



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**TWELFTH REPORT**  
**OF**  
**2009**

**28 October 2009**



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## MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)  
Senator M Bishop (Deputy Chair)  
Senator D Cameron  
Senator J Collins  
Senator R Siewert  
Senator the Hon J Troeth

## 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 2009

The Committee presents its Twelfth Report of 2009 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:

Australian National Preventive Health Agency Bill 2009

Aviation Transport Security Amendment (2009 Measures No. 1)  
Bill 2009

Corporations Amendment (Improving Accountability on Termination  
Payments) Bill 2009

Crimes Amendment (Working With Children—Criminal History)  
Bill 2009 \*

Education Services for Overseas Students Amendment (Re-registration  
of Providers and Other Measures) Bill 2009

Higher Education Support Amendment (VET FEE-HELP  
and Tertiary Admission Centres) Bill 2009 \*

Migration Amendment (Complementary Protection) Bill 2009 \*

Social Security and Other Legislation Amendment (Income Support  
for Students) Bill 2009 \*

- \* Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to the bills, under Standing Order 24(9).

# Australian National Preventive Health Agency Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 12 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 23 October 2009. A copy of the letter is attached to this report.

## ***Extract from Alert Digest No. 12 of 2009***

Introduced into the House of Representatives on 10 September 2009

Portfolio: Health and Ageing

### **Background**

This bill establishes the Australian National Preventive Health Agency (ANPHA) as a statutory authority under the *Financial Management and Accountability Act 1997*, and specifies its functions, governance and structure. The ANPHA will support the Australian Health Ministers' Conference and, through it, the Council of Australian Governments (COAG) in addressing the challenges associated with preventing chronic disease. The ANPHA will be established under the auspices of the National Partnership Agreement on Preventive Health, a COAG initiative announced in November 2008, and will commence operations on 1 January 2010.

The bill also provides for the establishment of the Australian National Preventive Health Agency Advisory Council (Advisory Council) which has the function of advising the ANPHA's Chief Executive Officer (CEO) on preventive health matters, particularly those identified by the Ministerial Conference through the ANPHA's strategic and annual operational plans.

### **Legislative Instruments Act—exemption Subclauses 41(8) and 42(5)**

Clause 41 provides for meetings of the Advisory Council, with subclause 41(2) providing that the CEO may determine, in writing, matters relating to the operation of the Advisory Council. Subclause 41(8) provides that such a determination is not a legislative instrument.



Similarly, subclause 42(1) provides for the establishment of committees by the CEO, by instrument, to assist the CEO in the performance of his or her functions or the Advisory Council in the performance of its function. Subclause 42(5) provides that such an instrument is not a legislative instrument. The explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory of the law (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying its need.

Therefore, the Committee **seeks the Minister's advice** as to the reasons for the proposed exemptions and **requests that the explanatory memorandum be amended** to include the appropriate explanations.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

### ***Relevant extract from the response from the Minister***

The Committee reported that the explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*. Subclauses 41(8) and 42(5) are merely declaratory of the law and included for the avoidance of doubt. They do not refer to a policy intention to exempt an instrument which is legislative in character from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

In accordance with the Committee's request to amend the explanatory memorandum to include the appropriate explanations, I will table a correction to the explanatory memorandum to clarify that subclauses 41(8) and 42(5), as well as subclauses 43(4) and 46(4), have been included for the sake of clarity only, to assist the reader, and do not amount to an exemption from the *Legislative Instruments Act 2003*.

The Committee thanks the Minister for this response, and is pleased to note her undertaking to amend the explanatory memorandum to clarify that the provisions are merely declaratory of the law.

### **Standing (special) appropriation**

#### **Clause 50**

Clause 50 establishes the ANPHA Special Account that is a special account for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) (see subclause 50(2)). Section 21 of the FMA Act provides that the Consolidated Revenue Fund is appropriated for the purposes of a special account. Clause 50 therefore establishes a standing appropriation.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be so appropriated and a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament. The Committee notes that the bill specifies the purposes for which money in the Special Account may be expended (clause 52). However, while the explanatory memorandum refers to the FMA Act (at pages 21 and 22), the reason for the standing appropriation has not been provided. The Committee **seeks the Minister's advice** on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured. The Committee also **requests that the explanatory memorandum be amended** to include this information.

*Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## ***Relevant extract from the response from the Minister***

The Committee also sought advice on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured.

Part 7, Division 1 of the Bill provides that the Australian National Preventive Health Agency (the Agency) will have a Special Account. As noted on page 3 of the explanatory memorandum to the Bill, the purpose for which the Special Account has been set up is to provide the Agency with the capability to manage pooled funds, as other organisations such as the State and Territory Governments, industry, non-governmental organisations and the community sector may wish to contribute financially to the Agency's operations.

The States and Territories have indicated a willingness to contribute to the Agency's operations in the future if appropriate provisions are made so that their funds could be transparently managed.

Paragraph 11(1)(h) of the Bill outlines that one of the functions of the Chief Executive Officer of the Agency is to encourage initiatives relating to preventive health matters through partnerships with industry, non-governmental organisations and the community sector. In forming partnerships, these bodies may want to contribute financially to joint projects, but as noted above, would require appropriate safeguards to ensure that the funds contributed would only be available for their agreed purpose.

It is not possible to place boundaries on the credits to the Special Account under clause 51 as contributions from other organisations may be one-off in nature, time limited or vary significantly from year to year.

The amounts to be credited and debited to the Special Account will be subject to parliamentary scrutiny through the Senate Standing Committee on Community Affairs, and disclosed annually in the Health and Ageing Portfolio Budget Statement, the Australian National Preventive Health Agency Annual Report, the Consolidated Financial Statements and Budget Paper No. 4: Agency Resourcing.

In accordance with the Committee's request that the explanatory memorandum be amended to include this information, I will table a correction to the explanatory memorandum at the earliest opportunity.

I appreciate the opportunity to address the Committee's comments on the Bill.

The Committee thanks the Minister for this comprehensive response, and for her undertaking to table a correction to the explanatory memorandum to include information in relation to parliamentary scrutiny of the Special Account established by the bill.

# **Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009**

## ***Introduction***

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 19 August 2009. The Minister's response was included in the Committee's *Tenth Report of 2009*.

## **Delayed commencement**

### **Clause 2**

In its *Tenth Report of 2009*, the Committee expressed the view that the information provided in the Minister's response should have been included in the explanatory memorandum to the bill.

The Minister advised, in a further letter dated 18 September 2009 (attached to this report), that a revised explanatory memorandum would be tabled in the Parliament in due course.

The Committee thanks the Minister for this further response, and is very pleased to note his undertaking to table a revised explanatory memorandum.

# Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 19 August 2009.

In its *Tenth Report of 2009*, the Committee sought further advice from the Minister as to whether alternative legislative approaches were considered in relation to new subsection 200E(2C). The Minister responded in a letter dated 8 October 2009 (attached to this report).

## ***Extract from Alert Digest No. 9 of 2009***

Introduced into the House of Representatives on 24 June 2009

Portfolio: Treasury

### **Background**

This bill amends the *Corporations Act 2001* to strengthen the regulatory framework relating to the payment of termination benefits to company directors and executives.

In particular, the bill:

- introduces a significantly lower threshold at which termination benefits to company executives (including directors, senior executives and key management personnel) must be approved by shareholders;
- clarifies and expands the definition of a termination benefit;
- better empowers shareholders to disallow excessive termination benefits, particularly where they are a reward for poor performance;
- requires unauthorised termination benefits to be repaid immediately;

- provides that retiring company directors and executives, who hold shares in the company, can no longer participate in a shareholder vote on their own termination benefit, except when acting as a proxy; and
- increases the penalties applicable to unauthorised termination benefits.

**‘Henry VIII’ clause**

**Schedule 1, item 22, new subsection 200E(2C)**

Item 22 of Schedule 1 inserts new subsections after subsection 200E(2) to restrict the right of a retiring director or executive, or their associate, from participating in a shareholder vote that includes their termination payment, although they can cast a vote if acting as a proxy. Proposed new subsection 200E(2C) provides that regulations may prescribe cases where subsection (2A) does not apply; that is, where the retiree *can* participate in a shareholder vote. The explanatory memorandum explains (at page 14) that this is to provide flexibility in the event that circumstances arise which give valid cause for retirees to exercise their vote. While recognising the need for flexibility in certain circumstances, the Committee, nevertheless, **seeks the Treasurer’s advice** on the justification for the inclusion of a power to create regulations in response to specific individual circumstances.

