplier and the technology;⁵
- that a country is a participating state for the purposes of the Wassenaar Arrangement; a participant in the Australia Group; a partner in the Missile Technology Control Regime; and a participant in the Nuclear Suppliers Group;⁶
- that a country is specified in a legislative instrument;⁷ and
- that the supply is made under or in connection with a contract specified in a legislative instrument.⁸

2.17 In addition, the committee considered that reversing the burden of proof in the following instances would appear to require the defendant to prove an element of the offence, which should more properly fall on the prosecution:

- proving that the supply of DGSL technology is not the provision of access to that technology;⁹ and
- proving that the supply is not for a military end-use nor for use in a Weapons of Mass Destruction Program.¹⁰

2.18 The minister's response did not deal with the specifics of the exceptions and therefore did not provide specific information to support a conclusion that they are

4 See item 21 of the bill.

5 See item 21 of the bill.

6 See item 41 of the bill, proposed new subsection 15(4).

7 See item 41 of the bill, proposed new subsection 15(4).

8 See item 41 of the bill, proposed new subsection 15(4B).

9 See item 17 of the bill.

10 See item 17 of the bill.

justified. Instead the response dealt with the offence provision more generally and reiterated how a reverse burden offence works in practice. The committee also noted the minister's comment regarding a defendant having a responsibility to satisfy themselves that their activity falls within an exception. While this may appear reasonable in itself, it doesn't address why the requirement to undertake due diligence is sufficient to warrant reversing the burden of proof and it doesn't support a conclusion that such matters are within the particular knowledge of the defendant.

2.19 Accordingly, the committee sought further information from the Minister for Defence as to why it is necessary and proportionate to reverse the burden of proof in the cases outlined at paragraphs [2.16] to [2.17] above.

Minister's response

For the new exceptions that have been included in the Bill, as the Committee notes, there are key elements of the exceptions that are solely within a defendant's knowledge. For the other elements of the exceptions listed in paragraphs 1.36 and 1.37 of the Report, although I concede that these elements may sometimes be within the Government's knowledge, they would definitely be within a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity. Given the defendant's lower evidentiary burden of only needing to produce evidence that suggests a reasonable possibility that the exception applies, it would not be burdensome or unreasonable for the defendant to prove these elements with the information collected from their compliance checks.

These reversals are warranted and proportionate, considering the importance of the Bill's objective to strengthen national security by stopping proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs. Suppliers, publishers and brokers of these goods and technologies must ensure that their activity falls within the relevant offence exception if they decide to proceed without a permit under the legislation. It is reasonable to expect that if the defendant has not undertaken appropriate compliance checks to establish whether the exception applies and does not possess the evidence to establish the exception, they may not be able to rely on the exception.

Although I consider that it is reasonable to reverse the burden for all elements of the relevant exceptions listed in paragraphs 1.36 and 1.37 of the Committee's Report, I have noted its concerns and, accordingly, will ensure that they are considered during the first review of the legislation conducted pursuant to section 74B.¹¹

11 See Appendix 2, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 30 July 2015) 1-2.

Committee response

2.20 The committee thanks the Minister for Defence for his response, and welcomes his advice that certain elements of the relevant exceptions will be considered during the first review of the legislation.

2.21 However, the committee reiterates that the reversal of the burden of proof in relation to the specified exceptions at [2.16] to [2.17] does not appear to be proportionate to the objective being sought to be achieved. Where the government seeks to limit the presumption of innocence it is incumbent on it to demonstrate why such a limitation is justified.

2.22 The committee notes that the minister has conceded that some of the elements to be initially proved by the defendant would sometimes be in the government's knowledge. The minister also notes that these elements would be in 'a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity.' The ability of a defendant to undertake compliance checks to determine the lawfulness of their actions does not seem a reasonable basis on which to reverse the burden of proof and would result, if applied more broadly, on reverse burdens being the norm rather than an exception.

