



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

TWELFTH REPORT
OF
2012

10 October 2012

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 2012

The Committee presents its *Twelfth Report of 2012* to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012

Introduced into the House of Representatives on 12 September 2012

Portfolio: Industry, Innovation, Science, Research and Tertiary Education

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2012*. The Minister responded to the Committee's comments in a letter dated 4 October 2012. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2012 - extract

Background

This bill amends the *Higher Education Support Act 2003* (the Act) and the *Australian Research Council Act 2001* to:

- update the maximum payment amounts for Other Grants and Commonwealth scholarships and also authorise wider use and disclosure of personal information collected for the purposes of the Act; and
- update appropriation amounts to apply indexation and to insert a new funding cap for the last year of the forward estimates.

Undue trespass—privacy

Schedule 3, item 2, proposed section 180-25

This schedule of the bill substitutes a new Division 180 of the *Higher Education Support Act 2003* to allow disclosure of Higher Education Support Act information by the Secretary to relevant Commonwealth and state agencies, higher education providers, VET providers and bodies or associations determined by the Minister by legislative instrument. The statement of compatibility (SOC) contains a detailed discussion of the extent to which the provisions of this schedule may be thought to interfere with the right to privacy.

The committee notes that persons to whom information may be disclosed include persons who are 'employed or engaged by a body or association' identified in a legislative instrument (see proposed subsections 180-25(3) and (4)). The SOC indicates that 'where personal information is disclosed to a third party engaged by the Department...this will be under a contract of services that requires the third party to act as though it were an agency

bound by the Privacy Act'. However, this requirement does not appear to be mandated by the bill.

The Committee therefore **seeks the Minister's advice in relation to whether consideration has been given to including such an obligation in the legislation or requiring such a term to be included in a relevant contract.**

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

In your letter you observe that the Statement of Compatibility with Human Rights that accompanied the Bill indicates that "where personal information is disclosed to a third party engaged by the Department...this will be under a contract of services that requires the third party to act as though it were an agency bound by the Privacy Act". You seek advice on whether consideration has been given to including this obligation in the legislation or as a requirement in a relevant contract.

As you may be aware, section 95B of the *Privacy Act 1988* requires an agency entering into a Commonwealth contract to take measures to ensure that a contracted service provider does not do an act, or engage in a practice that would breach an Information Privacy Principle. Accordingly, the Department's standard contracts for services require a contractor not to do any act or engage in any practice that would breach the Information Privacy Principles contained in section 14 of the *Privacy Act 1988*. Where the Department engages a third party to conduct a survey of staff, students or former students of higher education providers or VET providers, that third party will be engaged under a standard departmental contract which includes these provisions.

Furthermore, a third party contracted by the Department to conduct a survey of staff, students or former students of higher education providers or VET providers will fall within the meaning of "Commonwealth officer" for the purposes of the *Higher Education Support Act 2003* (the Act). That third party will therefore be subject to the offence provisions in Division 179 of the Act, which prohibit the unauthorised disclosure of personal information.

In your letter you also observe that persons to whom information may be disclosed under the Bill include persons who are "employed or engaged by a body or association" identified in a legislative instrument. Following a consultation process, upon recommendation by the Office of the Australian Information Commissioner (formerly the Office of the Privacy Commissioner), strong penalties for the improper use or disclosure of personal information or VET personal information by those persons have been included in

the Bill. The Bill provides that those persons commit an offence if they use or disclose the relevant information for a purpose that is not a permitted purpose, or disclose the relevant information to a person who is not an officer of that body. The penalty for committing such an offence is imprisonment for two years.

The Department will also revise its *Higher Education Data Protocols* and *VET FEEHELP Data Collection Data Protocols* to reflect amendments to the Bill. The revised protocols will require that all bodies to whom personal information and VET personal information is disclosed must comply with the Information Privacy Principles contained in section 14 of the *Privacy Act 1988*. This will provide additional safeguards to ensure the privacy of students and staff of higher education providers and VET providers.