*Pending the Treasurer’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

***Relevant extract from the first response from the Minister (dated 19 August 2009) and Tenth Report of 2009***

As you would be aware, the Bill contains a new provision prohibiting directors and executives from participating in the shareholder vote to approve their own termination benefit. This improves the integrity of the shareholder vote and removes the conflict of interest which exists with a person voting to approve their own termination benefit.

However, there may be legitimate circumstances where directors and executives should be able to participate in the shareholder vote. One such example is identified in subsection 200E(2B) of the Bill, which provides an exception where the director or executive is casting a vote as a proxy on behalf of another person who is entitled to vote, in accordance with the directions on the proxy form.

There may also be other unforeseen instances that may legitimately warrant the participation of directors or executives in the shareholder vote (for example, circumstances where the director or executive has somehow been dealt with extremely harshly and it would be unfair to prevent them from voting on the termination benefit). The Bill provides flexibility to address any harsh or unanticipated outcomes, by including a regulation making power in subsection 200E(2C) which provides that the regulations may prescribe cases where the prohibition does not apply. The purpose of the regulation making power is to ensure that any unforeseen instances or unintended consequences can be addressed in a timely way.

Currently, there are no regulations prescribed under 200E(2C). I do not expect that the regulation making power would be relied upon unless significant events arose that would necessitate further exceptions to the prohibition.

The Committee thanks the Minister for this response, but seeks further clarification. It appears from the Minister's response that it is intended that regulations could be made to vary the provisions in the Act to enable a director or executive of a company to vote on their own termination benefit to remedy a perceived defect in their treatment. The Committee **seeks the Minister's further advice** as to whether alternative legislative approaches were considered to otherwise alleviate harsh or unanticipated outcomes.

***Relevant extract from the further response from the Minister  
(dated 8 October 2009)***

As you are aware, the Bill contains a new provision prohibiting directors and executives from participating in the shareholder vote to approve their own termination benefit. This improves the integrity of the shareholder vote and removes the conflict of interest which exists with a person voting to approve their own termination benefit. Subsection 200E(2C) of the Bill allows the regulations to provide otherwise.

The Committee seeks clarification on whether regulations could be made to vary the provisions in the Bill to enable a director or executive to participate in the shareholder vote to "remedy a perceived defect in their treatment".

The purpose of the regulation making power in subsection 200E(2C) is not to remedy a perceived defect in the treatment of directors and executives and their ability to participate in the shareholder vote. Rather, the purpose of the regulation



making power is to provide flexibility in cases that could legitimately warrant the participation of directors and executives in the shareholder vote.

As I noted in my previous response, one such instance has already been identified in subsection 200E(2B) of the Bill, where a director or executive is casting a vote as a proxy on behalf of another person who is entitled to vote.

The regulation making power will enable other such instances to be addressed, which may not have been apparent at the time of drafting. As such, I consider the regulation making power to be an effective mechanism to address any future instances that may arise where it would be appropriate for directors and executives to participate in the shareholder vote. I expect that a significant and genuine need for further exceptions would need to be identified before any such exception would be provided for in the regulations.

I trust this information will be of assistance to you.

The Committee thanks the Minister for this further response.

# Crimes Amendment (Working With Children—Criminal History) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 11 of 2009*. The Minister for Home Affairs responded to the Committee's comments in a letter received on 16 September 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 11 of 2009*

Introduced into the House of Representatives on 20 August 2009

Portfolio: Home Affairs

#### **Background**

This bill amends the *Crimes Act 1914* (Crimes Act) to implement the Council of Australian Governments' (COAG) agreement of 29 November 2008 to facilitate the inter-jurisdictional exchange of criminal history information for people working with children, including information about spent, pardoned and quashed convictions. The bill removes legislative barriers at the Commonwealth level to ensure that the Commonwealth can provide information in accordance with the COAG agreement.

