

30 January 2015



Mr Tim Watling
Committee Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: rrat.sen@aph.gov.au

Dear Mr Watling

Biosecurity Bill 2014

Please find attached the Law Council of Australia's submission to the Senate Standing Committee on Rural and Regional Affairs and Transport regarding its inquiry into the Biosecurity Bill 2014.

The Law Council appreciates the opportunity to make this submission.

Yours faithfully

A handwritten signature in black ink, appearing to read "Martyn Hagan".

MARTYN HAGAN
SECRETARY-GENERAL

Biosecurity Bill 2014

Rural and Regional Affairs and Transport Legislation Committee

30 January 2015

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Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee and Australian Environmental Planning Law Group of the Legal Practice Section in the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to assist the Rural and Regional Affairs and Transport Legislation Committee (the Committee) in its inquiry into the Biosecurity Bill 2014 (the Bill).
2. The Law Council supports a modernisation of the *Quarantine Act 1908* (Cth) to provide a strong regulatory framework that enhances Australia's capacity to manage biosecurity risks.
3. The Law Council has confined its comments to the issues of:
 - needing an independent statutory oversight regime;
 - determination of a 'listed human disease' (LHD) and consequent control order provisions;
 - determination of a 'human health response zone' (HHRZ);
 - entry without warrant or consent powers;
 - coercive information-gathering powers;
 - penalties; and
 - certain strict liability offences.
4. Schemes for the management of biosecurity risks should be necessary and proportionate for preserving animal, plant and human health, the environment, the economy and should be subject to appropriate safeguards and oversight regimes. The Law Council considers that any legislative framework to manage biosecurity risks must have careful regard to certain guiding principles to ensure limitations on rights are necessary and proportionate. These include:
 - rule of law principles¹ and human rights obligations;
 - Commonwealth criminal law policy as articulated in the Commonwealth's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide)²;
 - key recommendations made by the:
 - Administrative Review Council (ARC) regarding coercive information-gathering powers³;
 - Scrutiny of Bills Committee regarding strict liability offences⁴; and

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011).

² Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).

³ Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (2008).

⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002).

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- Australian Law Reform Commission (ALRC) regarding Federal civil and administrative penalties, making inquiries and contempt.⁵
5. The proposed biosecurity framework requires further consideration and reform in some aspects to ensure it is appropriately balanced.

Independent oversight must be established in primary legislation

6. In contrast to previous reform proposals for biosecurity laws, the Bill does not establish the Inspector General of Biosecurity (IGB) as a statutory office. The existing IGB role is to continue as an administrative office.⁶ The Addendum to the Regulation Impact Statement notes that this is due to the government's policy not to create an unnecessary statutory position.⁷
7. While the Ministerial powers to review 'the performance of functions, or exercise of powers, by biosecurity officials'⁸ under the Bill are welcome, the exercise of such power is discretionary.
8. The lack of a statutory basis for the IGB has the potential to reduce the independence of that office. A statutory position would:
- (a) assure stakeholders, Australia's trading partners and the public of the integrity of the Department's processes and provide an independent, systemic approach towards maintaining and improving the biosecurity system;
 - (b) align with the recommendations of several recent reviews and inquiries;⁹
 - (c) ensure the IGB has adequate powers to compel a person to provide particular information or access specified premises to better manage biosecurity risks; and
 - (d) ensure that human biosecurity control orders and the range of coercive powers in the Bill are exercised in a lawful and reasonable manner.
9. For these reasons, the IGB should be established in legislation and be permitted to oversee the exercise of relevant powers to determine their lawfulness, necessity and proportionality.

⁵ Australian Law Reform Commission, *Contempt*, Report No 35 (1987); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003); Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111(2009).

⁶ The Interim IGB was administratively established in 2009.

⁷ Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 371.

⁸ Biosecurity Bill 2014 (Cth) cl 567-568.

⁹ Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 371; Commonwealth, Independent Review of Australia's Quarantine and Biosecurity Arrangements, *One Biosecurity: A Working Partnership* (2008) XXVII, 50; Commonwealth, Equine Influenza Inquiry, *Equine Influenza: The August 2007 Outbreak in Australia*; (2008) xxviii.

