

Question 1

Do the provisions in the bill which provide a use but not a derivative use immunity, such as proposed new subsection 4C(2) of the Customs Administration Act, breach Article 14, paragraph 3(g) of the International Covenant on Civil and Political Rights?

Article 14 of the ICCPR sets out the minimum guarantees to which every person is entitled in the determination of any criminal charges against him or her. Specifically, Article 14(3)(g) provides for the right of an accused not to be compelled to testify against himself or to confess guilt. Article 14(3)(g) of the ICCPR is not an absolute right and consequently, can be subjected to permissible limitations. Permissible limitations must be for a legitimate objective, and be reasonable, necessary and proportionate to achieving that objective.

The Bill provides for the CEO to be able to make orders about mandatory reporting as well as other matters regarding the administration of Customs and Border Protection. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. The provision in the Bill provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting Customs and Border Protection and the privilege against self-incrimination.

The Minister for Home Affairs and Justice, in his response to the Parliamentary Joint Committee on Human Rights, noted that '[d]ue to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions. If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person'. The inclusion of a derivative use immunity would prevent such action being taken.

This Bill provides safeguards that protect workers, by preventing any self-incriminating information from being used against the worker who provided the information in any proceedings. It does not limit, however, the CEO's powers to use relevant information provided, in assessing an employee's suitability in order to make a declaration to terminate employment.

Question 2

The Scrutiny of Bills Committee wrote to the minister clarifying the explanatory memorandum, indicating that there must be a nexus between the relevant conduct and the Customs law enforcement power before a declaration of serious misconduct can be made. That is only referred to in the explanatory memorandum. There is no reference to that nexus or that requirement in the legislation. We are wondering why if there is such a crucial link between the two, why is it not stipulated in the legislation?

Proposed section 15A of the Bill is not limited in its application to declarations of serious misconduct involving Customs and Border Protections' law enforcement functions.

The Explanatory Memorandum states that 'It is expected that this declaration will only be used in circumstances of serious misconduct that relate to Customs and Border Protection's law enforcement functions.' The Explanatory Memorandum further states 'the declaration will only apply to the most serious cases and cannot be used for disciplinary matters involving behaviour that falls short of serious misconduct'.

While proposed section 15A of the Bill is not expressly limited to circumstances where the serious misconduct relates to Customs and Border Protection's law enforcement functions, the statement in the Explanatory Memorandum exists to provide context around the situations in which it may be used. Including an express limitation in the Bill would not be desirable as it could encourage technical challenges to the exercise of the power based on the definition of a law enforcement function. It is important that the power be able to be used in all necessary circumstances.

Question 3

Why is that nexus referred to only in the EM and not in the bill? And if it is in the bill, you might point it out to us. I do not mean the nexus between what is serious misconduct and a definition of that, but the nexus between the relevant conduct and the customs law enforcement power before a declaration of serious misconduct is made.

Refer to the answer provided for Question 2.