I trust this advice will assist the Senate Standing Committee for the Scrutiny of Bills in its consideration of the Bill.

Committee Response

The Committee thanks the Minister for this detailed response and **requests that the key information is included in the explanatory memorandum.**

Public Service Amendment Bill 2012

Introduced into the House of Representatives on 1 March 2012

Portfolio: Prime Minister

Introduction

In *Alert Digest No.10 of 2012* the Committee commented in the amendments section on pages 18 and 19 on the bill. The Minister responded to the Committee's comments in a letter dated 2 October 2012. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2012 – amendment section extract

On 20 August 2012 the House of Representatives agreed to 28 Government and three Opposition amendments and tabled a supplementary explanatory memorandum. On 22 August 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on the additional material.

However, the Committee takes the opportunity to note a concern in relation to a provision proposed in the bill (this is in addition to the Committee's comment outlined in *Alert Digest 3 of 2012* and its *Fifth Report of 2012*).

Retrospective effect

Schedule 1, item 44

Item 44 of the bill seeks to make it a breach of the Code of Conduct for an APS employee to fail to 'behave honestly and with integrity' before being engaged as an APS employee in connection with the person's engagement. The proscribed conduct includes knowingly providing false or misleading information and wilfully failing to disclose relevant information.

While the policy justification for the proposed requirements is apparent to the Committee, it is concerned that the provision could have an unfair detrimental retrospective effect. It appears that conduct that did not amount to a breach of the code at the time of a person's engagement as an APS employee may, by the operation of proposed 15(2A), be taken to be a breach of the code. Thus sanctions for breach of the code may be imposed on the basis of an obligation which was not part of the code at the time of the impugned behaviour.

The terms of this provision are significant, but its capacity to apply retrospectively is not addressed in the explanatory memorandum. **The Committee therefore seeks the Minister's advice as to the justification for applying this requirement retrospectively,**

particularly to those employees who were, or will be, engaged by the APS before the provision comes into effect.

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

I am writing in reply to the Committee's letter of 13 September 2012 seeking a response to the issues identified in the Alert Digest No 10 of 2012 concerning Item 44, of Schedule 1 of the Public Service Amendment Bill 2012 (the Bill), which amends subsection 15(3), (4) and (5) of the *Public Service Act 1999*.

The Committee has raised concerns about the possible unfair detrimental retrospective application of this provision. As drafted, the provision would enable a finding of a breach of the Australian Public Service (APS) Code of Conduct in circumstances where an employee has, in connection with their engagement,

- provided false or misleading information; or
- wilfully failed to disclose information; or
- otherwise failed to act with honesty and integrity.

Under existing provisions, failure by an employee to comply with the Code of Conduct before engagement is not grounds for finding a breach of the Code or imposing a sanction.

It is essential to the delivery of government services that the public has trust in the public service and confidence in the way public servants exercise the authority given to them by the Government on behalf of the public. Hence, the standards of conduct and character expected of APS employees are high. In this regard included within section 13 of the *Public Service Act 1999* is the requirement to behave with honesty and integrity in the course of APS employment and, in section 10 of that Act, to demonstrate the highest ethical standards.

Given that, there is no strong argument to protect current employees of the APS who have attained that employment through an act of dishonesty from action under the Code of Conduct.

The proposed provision is also consistent with elements of the Criminal Code which may currently apply to a person providing false or misleading statements to the Commonwealth (section 137.1). Subsection 137.1(1) of the Criminal Code has been in its present form

since at least 2002. It would be extraordinary for an employee to be able to be found guilty of a criminal offence for providing false or misleading information on recruitment, while an agency head is unable to take misconduct action for the same reason.

In practice it is likely that the retrospective application of the proposed provision will affect only a limited number of employees. The Commission has published guidance to agency heads which draws attention to the limitations of the existing Code in its application to pre employment misrepresentation and suggested that agencies adopt practices to ensure that any misrepresentation can be dealt with appropriately, including by obtaining undertakings from new employees about their honesty during the recruitment process. Where an employee is subsequently found to have made misrepresentations in the course of recruitment the agency can consider termination of employment, either through failure to meet a condition of employment or through misconduct action.