Determination of a 'listed human disease' and consequent control order provisions

10. Currently, the Governor-General has the power to declare, by proclamation, a 'quarantinable disease'.¹⁰ The Bill proposes to amend this power to enable the Director of Human Biosecurity (DHB) to determine a human disease as a listed human disease (LHD) if he or she considers that the disease *may* be communicable and *may* cause significant harm to human health.¹¹
11. The determination of a particular disease as a LHD can have significant repercussions under the Bill, particularly in relation to control orders. When the DHB may make such a determination must be sufficiently defined and subject to oversight arrangements. Imposing clear limitations on the exercise of such power, particularly with pronounced impacts on the rights and liberties of individuals, is a key component of the rule of law and reflected in the Law Council's *Rule of Law Principles*.¹²
12. The DHB should therefore only be able to determine that a disease is a LHD if he or she believes on reasonable grounds that the disease *is* communicable and poses a significant risk to public health. The determination should also be contingent on the DHB obtaining the agreement of the Minister for Health and should be subject to review by the IGB.
13. While control orders in cases of infectious disease may be justified,¹³ under the Bill there is no requirement for a person to actually be infected or for the officer to even reasonably believe or suspect that the person is infected, or may be infected, with a LHD, before a control order can be made.¹⁴ The Bill should be amended to require that a human biosecurity control order may only be imposed on an individual in these circumstances. Otherwise there is the potential for a person to be subject to a control order for having a symptom common to a LHD and many other diseases, such as a fever.¹⁵
14. Control orders have the potential to significantly impact upon a person's liberty as they can, for example, require isolation or restricted movement measures to be in place.¹⁶ While the use of such a power is necessary to limit the spread of potentially dangerous infectious diseases, the threshold for determining a LHD and then for imposing a

¹⁰ Diseases and are relatively few in number, including cholera, highly pathogenic avian influenza in humans, human swine influenza with pandemic potential, the plague, rabies, severe acute respiratory syndrome, smallpox, viral haemorrhagic fevers and yellow fever. Quarantine Proclamation 1998 (Cth) s21.

¹¹ The Director must consult the Chief Health Officer for each State and Territory and the Director of Biosecurity in making such a determination – see Biosecurity Bill 2014 (Cth) cl 42.

¹² Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011).

¹³ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

¹⁴ Under sub-clause 60(2) of the Bill a human biosecurity control order may be imposed on an individual if the officer is satisfied that: the individual has one or more signs or symptoms of a listed human disease; or the individual has been exposed to a listed human disease; or another individual who has one or more signs or symptoms of a listed human disease; or the individual has failed to comply with an entry requirement in subsection 44(6) in relation to a listed human disease. The Law Council notes that clause 76 sets out that an application may be made to the Administrative Appeals Tribunal for review of a decision by the Director of Human Biosecurity to give a direction in accordance with 72(5)(a) for an individual to comply with an isolation measure or a traveller movement measure. Clause 80 sets out that an application may be made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for an order of review of a decision to give a direction under paragraph 72(5)(a).

¹⁵ *Ibid.*

¹⁶ See for example clauses 96 and 97 of the Bill.

control order needs to be carefully considered to ensure it achieves this purpose based on reasonable grounds.

Human health response zone

15. Imposing clear limitations on the exercise of Executive power – particularly when that power can have pronounced impacts on individuals – is a key component of the rule of law and reflected in the Law Council’s *Rule of Law Principles*.¹⁷
16. The Bill enables the DHB to determine that a ‘specified area’ within a State or Territory is an human health response zone (HHRZ) if the DHB is satisfied that it is necessary to do so for the purposes of preventing, or reducing the risk of, a LHD emerging, establishing itself or spreading in Australian territory or a part of Australian territory.¹⁸
17. The power to make a determination of a LHD sits alongside the Governor-General’s power to make a biosecurity emergency determination where there is a severe and immediate threat of causing harm to human health on a ‘national scale’.¹⁹
18. However, the Law Council is concerned that an HHRZ can be an area of a size that can cause a significant disruption.²⁰ This means that under the Bill there is the potential for the DHB to declare a small city, parts of a city or large rural areas as a HHRZ. Under a declaration of an HHRZ, the DHB will have the ability to authorise various relevant officers to exercise intrusive activities²¹ or require individuals to evacuate, remain in or not enter the zone. The determination can be in place for up to 3 months.
19. While the DHB must be satisfied that the requirements relating to a determination of a HHRZ are appropriate and adapted to prevent, or reduce the possibility of, the emergence, establishment or spread of the specified LHD,²² the Law Council questions whether a senior official, such as the DHB, should have the ability to declare potentially large areas a HHRZ.
20. The Law Council’s suggested approach would be that the Minister for Health be required to authorise the determination of a HHRZ, with the agreement of the relevant State or Territory Health Minister and on the advice of the DHB. Such an approach would be consistent with other emergency powers in Commonwealth legislation, for example, section 3UJ of the *Crimes Act 1914* (Cth) permits the Minister to declare a prescribed security zone in order to assist prevention or response to a terrorist act.
21. Extending the relevant Ministers for Health approval to HHRZ’s would provide a greater degree of assurance to the Parliament and to the public that thorough consideration has been given to the necessity of declaring a HHRZ. Alternatively, it may be appropriate for the DHB to declare a HHRZ over a much more limited area, such as a single building.