In particular, the bill:

- replaces the existing exclusions in Division 6 of the Crimes Act relating to the disclosure of spent convictions information with new exclusions allowing for the disclosure of information about a person's spent, quashed and pardoned convictions in specified circumstances;
- defines 'child' and 'work' for the purposes of the new exclusions;

- specifies criteria that screening units must meet before they can be prescribed to enable them to obtain and deal with Commonwealth criminal history information (these criteria reflect the requirements of the COAG agreement and include compliance with applicable privacy, human rights and records management legislation, natural justice principles and implementation of risk assessment frameworks);
- requires the Minister to cause a review of the operation of the new provisions, to start no later than 30 June 2011 and be completed within 3 months; and
- requires the Minister to cause a written report about the review to be prepared and tabled in each House of the Parliament within 15 sitting days after receipt of the report.

### **Trespass unduly on rights and liberties Schedule 1, item 6**

As a general rule, a person does not have to disclose information about his or her criminal history where a conviction is ‘spent’, pardoned or quashed; nor can others disclose the conviction without the person’s consent, or take it into account (Part VIIC of the Crimes Act). Division 6 of the Crimes Act currently contains limited exclusions to this rule.

Schedule 1 of the bill contains provisions amending the Crimes Act (including Division 6) so that criminal history information relating to ‘spent’, pardoned or quashed convictions can be exchanged with prescribed bodies for the purpose of child-related employment screening. Proposed new Subdivision A of Division 6, to be inserted by item 6 of Schedule 1, contains a number of provisions allowing for exclusions for the purpose of assessing the suitability of persons for working with children.

Under principle (1)(a)(i) of its terms of reference, the Committee has regard to whether provisions in bills trespass *unduly* on personal rights and liberties. The Committee notes that, despite its divergence from the general rule, the bill provides for mandatory review of the operation of new Subdivision A (see proposed new section 85ZZGG).

Further, disclosure can only be made to prescribed bodies for a prescribed purpose (proposed new section 85ZZGB) by a prescribed body (proposed new section 85ZZGD); and the person or body receiving the information must comply with principles relating to privacy, human rights, records management, natural justice, and risk assessment frameworks (proposed new section 85ZZGE).

While mindful of the stated aim and purpose of the amendments to protect children from sexual, physical and emotional harm, along with the fact that extensive safeguards have been provided, the Committee considers that there may still be significant possible adverse effects on a person's rights and liberties through disclosure of criminal history information. Therefore, the Committee **seeks the Minister's advice and clarification** in relation to the breadth of the bill's application.

In particular, the Committee wishes to ascertain whether the bill covers *all* of a person's criminal history information or is more limited to criminal history pertaining to offences involving, for example, sexual assault or violence. If a person's entire criminal history is intended to be covered, the Committee **seeks the Minister's advice** in relation to why this is considered necessary and appropriate in the context of the stated purpose of the bill. The Committee also **seeks the Minister's advice** on the reasons for the application of the amendments to offences that have been 'quashed'. Further, it is not clear to the Committee from the language used in the bill that exchange of information under the proposed scheme is mandatory or would simply *allow* relevant information to be exchanged in particular circumstances.

*Pending the Minister's advice, 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.*

### ***Relevant extract from the response from the Minister***

My response to the issues raised by the Committee is set out below.

#### *Breadth of the Bill's application*

In seeking to establish whether the Bill trespasses unduly on personal rights and liberties through disclosure of criminal history information, the Committee sought advice and clarification about the breadth of the Bill's application.

In particular, the Committee sought advice about whether the Bill covers all of a person's criminal history information and, if so, why this is considered necessary and appropriate in the context of the stated purpose of the Bill.

I confirm that the Bill will allow the disclosure and use of a person's full criminal history, including spent, pardoned and quashed convictions, and that it is not limited to information pertaining to offences such as sexual assault or violence. This is consistent with the agreement by the Council of Australian Governments on 29 November 2008.

In assessing whether he or she poses a risk to children if employed in child related work, it is appropriate to consider a person's full criminal history for several reasons. First, the nature and circumstances of the offence of which a person is convicted may be relevant in assessing the person's suitability to work with children even if it is not a violent or sexual offence. For example, convictions for a range of offences where the victim is a child may be relevant. Other types of offences such as drug trafficking offences or offences of menacing or harassing another person may also be relevant. Restricting the exchange of criminal history information to certain categories of offences would create a risk that relevant information could not be disclosed to a screening unit and would undermine the comprehensiveness of the screening process.