I am also advised that when imposing sanctions on employees who have been determined to have breached the proposed provision, agency heads will have available guidance from the Public Service Commissioner which will make clear that where a period of time has elapsed since the misrepresentation, the fairness of a sanction of termination of employment will require close consideration. This is consistent with the Commission's existing guidance on conditions of engagement concerning the veracity of the information provided by employees on recruitment which says, among other things:

It should be noted that reliance on such a condition as a basis for termination of employment may be considered to be less 'fair over time.

In summary, given the requirement for public confidence in the integrity of APS employees it is appropriate that the proposed provision applies retrospectively to existing APS employees who may have been dishonest or failed to act with integrity when recruited.

I note also that the provision is retrospective in relation to procedures for determining whether there has been a breach of the Code of Conduct. Retrospectivity is justified as it would be inefficient and confusing for employees to have two sets of procedures operating concurrently in an agency.

Provisions relating to procedures for determining sanctions are new. Nevertheless, given the close connection to procedures for determining breaches of the Code, it is also sensible to have those procedures applicable from the same date. The provisions will not operate to the detriment of employees.

Subject to the views of the Committee, I will arrange for a correction to the explanatory memorandum to be presented to the Parliament making clear the justification for, and scope of, the retrospectivity of the proposed provision.

Committee Response

The Committee thanks the Minister for this detailed response and for indicating that additional material will be included in the explanatory memorandum. **The Committee agrees that this material should be included in the explanatory memorandum.**

Although the Committee acknowledges the importance of maintaining public confidence in the integrity of APS employees, it remains concerned about the retrospective operation of the proposed provision. In the Committee's view, neither the belief that impugned conduct was or should have been recognised as inappropriate at the time of the conduct, nor the possible applicability of criminal offences concerning the provision of false or misleading statements to the Commonwealth, are sufficient reasons to retrospectively impose an additional penalty. The Committee accepts that retrospective legislation may be justified in limited circumstances but notes its view that laws which subject persons to new or additional penalties with retrospective effect require very strong justification. However, in light of the detailed response from the Minister, **the Committee leaves the question of whether this approach unduly trespasses on personal rights and liberties to the Senate as a whole.**

Superannuation Legislation Amendment (Stronger Super) Bill 2012

Introduced into the House of Representatives on 24 May 2012

Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter dated 21 September 2012. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill introduces a framework to support the implementation of superannuation data and payment standards that will apply to specified superannuation transactions undertaken by superannuation entities and employers.

Delegation of legislative power – incorporating material by reference

Item 1, Schedule 1, proposed subsections 45B(7) and 34K(7)

The regulations made under proposed section 45B in relation to data and payment matters may, by this proposed subsection, apply, adopt or incorporate any matter contained in any other instrument as in force or existing from time to time. The explanatory memorandum, at page 15, justifies this delegation of legislative power by reference to the need to 'future proof the interactions between the superannuation data and payment regulations and standards and third party standards that are adopted or incorporated'. The example given is the Bulk Electronic Clearing System Direct Credit Standard.

Further, it is stated that 'without this flexibility, the superannuation and data payment regulations and standards would be compromised as it could only reference a third party standard that existed at a point in time' (see 1.39 of the explanatory memorandum).

The same issue also arises in relation to item 2, Schedule 1, proposed 34K(7).

The Committee understands this explanation, **but also seeks the Minister's advice as to whether consideration has been given to including legislative requirements that instruments incorporated by reference be made readily available and amendments announced on an appropriate website to facilitate accountability and parliamentary scrutiny.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

Instruments incorporated by reference and amendments to these instruments will be made readily available on the Australian Taxation Office's website as the Commissioner of Taxation has general administration of this legislation.