¹⁷ Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011).

¹⁸ Biosecurity Bill 2014 (Cth) cl 113(1).

¹⁹ *Ibid*, cl 473.

²⁰ Cl 113(2) of the Biosecurity Bill 2014 provides that ‘without limiting subsection (1), a specified area may consist of the whole or a part of a specified building.’

²¹ For example, information gathering powers under clause 55(1)(b).

²² Biosecurity Bill 2014 (Cth) cl 113(4).

22. While the Law Council has not had the opportunity to consider the proposed process of declaring 'biosecurity activity zones'²³, 'biosecurity response zones'²⁴ and 'biosecurity monitoring zones',²⁵ it encourages the Committee to inquire as to whether the issues raised above may be relevant to the Committee's consideration of those zones.

Entry without warrant or consent

23. The Law Council regards entry to premises without consent may be reasonable in situations of emergency, serious danger to public health, or where there is a serious threat to national security. This principle has also been recognised by the Scrutiny of Bills Committee.²⁶

Persons authorised to exercise powers

24. Clause 470 grants biosecurity enforcement officers or biosecurity officers the power to enter *any* premises without a search warrant or consent during a biosecurity emergency period.²⁷ Similarly, we understand that the Australian Federal Police (AFP) have the power to enter and search a premise without a search warrant in certain circumstances.²⁸

25. Clauses 9, 545, 546 and 548 provide the Director of Biosecurity (DB) with the ability to appoint a broad range of persons as 'biosecurity enforcement officers' or 'biosecurity officers' including persons who the DB 'considers it necessary to authorise to be a biosecurity officer' where that person satisfies the training and qualification requirements for biosecurity officers as determined by the DB.²⁹ This has the potential, for example, to include persons who perform functions related to matters about biosecurity under a law of another country or contractors. Similar requirements apply in terms of persons authorised to exercise the coercive information gathering powers under the Bill.

26. While Ministerial authorisation is required³⁰ for the entry without warrant or consent powers to be enlivened, the particular attributes, qualifications or training the person should possess are not included in the Bill but are rather determined by the DB.³¹ Such a determination is not a legislative instrument³² and, therefore, the Director in

²³ Biosecurity Bill 2014 (Cth) cl 395.

²⁴ Ibid, cl 365.

²⁵ Ibid, cl 384.

²⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Entry and Search Provisions in Commonwealth Legislation* (2000) 75 [1.44].

²⁷ The power to enter a premises without a warrant can also be exercised outside of a 'biosecurity emergency period' if the premises is a landing place or port that is determined to be a first point of entry. In these circumstances, a biosecurity enforcement officer may enter without a warrant in order to determine whether the Bill is being complied with (clause 511) or if the officer suspects an offence (Clause 512). Consent to entry is implied as it will be a condition of the approved arrangement.

²⁸ See for example, s3UAE of the *Crimes Act 1914* (Cth).

²⁹ Biosecurity Bill 2014 (Cth) cl 545.

³⁰ As the Governor-General on the advice of the Minister for Agriculture declares that a biosecurity emergency exists (paragraph 443(1)).

³¹ Biosecurity Bill 2014 (Cth) cl 545.

³² Ibid, cl 545(6); 562(6); and 563(6).

effect has the power to determine who may exercise coercive powers without Parliamentary scrutiny and without independent statutory oversight.³³

27. A biosecurity officer may also be assisted by other persons in exercising these powers (and other powers) if that assistance is 'reasonable and necessary'.³⁴ The person assisting the officer has the power to enter premises and exercise powers in order to assist the officer.
28. These extraordinary powers do not have the types of safeguards and independent oversight protections afforded to our law enforcement and security agencies' exercise of coercive powers, for example:
- (a) there is no requirement for an independent statutory body to determine whether these powers are exercised in a lawful and proportionate manner and to review the adequacy of training requirements; or
 - (b) reporting requirements relating to the exercise of such powers to a independent statutory body or relevant Minister in line with the recommendations of the Guide³⁵ and the Scrutiny of Bills Committee.³⁶
29. The Bill should provide for these oversight and reporting measures as accountability standards for conduct. Under the Bill, biosecurity officers may not have to adhere to the strict operational, ethical and legislative standards set for other officers, such as AFP officers.

