

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cwlth)*

### **Biological Control Amendment Bill 2017**

In relation to its overall purpose, this 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*. This compatibility statement provides justification for matters specific to Clauses 21 and 23 of the Bill that may be considered to have a bearing on the rights and liberties of individuals.

#### **Overview of the Bill**

The *Biological Control Act* (NT) [the Act] provides for the declaration of agent and target organisms for biological control activities.

The purpose of the Biological Control Amendment Bill 2017 (the Bill) is to amend the definition of an ‘organism’ to reflect the use of viruses and sub-viral agents as agent organisms or target organisms under the Act; and further clarifies the definition of an ‘organism’ for the purpose of the Act by omitting the term ‘live’. The amendment is intended to achieve uniformity with provisions of biological control legislation of the Commonwealth and all States of Australia, and will provide strengthened legislative authority for future biological control programs.

The Act has not been significantly amended for more than 30 years. The amendments to the offence provisions are aimed at ensuring the offences comply with Part IAA of the *Criminal Code Act* (NT) [Criminal Code].

#### **Human rights implications**

For the purpose of the Act, the amended definition of an *organism* in the Bill supports future declarations of organisms by clarifying that viruses (or sub-viral agents) are target or agent organisms. The definition of an *organism* explicitly excludes humans.

In relation to two of the offence provisions, this Bill engages rights referred to in the International Convention on Civil and Political Rights (ICCPR). The ICCPR protects the presumption of innocence. Article 14(2) states

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

### *Reversal of Onus of Proof*

The reversal of the onus of proof in section 49(3) of the Bill is relevant to the consideration of the presumption of innocence.

Clause 23 of the Bill replaces the section 49 offence provision **Witness not to be prejudiced**. This section creates an offence to prevent employers taking prejudicial action against their employees for giving evidence at an inquiry. It is a form of a common ‘whistleblower’ protection offence.

Subsection 49(3) places a legal burden of proof on the employer to prove that the actions taken in subsection 49(2) in relation to an employee appearing to give evidence at the Commission is not related to the employee’s role as a witness in an inquiry or their role to provide evidence to the inquiry.

Section 43BV of the Criminal Code states that a law that imposes a legal burden of proof on a defendant can only do so if it expressly states that the burden is a legal one. Further, section 43BW of the Criminal Code states that a legal burden on the defendant must be discharged on the balance of probabilities. Generally the presumption of innocence requires the prosecution to prove each element of an offence beyond reasonable doubt. An offence provision which requires the defendant to prove a matter to the legal burden of proof will engage the presumption of innocence because the defendant’s failure to discharge the burden of proof in relation to the defence may result in their conviction for the offence despite the prosecution having to prove the offence beyond reasonable doubt.

Currently Part II of the Criminal Code applies to the offences in the *Biological Control Act*. The Bill amends section 49 (and other offences) to convert the section to comply with the principles and concepts of Part IIAA of the Criminal Code. It is intended that the current policy of the offence, together with the criminal responsibility principles in Part II of the Criminal

Code, be retained to the extent that is possible, taking account of differences between Part II and Part IIAA of the Criminal Code.

The current wording of section 49(3) of the *Biological Control Act* suggests an intention to confer a legal burden of proof because it states ‘the burden lies on the employer’. The same wording is used in the equivalent offences in other jurisdictions’ biological control legislation. Further, section 440 of the Criminal Code currently applies to the offence and provides that any matter that needs to be proved by the defence at trial must be proved on the balance of probabilities. This section therefore confers what is, under Part IIAA, a legal burden of proof.

Reversing the onus of proof will not necessarily be inconsistent with the presumption of innocence, provided the reversal of onus is not unreasonable in the circumstances and the offence otherwise maintains the rights of the accused. The reverse onus might be considered legitimate where the burden relates to facts that are readily provable by the defendant as matters within their own knowledge, and is more practical to be proved by the defendant. In this case, placing the legal burden of the defendant is appropriate because the matter required to be established, namely that the employer did not dismiss or prejudice, or threaten to dismiss or prejudice, the employee because of the employee’s evidence or intended evidence at the Commission, is a matter peculiarly within the knowledge of the defendant.

### *Strict Liability*

Some offences in the Bill prescribe strict liability for certain physical elements of the offence. Section 43AN of the Criminal Code states that where strict liability is prescribed for an offence or an element of an offence, there are no fault elements for the offence or the physical element, and the defence of mistake of fact under section 43AX is available.

Strict liability offences engage the presumption of innocence because a person can be found guilty of an offence without the need to prove fault or ‘a guilty mind’ for the offence or for an element of the offence.

Clause 21 of the Bill replaces the section 41 offence provision **Failure of Witness to attend**. New section 41(3) states that strict liability applies to the physical elements in 41(1)(a) and (2)(a). Those physical elements are that the person has been served with a summons to appear as a witness at an inquiry by a Commission [for the offence in section 41(1)] or the person has been served with a summons to produce evidentiary material [for the offence in section 41(2)].

Strict liability is used in these circumstances because it can be reasonably expected that the person was aware of the fact that they had been served with the summons. Service of a summons is lawfully effected if section 25 of the *Interpretation Act* is complied with, and that section is aimed at ensuring the person served actually receives the document. The objective of the offences are to ensure compliance with summonses issued by a Commission.

The offences in section 41(1) and (2) are not wholly strict liability, as strict liability applies to one physical element of each of the offences. Additionally, subsection 41(4) provides for a reasonable excuse defence to the offences. What is a reasonable excuse will be up to the Court or Jury to determine in the circumstances of the case.

### **Conclusion**

This Bill does interfere with the presumption of innocence, but in a reasonable and proportionate manner to achieve a legitimate outcome.

**The Hon Ken Vowles MLA, Minister for Primary Industry and Resources**