I trust this information will be of assistance to you.

Committee Response

The Committee thanks the Minister for this response and appreciates that relevant information will be made available on the Australian Taxation Office website. **The Committee notes that the response did not address whether consideration had been given to including legislative requirements for the publication of information relating to instruments incorporated by reference. However, the Committee makes no further comment as the bill has already been passed by the Parliament.**

Senator the Hon Ian Macdonald
Chair



RECEIVED

- 9 OCT 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Science and Research

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

Thank you for your enquiry concerning provisions in the Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012 (the Bill).

In your letter you observe that the Statement of Compatibility with Human Rights that accompanied the Bill indicates that "where personal information is disclosed to a third party engaged by the Department...this will be under a contract of services that requires the third party to act as though it were an agency bound by the Privacy Act". You seek advice on whether consideration has been given to including this obligation in the legislation or as a requirement in a relevant contract.

As you may be aware, section 95B of the *Privacy Act 1988* requires an agency entering into a Commonwealth contract to take measures to ensure that a contracted service provider does not do an act, or engage in a practice that would breach an Information Privacy Principle. Accordingly, the Department's standard contracts for services require a contractor not to do any act or engage in any practice that would breach the Information Privacy Principles contained in section 14 of the *Privacy Act 1988*. Where the Department engages a third party to conduct a survey of staff, students or former students of higher education providers or VET providers, that third party will be engaged under a standard departmental contract which includes these provisions.

Furthermore, a third party contracted by the Department to conduct a survey of staff, students or former students of higher education providers or VET providers will fall within the meaning of "Commonwealth officer" for the purposes of the *Higher Education Support Act 2003* (the Act). That third party will therefore be subject to the offence provisions in Division 179 of the Act, which prohibit the unauthorised disclosure of personal information.

In your letter you also observe that persons to whom information may be disclosed under the Bill include persons who are “employed or engaged by a body or association” identified in a legislative instrument. Following a consultation process, upon recommendation by the Office of the Australian Information Commissioner (formerly the Office of the Privacy Commissioner), strong penalties for the improper use or disclosure of personal information or VET personal information by those persons have been included in the Bill. The Bill provides that those persons commit an offence if they use or disclose the relevant information for a purpose that is not a permitted purpose, or disclose the relevant information to a person who is not an officer of that body. The penalty for committing such an offence is imprisonment for two years.

The Department will also revise its *Higher Education Data Protocols* and *VET FEE-HELP Data Collection Data Protocols* to reflect amendments to the Bill. The revised protocols will require that all bodies to whom personal information and VET personal information is disclosed must comply with the Information Privacy Principles contained in section 14 of the *Privacy Act 1988*. This will provide additional safeguards to ensure the privacy of students and staff of higher education providers and VET providers.

I trust this advice will assist the Senate Standing Committee for the Scrutiny of Bills in its consideration of the Bill.

Yours sincerely



CHRIS EVANS

4/10/12



HON GARY GRAY AO MP

Special Minister of State
Minister for the Public Service and Integrity

REF: GA12/250

Senator the Hon Ian MacDonald
Chair, Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator MacDonald~~ *Jan*

I am writing in reply to the Committee's letter of 13 September 2012 seeking a response to the issues identified in the Alert Digest No 10 of 2012 concerning Item 44, of Schedule 1 of the Public Service Amendment Bill 2012 (the Bill), which amends subsection 15(3), (4) and (5) of the *Public Service Act 1999*.

The Committee has raised concerns about the possible unfair detrimental retrospective application of this provision. As drafted, the provision would enable a finding of a breach of the Australian Public Service (APS) Code of Conduct in circumstances where an employee has, in connection with their engagement,

- provided false or misleading information; or
- wilfully failed to disclose information; or
- otherwise failed to act with honesty and integrity.

Under existing provisions, failure by an employee to comply with the Code of Conduct before engagement is not grounds for finding a breach of the Code or imposing a sanction.