Entry to adjacent premises

30. The powers of entry during a biosecurity emergency period also extend to adjacent premises where it will provide access to the primary premises.³⁷ These amendments do not sufficiently consider the privacy impact on the third party and the potential for property damage.
31. If progressed, the amendments should be modified to provide that the power to enter third-party premises should be limited to circumstances where there is no other way to gain access to the primary premises; or there is a substantial risk that without access to the adjacent premises the authorised officer would not be able to access the primary premises.
32. In non-emergency circumstances where an adjacent premises warrant under the Bill may be obtained, there is a requirement for a biosecurity officer to take all reasonable steps to ensure they cause as little inconvenience to the occupier of the premises as is

³³ The investigation powers contained in the Bill which include powers to subject people to coercive questioning or require the production of documents have the potential to be utilised by a broad range of officers. For example, a biosecurity officer may exercise certain coercive powers. A biosecurity officer can be an officer or employee of a Commonwealth body, a State or Territory body, a member of the Australian Defence Force; or any other person who the Director of Biosecurity considers it necessary to authorise.

³⁴ Biosecurity Bill 2014 (Cth) cl 536(2). Any power exercised by the person assisting either a biosecurity officer or biosecurity enforcement officer is taken to have been exercised by the relevant officer.

³⁵ Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 86.

³⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Entry, Search and Seizure Provisions in Commonwealth Legislation* (2006); The report made a recommendation at page 292 - 293 that: 'entry and search without a warrant should only be authorised in very exceptional circumstances and only after avenues for obtaining a warrant by telephone or electronic means have proved absolutely impractical in the particular circumstances. In such circumstances, senior executive authorisation for the exercise of such powers should be required together with appropriate reporting requirements.'

³⁷ Biosecurity Bill 2014 (Cth) cl 470; cl 472l.

practicable³⁸. This requirement should also apply in circumstances where entry to adjacent premises is permitted for entry without a warrant or consent during a biosecurity emergency period. Further, the Bill should be amended to provide indemnity for damage caused to premises in the course of such a search.³⁹

Use of force

33. In entering premises or adjacent premises without a warrant or consent, and while on those premises, a biosecurity enforcement officer, or a person assisting a biosecurity enforcement officer, may use such force against things as is necessary and reasonable in the circumstances.⁴⁰
34. Permitting the use of force without a warrant is a departure from traditional criminal law principles. Generally, legislation should only allow an authorised officer to use such force against things or persons as is necessary and reasonable to execute a warrant.⁴¹ The Law Council supports this assessment. A warrant process is an important safeguard in avoiding or minimising resort to force unless it is strictly necessary and proportionate.
35. The rationale for a departure from these principles should be made publicly available. The Committee should also be satisfied that such a departure is necessary and proportionate to meet the legitimate purpose of the Bill. If the Committee is satisfied, the Law Council recommends that biosecurity enforcement officers be required to notify and provide a written report to the Minister for Agriculture and the IGB within a specified time of an incident in which force is used. The Bill should be amended to require the IGB to provide close oversight of any use of force powers. Further, as noted, the Bill should be amended to provide indemnity for damage caused to premises in the course of such a search.⁴²

Coercive information-gathering powers

Key terms should be defined in primary legislation

36. Certain offences in the Bill require a person to provide 'prescribed contact information' which is proposed to be defined by regulations.⁴³ The Law Council's *Rule of Law Principles* state that the intended scope of offence provisions should be unambiguous and key terms should be defined.⁴⁴ Accordingly, 'prescribed contact information' should be defined in the Bill rather than through regulations. This would put beyond

³⁸ Ibid, cl 499.

³⁹ Clauses 632 and 633 of the Bill deal with compensation for damage to goods and destruction of premises, but not damage to premises.

⁴⁰ Clause 515 and subclauses 470(1) and 472(1) of the Bill. The use of force against things may also be permitted under the following clauses: 252(2) – biosecurity officer may enter landing places or ports and clause 512 – biosecurity officer may enter relevant premises (premises where biosecurity activities are carried out by an industry participant covered by an approved arrangement or a first point of entry) if officer has reasonable grounds for suspecting there may be things related to offence on the premises.

⁴¹ Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 80.