2.23 Moreover, the reason given for reversing the burden of proof is that it would not be burdensome or unreasonable for the defendant to prove these elements. This does not address the committee's concerns that any reversal of the burden of proof must be proportionate to the objective sought to be achieved, including that there are not any other less rights restrictive ways to achieve the same aim. In this case the less rights restrictive approach would be to not reverse the burden of proof except in situations where the circumstances are peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.24 The committee therefore considers that the measures reversing the burden of proof in relation to the proposed new statutory exceptions (defences) limit the right to be presumed innocent. As set out above, the minister's response does not sufficiently justify that limitation for the purposes of international human rights law, in particular that it is proportionate to reverse the burden of proof in relation to all elements of the defence. Accordingly, the committee considers that the offence provision is likely to be incompatible with the right to be presumed innocent.

Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 [F2015L00265]

Portfolio: Attorney-General

Authorising legislation: Federal Circuit Court of Australia Act 1999

Last day to disallow: 22 June 2015

Purpose

2.25 The Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 (the instrument) requires the Federal Circuit Court (FCC) to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW.

2.26 Measures raising human rights concerns or issues are set out below.

Background

2.27 The committee considered the Federal Courts Legislation Amendment Bill 2014 (the bill) in its *Eighteenth Report of the 44th Parliament*.¹ The bill sought to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to confer jurisdiction on the Federal Circuit Court of Australia (FCC) in relation to certain tenancy disputes to which the Commonwealth is a party. For example, such a dispute may arise in the case of public or government housing where the lessor is the Commonwealth government. The committee raised concerns in relation to the conferral of jurisdiction on the Federal Circuit Court for certain tenancy disputes, and requested further information from the Attorney-General as to whether this conferral is compatible with fair hearing rights.

2.28 The committee considered the Attorney-General's response in its *Nineteenth Report of the 44th Parliament*.² In his response to the committee, the Attorney-General stated that '...state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction'.³ However, the instrument makes a number of amendments to state and territory law applicable to such disputes.

2.29 The bill finally passed both Houses of Parliament and received Royal Assent on 25 February 2015 as the *Federal Courts Legislation Amendment Act 2015* (the Act).

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 37-39.

2 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 109-111.

3 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 110.

2.30 The committee previously considered the instrument in its *Twenty-second Report of the 44th Parliament* (previous report), and requested further information from the Attorney-General as to whether the instrument was compatible with Australia's international human rights obligations.⁴

Power of the FCC to dictate vacation date of tenant

2.31 As outlined, the instrument requires the FCC to apply NSW law (namely the *Residential Tenancies Act 2010* (NSW) (the NSW Residential Tenancies Act), the Residential Tenancies Regulation 2010, and the *Sheriff Act 2005* (NSW) (the Sheriff Act)) when determining Commonwealth tenancy disputes involving land within NSW. The instrument makes a number of modifications to the application of these laws, including subsection 8(2) which allows the FCC to dictate the date of vacant possession for tenants who have received a termination order. This differs from section 94(4) of the NSW Residential Tenancies Act which provides that long-term tenants must not be ordered to vacate premises earlier than 90 days after a termination order is made. As a result of this modification to the NSW law, this could result in tenants being given a date to vacate premises of less than 90 days.

2.32 The committee considers that the instrument engages and may limit the right to an adequate standard of living (housing).

Right to an adequate standard of living

2.33 The right to an adequate standard of living is guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.34 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

2.35 The explanatory statement for the regulation acknowledges that the instrument engages the right to an adequate standard of living in relation to housing, but states that it does not limit the right.⁵

2.36 However, in its previous report the committee considered that the explanatory statement had failed to set out how amending existing NSW law which

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 111-115.

5 Explanatory Statement (ES) 12.

would allow the FCC to exercise discretion in determining a vacation date seeks to achieve a legitimate objective. In particular, there is no justification provided as to why the existing provisions of the NSW Residential Tenancies Act as detailed above at [2.31] would be inappropriate or ineffective when determining Commonwealth tenancy disputes. The committee therefore considered that the limitation had not been justified.