It is essential to the delivery of government services that the public has trust in the public service and confidence in the way public servants exercise the authority given to them by the Government on behalf of the public. Hence, the standards of conduct and character expected of APS employees are high. In this regard included within section 13 of the *Public Service Act 1999* is the requirement to behave with honesty and integrity in the course of APS employment¹ and, in section 10 of that Act, to demonstrate the highest ethical standards.

Given that, there is no strong argument to protect current employees of the APS who have attained that employment through an act of dishonesty from action under the Code of Conduct.

The proposed provision is also consistent with elements of the Criminal Code which may currently apply to a person providing false or misleading statements to the Commonwealth (section 137.1). Subsection 137.1(1) of the Criminal Code has

¹ The Bill amends the first four elements of the Code of Conduct, including section 13 (1), so that 'in connection with APS employment' is substituted for 'in the course of APS employment'.

been in its present form since at least 2002. It would be extraordinary for an employee to be able to be found guilty of a criminal offence for providing false or misleading information on recruitment, while an agency head is unable to take misconduct action for the same reason.

In practice it is likely that the retrospective application of the proposed provision will affect only a limited number of employees. The Commission has published guidance to agency heads which draws attention to the limitations of the existing Code in its application to pre employment misrepresentation and suggested that agencies adopt practices to ensure that any misrepresentation can be dealt with appropriately, including by obtaining undertakings from new employees about their honesty during the recruitment process. Where an employee is subsequently found to have made misrepresentations in the course of recruitment the agency can consider termination of employment, either through failure to meet a condition of employment or through misconduct action.

I am also advised that when imposing sanctions on employees who have been determined to have breached the proposed provision, agency heads will have available guidance from the Public Service Commissioner which will make clear that where a period of time has elapsed since the misrepresentation, the fairness of a sanction of termination of employment will require close consideration. This is consistent with the Commission's existing guidance on conditions of engagement concerning the veracity of the information provided by employees on recruitment which says, among other things:

It should be noted that reliance on such a condition as a basis for termination of employment may be considered to be less 'fair' over time.

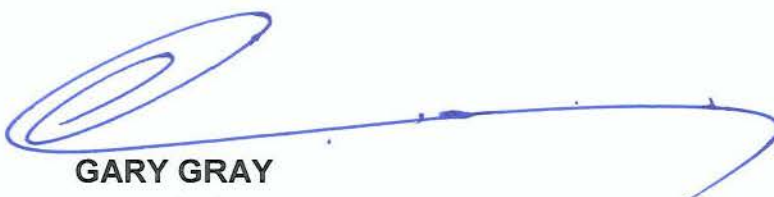
In summary, given the requirement for public confidence in the integrity of APS employees it is appropriate that the proposed provision applies retrospectively to existing APS employees who may have been dishonest or failed to act with integrity when recruited.

I note also that the provision is retrospective in relation to procedures for determining whether there has been a breach of the Code of Conduct. Retrospectivity is justified as it would be inefficient and confusing for employees to have two sets of procedures operating concurrently in an agency.

Provisions relating to procedures for determining sanctions are new. Nevertheless, given the close connection to procedures for determining breaches of the Code, it is also sensible to have those procedures applicable from the same date. The provisions will not operate to the detriment of employees.

Subject to the views of the Committee, I will arrange for a correction to the explanatory memorandum to be presented to the Parliament making clear the justification for, and scope of, the retrospectivity of the proposed provision.

Yours sincerely



GARY GRAY

2 OCT 2012



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24 SEP 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

**THE HON BILL SHORTEN MP
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

21 SEP 2012

Dear Senator MacDonald

Thank you for your letter of 21 June 2012 concerning the Superannuation Legislation Amendment (Stronger Super) Bill 2012.

Instruments incorporated by reference and amendments to these instruments will be made readily available on the Australian Taxation Office's website as the Commissioner of Taxation has general administration of this legislation.

I trust this information will be of assistance to you.

Yours sincerely

BILL SHORTEN