⁴² Clauses 632 and 633 of the Bill deal with compensation for damage to goods and destruction of premises, but not damage to premises.

⁴³ Clauses 47, 69 and 85 of the Bill. The Explanatory Memorandum to the Bill notes that the prescribed contact information required will be prescribed in the regulations, and will include for example the individual's name, address, contact phone number and passport number (pg 110).

⁴⁴ Law Council of Australia, *Rule of Law Principles*, March 2011, Principle 1(b).

doubt that only certain types of information may be compelled and be consistent with Commonwealth criminal law policy.⁴⁵ It would also allow robust Parliamentary scrutiny of these powers which is important, given their coercive nature. Further, such an approach is consistent with analogous coercive powers in Commonwealth legislation requiring an individual to provide contact information.⁴⁶

Requiring information to be given about a third-party

37. Clause 85 provides that a human biosecurity control order may require an individual to provide an officer with 'prescribed contact information' for any individual with whom the person has been, or will be, in 'close proximity' to. The term 'close proximity' should be further clarified in the Bill. The Law Council's *Rule of Law Principles* state that the law must be certain and clear.⁴⁷

Need for 'reasonable grounds' for belief or suspicion before powers are exercised

38. If a coercive information-gathering power is used in connection with a specific investigation, the minimum threshold for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that it is required before the power can be exercised.⁴⁸ Some of the coercive powers in the Bill do not meet this threshold. For example, biosecurity officers may only ask questions and require documents under clauses 55 and 56 if they are 'satisfied' that certain criteria are met. The Law Council recommends that this be increased to a 'reasonable grounds' for the belief or suspicion test in accordance with Principle 1 of the ARC's *The Coercive Information-Gathering Powers of Government Agencies Report* (2008) (the ARC Report).⁴⁹

Information to be given to an individual

39. The Law Council recommends that in the exercise of each of the coercive powers under the Bill there should be a requirement for the officer to inform an individual identify the legislative authority under which the request is made, the time, date and place for compliance, and any penalties for non-compliance. This is in similar terms, for example, to s14I of the *Australian Federal Police Act 1979* (Cth) and is consistent with Principle 14 of the ARC's Report.⁵⁰

Penalties

40. Several of the penalties for non-compliance with a coercive power in the Bill include a term of imprisonment and/or a civil penalty, or both.⁵¹ However, the penalty scheme is inconsistent with several recommendations made by the ALRC in its 2003 Report,

⁴⁵ Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 73. The Guide states that coercive powers should generally be contained in an Act, rather than in subordinate legislation.

⁴⁶ See for examples section 14I of the *Australian Federal Police Act 1979* (Cth) which sets out the exact scope of information that may be requested.

⁴⁷ Law Council of Australia, *Rule of Law Principles*, March 2011, Principle 1(b).

⁴⁸ Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (2008) xi.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, xv.

⁵¹ See, for example, clauses 69, 70, 85, 120, 121, 122, 193, 194, 195, 267, 268, 437, 450 and 451.

*Principled Regulation: Federal Civil and Administrative Penalties in Australia.*⁵² For example, the penalty scheme in the Bill does not:

- clearly distinguish fault elements for the civil contravention from those for the criminal offence⁵³; and
- distinguish the physical and fault elements of both the contravention attracting a civil penalty and the criminal offence when the same physical elements can attract *both* a civil penalty and criminal liability.⁵⁴

41. The penalty scheme in the Bill should explicitly address such matters.

42. Further consideration is also required to consider whether penalties are formulated in a manner similar to offences of the same nature in other legislation as per the Guide.⁵⁵ For example, section 14I of the *Australian Federal Police Act 1979* (Cth) carries a penalty of 20 penalty units which is significantly lower than that provided, for example, in clause 69 of the Bill which requires 12 months' imprisonment and/or 60 penalty units. The 12 months imprisonment and/or 60 penalty units generally applies to a higher threshold of culpable behaviour, for example, intentionally providing false or misleading statements.⁵⁶

Reporting requirements needed

43. The Law Council recommends that the use of coercive powers under the Bill must form part of regular reporting to a statutory IGB to ensure adequate oversight and transparency. The Law Council also recommends that there be a legislative requirement for the Department of Agriculture's annual reports to include information on the frequency, nature and outcome of the use of coercive powers under the Bill. Such reporting requirements are in accordance with Principle 4 of the ARC's Report.