2.37 The committee therefore sought the advice of the Attorney-General as to whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Attorney-General's response

The Committee has sought further advice regarding the Court's ability to determine dates for tenants to vacate premises in relation to Commonwealth tenancy disputes in New South Wales (NSW). This engages the right to an adequate standard of living.

As the Committee points out, the Instrument applies the *Residential Tenancies Act 2010* (NSW), with some modifications, so that the Court can exercise jurisdiction in these matters. In particular, subsection 94(4) of the Residential Tenancies Act is modified in relation to long-term tenants to remove the minimum guaranteed 90 days to vacate premises after a termination order is made.

Unlike other residential tenancies in NSW, a long term tenant is provided greater rights, whereby the landlord may not issue a termination notice alone to effect termination of the leasing arrangement. A landlord must seek a termination order from the Court instead. In this way, it ensures that due process is required to be followed through the Court with the opportunity for a tenant to be heard.

The Court has been given the discretion to take all factors into account in determining a matter. Enabling the Court to take into account all relevant factors provides equity to both parties. The Committee has pointed out that this could result in an order being made for less than 90 days. Equally, the Court could order 90 days or more for vacant possession to occur. Ultimately, the Court has the discretion to decide what is reasonable and proportionate on a case by case basis in relation to an application to seek vacant possession of land.

For example, tenants may be informed on an ongoing basis, months in advance, that termination of their tenancy will occur and vacant possession sought by a certain date. Other relevant factors that could be taken into account may include length of tenancy, size of the property,

ability to relocate in a given timeframe, reason for vacant possession being sought or similar reasons.⁶

Committee response

2.38 The committee thanks the Attorney-General for his response.

2.39 The committee notes that it previously concluded that the *Federal Courts Legislation Amendment Act 2015* was compatible with human rights on the basis of advice from the Attorney-General that the applicable state and territory law would continue to govern tenancy arrangements where the Commonwealth is a lessor.

2.40 The committee also notes that the Attorney-General's response sets out the rights that are provided to long-term tenants in NSW, including the obligation on landlords to obtain a termination order from the Federal Circuit Court before effecting termination of leasing arrangements and that the court will take into account a number of factors including the length of tenancy and ability to relocate.

2.41 The committee considers that the power of the Federal Circuit Court to dictate the vacation date of a long-term tenant engages and limits rights to adequate standards of housing. However, noting the Attorney-General's advice regarding factors that will be taken into account during the court process, the committee considers that the measure may be compatible with the right to an adequate standard of living (housing).

Powers when executing orders made by the Court

2.42 Section 10 of the instrument grants the Sheriff and Deputy Sheriff of the FCC any of the powers prescribed under section 7A of the Sheriff Act, including use of force powers, when enforcing a warrant for the possession of residential premises owned by the Commonwealth involving land in NSW.

2.43 The committee considers that the instrument engages and may limit the right to security of the person.

Right to security of the person

2.44 Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

6 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 24 June 2015) 1-2.

Compatibility of the measure with the right to security of the person

2.45 The committee considered in its previous report that empowering the Sheriff and the Deputy Sheriff to use force against a person in exercising a writ or warrant engages and limits the right to security of the person, as levels of force could be used that restrict or interfere with their personal integrity. However, a measure that limits the right to security of the person may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.46 The explanatory statement acknowledges that the instrument engages and limits the right to security of the person. It also sets out that 'section 10 of the Instrument is aimed at the legitimate and lawful objective of executing a warrant for possession of Commonwealth property in NSW where the FCC finds that the Commonwealth is entitled to possession of the premises'.⁷ The committee accepts that the lawful execution of a warrant is a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective. However, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

2.47 The explanatory statement points to a range of safeguards to support its conclusion that the proposed measures are proportionate to their stated objective.⁸

2.48 It is likely, however, that despite these safeguards there could remain potential issues of proportionality in relation to the measures, and the committee considered in its previous report that further safeguards could have been put in place. These could include, for example, requirements that:

- the use of force only be used as a last resort;
- force should be used only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force;
- the infliction of injury is to be avoided if possible; and
- the use of force be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

2.49 The committee therefore considered that the instrument engages and limits the right to security of the person. The explanatory statement for the instrument does not provide sufficient information to establish that the instrument may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore sought the advice of the

7 ES 12-13.

8 ES 8.

Attorney-General as to whether the instrument imposes a proportionate limitation on the right to security of the person.