Second, the jurisdictional authorised screening units that assess a person's suitability to work with children are required to have risk assessment frameworks and appropriately skilled staff to assess risks to children's safety and to comply with the principles of natural justice. This will ensure that, when a screening unit receives a person's full criminal history information, it undertakes a rigorous process to determine the relevance of a particular conviction to a person's suitability to work with children and provides the individual concerned an opportunity to challenge that determination.

The Attorney-General's Department has been advised by all current jurisdictional screening units that they have appeals processes in place for decisions made in relation to working with children checks. Each jurisdictional authorised screening unit is also required to undertake the following activities as part of their standard process, when a decision to issue a negative notice to an application is made:

- disclosure of the criminal history information to the individual
- allowing the individual a reasonable opportunity to be heard, and
- consideration of the individual's response prior to the finalisation of the screening decision.

*Reasons for the application of the amendments to offences that have been 'quashed'*

The Committee sought advice about why the amendments allow the disclosure of criminal history information pertaining to offences that have been 'quashed'.

The fact that a person's conviction for an offence has been quashed does not necessarily make the facts and circumstances of that offence irrelevant to an assessment of the risk that the person poses to children if employed in child related work. A person's conviction may be quashed for reasons that do not negate the credibility of evidence on which the conviction was based.

It is appropriate that screening units be able to have access to information on quashed convictions so they can assess the weight that can reasonably be placed on that information in all the circumstances. As set out above, screening units have rigorous risk assessment frameworks, skilled staff and natural justice processes in place to ensure a careful and comprehensive approach.

In many cases, a person whose conviction has been quashed may be re-tried for the same offence. For example, the Commonwealth Director of Public Prosecutions reported that, of the 22 convicted defendants who had some or all of the charges against them quashed on appeal in 2008-09, further prosecution action is underway in relation to the quashed charges in eight of those cases. Accordingly, these defendants may ultimately be reconvicted. In such cases, the comprehensiveness of the screening process could be undermined if screening units were prevented from obtaining access to information about the quashed conviction prior to any reconviction.

*Whether the exchange of information is mandatory*

The Committee also sought advice about whether the exchange of information is mandatory or would simply allow relevant information to be exchanged in particular circumstances. The Bill removes the legislative barriers to the exchange of criminal history information, in accordance with the relevant Council of Australian Governments (COAG) agreement of 29 November 2009. The Bill does not require the exchange of this information; it simply allows it to be exchanged.

The Committee thanks the Minister for this very comprehensive and informative response, noting the processes in place in screening units in other jurisdictions which are designed to provide natural justice to those affected by the operation of the provisions.

# Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 11 of 2009*. The Minister for Education responded to the Committee's comments in a letter dated 23 September 2009. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 11 of 2009*

Introduced into the House of Representatives on 19 August 2009  
Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Education Services for Overseas Students Act 2000* (Education Services for Overseas Students Act) and the *Education Services for Overseas Students (Registration Charges) Act 1997* to clarify the application of various provisions; and to introduce processes that will increase the accountability of international education and training services providers under the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*.

In particular, the bill:

- requires the re-registration by 31 December 2010 of all institutions that are currently registered on the Commonwealth Register of Institutions and Courses for Overseas Students (registration of providers not re-registered by that date will be cancelled);
- introduces two new registration criteria which aim to raise quality by ensuring only those institutions that have both genuine purpose and demonstrated capacity to provide quality education are able to be registered;

- requires the publication by providers of the names of education agents who represent them and promote their education services;
- enhances provisions relating to the management of a provider's registration, ability to provide educational services and determination of default situations;
- provides the Commonwealth with more clarity in relation to what constitutes a 'suitable alternative course'; and
- lessens the financial and regulatory burdens on providers that may wish to change their legal entity for the purpose of improving business operations (in circumstances where the delivery of courses and outcomes for international students will not be affected).

### **'Henry VIII' clause**

#### **Schedule 1, item 11, new paragraph 9B(1)(b)**

Proposed new section 9B of the Education Services for Overseas Students Act, to be inserted by item 11 of Schedule 1, makes provision for deciding whether a higher education provider is 'a fit and proper person'. Proposed new paragraph 9B(1)(b) specifies that paragraphs 9(2)(ca) and 9A(2)(e) (which contain certain criteria) do not apply to providers 'entitled to receive funds under a law of the Commonwealth for recurrent expenditure for the provision of education or training, other than one excluded by the regulations from the scope of this paragraph'. This is a 'Henry VIII' clause.

Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee. The explanatory memorandum does not explain why regulations will be needed to exclude certain providers from the scope of paragraph 9B(1)(b). Therefore, the Committee **seeks the Minister's advice** on the reasons for the use of the regulation-making power to alter the scope of the principal legislation in these circumstances.

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



## ***Relevant extract from the response from the Minister***

I note that the Committee has raised concerns about proposed new section 9B of the *Education Services for Overseas Students Act 2000* (ESOS Act), to be inserted by item 11 of Schedule 1. In particular, the Committee is concerned that proposed new paragraph 9B(1)(b), which specifies that paragraphs 9(2)(ca) and 9A(2)(e) do not apply to providers 'entitled to receive funds under a law of the Commonwealth for recurrent expenditure for the provision of education or training, other than one excluded by the regulations from the scope of this paragraph', may be considered to be an inappropriate delegation of legislative powers. The Committee is concerned that this 'exclusion' is an inappropriate delegation of legislative powers.

Subsection 9B(1) is not a new provision. Instead, it simply replicates current subsection 9(5) (which is to be repealed by virtue of item 8 of Schedule 1 of the ESOS Bill) and applies it to both the registration of new providers under section 9 and the re-registration of providers under proposed section 9A.

The international education industry is undergoing extraordinary growth in a rapidly changing environment. Given this, and in order to manage the integrity of registration processes, it is important to maintain the flexibility for the regulations to continue to be able to exclude providers in receipt of Commonwealth recurrent expenditure funding for education and training from the fit and proper exemption. I note that no such regulations have been made to date.

In addition, any regulations to be made under proposed paragraph 9B(1)(b) would be subject to Parliamentary scrutiny and potential disallowance (during the disallowance period) in both Houses of Parliament.

I therefore do not consider there to be an inappropriate delegation of regulation-making powers.

The Committee thanks the Minister for this response, noting that proposed new paragraph 9B(1)(b) replicates current subsection 9(5) of the *Education Services for Overseas Students Act 2000*.

## **Retrospective application**

### **Schedule 1, item 31**

Item 31 of Schedule 1 applies section 9 of the Education Services for Overseas Students Act, as amended by the bill, to ‘pending matters’. Specifically, item 31 provides that if a designated authority for a state made a recommendation in relation to an approved provider under subsection 9(1) before the commencement of the item, and the Secretary did not make a decision on whether the provider should be registered before that commencement, then the section as amended (containing new registration criteria) applies to the making of the decision about whether to register the provider.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth. Since there is no explanation in the explanatory memorandum for the retrospective operation of amended section 9 to applications made prior to the commencement of item 31, the Committee **seeks the Minister’s advice** on whether the retrospectivity will have an adverse impact on any affected provider.

*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.*

### ***Relevant extract from the response from the Minister***

I also note that the Committee has raised concerns about item 31 of Schedule 1, which applies section 9 (as amended) to ‘pending matters’. The Committee queries whether this ‘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’.

Once amended, section 9 will, amongst other things, require state and territory designated authorities to provide the Secretary with a certificate stating that providers they recommend for registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) have met two new quality criteria to be introduced by the ESOS Bill. These new criteria are that a provider must have the principal purpose of providing education and the clearly demonstrated capacity to provide education of a satisfactory standard. The criteria will apply to

both new applicants for registration on CRICOS (under section 9 as amended) and also to providers to be re-registered by 31 December 2010 (under proposed new section 9A).

In these circumstances, I consider that it makes sense for section 9 as amended to also apply to 'pending matters'. If this does not happen, and a pending new provider is registered before the ESOS Bill measures take effect, the provider would still need to go through the re-registration process whereby the new criteria would be applied.

I trust this information enables the Committee to finalise its consideration of the ESOS Bill.

The Committee thanks the Minister for this response, which addresses its concerns.