Strict liability offences

44. The Explanatory Memorandum to the Bill outlines that strict liability offences have been used when there is a strong public interest in managing biosecurity risks appropriately and preventing serious damage to plant and animal health, human health, local industries, the economy and the environment.⁵⁷ As noted by the ALRC's 2009 report, 'Making Inquiries: A New Statutory Framework':

*Offences of strict liability depart from the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from the assumption of an unjustified risk (that is, recklessness).*⁵⁸

⁵² Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003).

⁵³ *Ibid*, Recommendation 4-3.

⁵⁴ *Ibid*, Recommendation 11-1.

⁵⁵ Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 39. .

⁵⁶ See for example sections 209 and 216 of the *Proceeds of Crime Act 2002* (Cth) and section 137.1 of the Criminal Code.

⁵⁷ Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 14.

⁵⁸ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111(2009) 492 [19.39], citing Australian Government Attorney-General's Department,

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45. Section 5.6 of the Criminal Code also reflects this principle as it provides that where no fault element is prescribed in relation to conduct, the relevant fault element is intention.
46. In its 1987 report, *Contempt*, the ALRC recommended that there should be an intention not to comply, or no reasonable attempt to comply, before offences relating to non-compliance with a coercive power are committed. Further, the ALRC suggested that, in addition, punitive sanctions should only be imposed where a person was at least reckless as to whether the act or omission constituted a breach of the summons or written notice⁵⁹. The ALRC confirmed this view again in its 2009 Report.⁶⁰
47. The Law Council supports this assessment in relation to clauses 58 (failing to answer a question or provide information), 301 (failing to produce a record) and 305 (failing to comply with a direction). Federal legislation governing other bodies with coercive powers also does not generally provide for strict liability in relation to similar offences⁶¹. Accordingly, these offences should include a fault element of intention.

Failing to answer a question or provide information (clause 58)

48. Clause 58 creates a strict liability offence for individuals potentially the subject of a human biosecurity control order for failing to answer a question or provide information. As noted by the Senate Standing Committee for the Scrutiny of Bills, strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning⁶². The use of strict liability in relation to this offence is therefore inappropriate. Clause 58 should be amended to require intention as the fault element for the offence.

Receiving or possessing prohibited or suspended goods (clause 188)

49. The Explanatory Memorandum to the Bill notes that the findings of the Commonwealth Ombudsman's *Compliance and Investigations Activities of the Australian Quarantine and Inspection Service* Report (2009) support the approach towards strict liability offences in suspected importation offences⁶³. However, the report does not appear to recommend the introduction of strict liability for suspected importation offences but rather, recommends a consideration of options 'to introduce a reverse onus of proof'.⁶⁴ The difference is that under the Ombudsman's recommendation the offence should still require a fault element such as intention to be present, although the defendant may bear an evidential burden in relation to adducing evidence that he or she received *prohibited goods* through legal means under clause 188. Accordingly, this justification for strict liability has not been demonstrated to be reasonable, necessary or proportionate.

A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (2007) 24.

⁵⁹ Australian Law Reform Commission, *Contempt*, Report No 35 (1987).

⁶⁰ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) 494.

⁶¹ For example, section 93 of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) which includes fault based offences of failing to answer a question (93(2)) and failing to produce a document or thing (93(4)) at a hearing held by the Integrity Commissioner. Another example is section 30 of the *Australian Crime Commission Act 2002* (Cth) which includes a fault based offence of failing to answer questions (30(2)) at an examination before an examiner.

⁶² Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 286

⁶³ Explanatory Memorandum, *Biosecurity Bill 2014* (Cth) 160

⁶⁴ Commonwealth Ombudsman, *Compliance and investigations activities of the Australian Quarantine and Inspection Service (AQIS) Report One: audit of policies, procedures, systems and processes*, Report No. 13, (2009) 18

Failing to return identity card (clause 571)

50. It is inappropriate for conduct relating to failing to return an identity card to constitute a strict liability offence even though the penalty is low (1 penalty unit). The Explanatory Memorandum justifies this offence on the basis that it is necessary to achieve the legitimate objective of ensuring that identity cards cannot be obtained and misused by persons that are not authorised under the legislation.⁶⁵ However, it is not apparent how an offence which does not require a deliberate attempt to fail to return an identity card will ensure that such cards cannot be obtained and misused by persons. The Law Council notes that under the Aviation Transport Security Regulations 2005 an aviation security inspector who ceases to be an inspector must return their identity card within 7 days. This is *not* a strict liability offence. Clause 571 should therefore be removed or at the very least include a fault element for the offence.

⁶⁵ Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 39.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.