Attorney-General's response

The Committee has also sought further advice about the proportionality of powers granted to the Sheriff and Deputy Sheriff of the Court to execute orders made by the Court in relation to Commonwealth tenancy disputes. This engages the right to security of the person.

The object of the measures in section 10 of the Instrument is to enable the lawful execution of a warrant for possession as is permitted under NSW tenancy law. A number of safeguards have been built into the Instrument which clarifies the extent of a proportional response, should circumstances require it, on top of the basic powers set out in section 7A of the *Sheriff Act 2005* (NSW). The Committee has noted that despite these requirements, further safeguards should be put in place.

Sheriffs are responsible for the service and execution of all process of the Federal Circuit Court of Australia, as directed by the Sheriff (section 106, *Federal Circuit Court of Australia Act 1999*). While the Federal Circuit Court of Australia Act provides for Federal Circuit Court Sheriffs to execute Enforcement Orders, I understand that in practice Enforcement Orders would be executed by NSW Sheriffs Officers. NSW Sheriffs Officers are trained in use of force and must comply with NSW law including the Sheriff Act. Sheriffs Officers are subject to probation, internal and external training, on the job training and completion of a Certificate IV in Government (Court Compliance).

The Sheriff Act empowers a Sheriffs Officer to use such force as is reasonably necessary to enforce the writ or warrant for possession of land. Reasonable force is a well-established concept of law, with the principles set out in *Fontin v Katapodis* (1962) 108 CLR 177. Reasonable force is to mean that degree of force which is fair, proper, and reasonably necessary in the circumstances. Reasonableness generally means that the action taken was not excessive or disproportionate in the circumstances while necessity generally indicates a lack of any practicable alternatives to the action taken. At common law, a person is entitled to use reasonable force in self-defence or to protect another person where there is actual danger or a reasonable apprehension of immediate danger; to protect land or goods from unjustified interference; to remove a trespasser from land; and to recover goods from someone who has wrongfully taken and detained them. The safeguards in the Instrument essentially set out the common law.

In addition to the Instrument, Part 6 of the Residential Tenancies Act sets out various limitations as to the recovery of possession of premises. For example, section 120 makes it an offence to enter premises unless it is abandoned or given vacant possession, or unless the person is acting in accordance with a warrant, while subsection 121(4) of the Residential

Tenancies Act provides that a warrant should be in the approved form and must authorise a Sheriff to enter specified residential premises and to give possession to the person in the warrant. This provides sufficient procedural checks prior to any warrant for possession being executed.

The requirements in section 10 of the Instrument broadly encompass the Committee's suggestions, listed in 1.488 of the Committee's *Twenty-second Report of the 4th Parliament*. In particular, where the Committee suggests that infliction of injury is to be avoided if possible, this would fall within the safeguard that the Sheriff or Deputy Sheriff must not use more force than necessary and reasonable to execute the warrant. There is nothing in the provisions that would remove liability for any unnecessary infliction of injury.

The combination of these various requirements ensures that the least rights restrictive approach will be taken by Sheriffs and Deputy Sheriffs in executing warrants for possession of land.⁹

Committee response

2.50 The committee thanks the Attorney-General for his response. The committee considers that the response demonstrates that the measures are likely to be proportionate to their stated objective. In particular, the committee notes the definition of 'reasonable force' as it relates to the use of force by a Sheriff or Deputy Sheriff, and the required necessity that there is a lack of any practicable alternatives to the action taken.

2.51 The committee therefore considers that the measure may be compatible with the right to security of the person and has concluded its examination of this matter.

The Hon Philip Ruddock MP

Chair

9 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 24 June 2015) 2-3.