# Higher Education Support Amendment (VET FEE-HELP and Tertiary Admission Centres) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 12 of 2009*. The Minister for Education responded to the Committee's comments in a letter dated 19 October 2009. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 12 of 2009*

Introduced into the House of Representatives on 9 September 2009

Portfolio: Education

### **Background**

This bill amends the *Higher Education Support Act 2003* (Higher Education Support Act) as part of the extension of the VET FEE-HELP Assistance Scheme to certain subsidised students from 1 July 2009.

Schedule 1 broadens guidelines-making powers to allow lesser VET FEE-HELP debt amounts to apply for a particular class of student and to allow for matters in relation to VET credit transfer requirements to be dealt with in guidelines.

Schedule 2 provides that Tertiary Admission Centres (TACs) have the same status and duty of care as Officers of a Higher Education Provider (HEP) and VET provider in relation to the processing of students' personal information, ensuring that student information may be shared between relevant Commonwealth agencies, HEPs, VET providers and TACs (as appropriate and in accordance with privacy requirements under the Higher Education Support Act).

## **Absolute liability**

### **Schedule 2, item 15, subparagraphs 78(1)(d)(iii) and (iv)**

Item 15 of Schedule 2 inserts new provisions into the Higher Education Support Act to extend the offence under clause 78 (relating to causing unauthorised access to, or modification of, VET personal information) to include information held on, or on behalf of, a computer of a TAC. The Committee notes that a clause 78 offence is an offence of absolute liability (see subclause 78(2)) which means the defence of mistake of fact is excluded. The explanatory memorandum does not contain any reference to absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to Senators' attention provisions which create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee therefore **seeks the Minister's advice** as to whether the explanatory memorandum might be amended to include the reasons and justification for the imposition of absolute liability in subparagraphs 78(1)(d)(iii) and (iv).

*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.*

## ***Relevant extract from the response from the Minister***

I note that the Committee has raised concerns about proposed new subparagraphs 78(1)(d)(iii) and (iv) of Schedule 1A to the *Higher Education Support Act 2003* (the Act) and particularly the imposition of absolute liability in these proposed new subsections. The Committee has asked whether the explanatory memorandum to the Bill might be amended to include reasons and justification for the imposition of absolute liability in these proposed new subsections.

Clause 78 of Schedule 1A of the Act provides that a person commits an offence punishable by up to 2 years imprisonment if:

- the person causes unauthorised access to or modification of VET personal information that is held in a computer to which access is restricted by an access control system; and
- the person intends to cause the access or modification; and
- the person knows that the access or modification is unauthorised; and
- the VET personal information is held in a computer of a VET provider or held on behalf of a VET provider.

All of the above elements must be met in order for a person to be found guilty of an offence. Subclause 78(2) provides that absolute liability applies to the element of the offence which requires the VET information be held in a computer of a VET provider or on behalf of a VET provider.

The proposed amendments to this clause contained in the Bill will extend the offence contained in clause 78 of Schedule 1A to VET personal information which is held in the computer of a Tertiary Admission Centre (TAC) or held on behalf of a TAC. As the Committee has identified, this includes extending absolute liability to the element of the offence which requires the VET information be held in a computer of a TAC or on behalf of a TAC.

The effect of applying absolute liability to this element of the offence is that it will not be necessary to prove that the person was aware that the VET personal information that they accessed was held on the computer of a TAC or was held on behalf of a TAC. Further, as the Committee has noted, the defence of mistake of fact will not be available against this element of the offence.

I consider the use of absolute liability in these circumstances is justified when it is considered in context with the other elements of the offence. Although absolute liability removes the requirement to establish fault with regards to one element of the offence, it will still be necessary to prove fault in the other elements of the offence. An offence under clause 78 can only arise where the person *intends* to cause access to, or modification of, VET personal information and the person *knows* that the access or modification is unauthorised.

Given that elements of the offence already clearly require the establishment of fault and that the person is aware of the nature of the information they accessed or modified, having to prove that a person knows that the information they accessed was held in the computer of a TAC or on behalf of a TAC would be an unnecessary burden which may undermine the offence. Proving that the person was aware the information they accessed or modified was held on the computer of a TAC or on behalf of a TAC is likely to be difficult and, were absolute liability not attached to this element of the offence, a person may be able to escape liability for an offence under clause 78 of Schedule 1A through claiming that they were unaware that the information they accessed was held on a computer of a TAC or on behalf of a TAC. The purpose of attaching absolute liability to this element of the offence is to prevent

a person from being able to escape liability for the offence by making such a claim despite the existence of all of the other elements of the offence.

I draw to the Committee's attention that this proposed provision is consistent with other provisions contained in the Act concerning unauthorised access to, or modification of, VET personal information being held by VET providers and with information being held by Open Universities Australia.

I am pleased to inform you that I will be amending the explanatory memorandum to the Bill to include the reasons and justification for the proposed imposition of absolute liability as explained above.

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this comprehensive response, and for her undertaking to amend the explanatory memorandum. The Committee notes that a correction to the explanatory memorandum was tabled in the House of Representatives on 20 October 2009.

# Migration Amendment (Complementary Protection) Bill 2009

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 12 of 2009*. The Minister for Immigration and Citizenship responded to the Committee's comments in a letter dated 26 October 2009. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 12 of 2009*

Introduced into the House of Representatives on 9 September 2009  
Portfolio: Immigration and Citizenship

#### **Background**

This bill amends the *Migration Act 1958* (Migration Act) to:

- introduce complementary protection arrangements to allow all claims that may engage Australia's *non-refoulement* obligations (under various international conventions) to be considered under a single Protection visa application process;
- provides relevant tests and definitions for identifying a *non-refoulement* obligation in determining whether a person is eligible for a protection visa on complementary protection grounds;
- provides a criterion for the grant of a protection visa (where the applicant has been found not to be owed protection obligations under the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* (Refugee Convention)) in circumstances where the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that a non-citizen will be irreparably harmed in a specified way;



- provides that applicants who would currently be ineligible for the grant of a protection visa because of the exclusion provisions contained in the Refugees Convention, will also be ineligible for the grant of a visa on complementary protection grounds through a similar exclusion provision;
- extends the current review arrangements for decisions to refuse to grant a protection visa so that decisions to refuse complementary protection claims may be reviewed in the same way as decisions to refuse Refugees Convention claims;
- extends current provisions in the Migration Act that ensure that an applicant raising Refugee Convention claims is not eligible for a protection visa if the applicant can access protection in another country, to also cover applicants raising complementary protection claims;
- ensures that only applicants who engage Australia's *non-refoulement* obligations will be eligible for a protection visa on complementary protection grounds, by specifying certain circumstances in which a non-citizen will be taken not to face a real risk of being irreparably harmed; and
- enables protection visa applicants who engage Australia's *non-refoulement* obligations on complementary protection grounds, and to whom the exclusion provisions do not apply, to be granted a protection visa with the same conditions and entitlements as applicants owed *non-refoulement* obligations under the Refugees Convention.

### **Drafting note**

#### **Schedule 1, item 13, new subsection 36(2A)**

Proposed new subsection 36(2A) of the Migration Act, to be inserted by item 13 of Schedule 1, lists 'matters' that could form the basis of a claim for protection by an offshore entry person under proposed new paragraph 36(2)(aa) (to be inserted by item 11 of Schedule 1). Proposed new subsection 36(2A) simply begins with the words: 'The matters are'. This functional statement is inelegant and provides little context or description. The Committee **draws this drafting matter to the attention of the Minister.**

### ***Relevant extract from the response from the Minister***

As the Committee is aware, proposed subsection 36(2A) to be inserted into the *Migration Act 1958* (“the Act”) (item 13 of Schedule 1 of the Bill) begins with the words “The proposed matters are”. The Committee seeks my views on this drafting matter. The Alert Digest states that this functional statement is inelegant and provides little context or description.

If the Bill were to pass as proposed, I am of the view that taking section 36 of the Act in its entirety, the reader would grasp the context of proposed subsection 36(2A), despite it beginning with the opening words “The proposed matters are”. I note that this language links back to proposed paragraph 36(2)(aa) (to be inserted by item 11 of the Bill) that ends with “...because of a matter mentioned in subsection (2A)”.

Thank you for seeking my views on this matter.

The Committee thanks the Minister for this response.

# **Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009**

## ***Introduction***

The Committee dealt with this bill in *Alert Digest No. 12 of 2009*. The Acting Minister for Education responded to the Committee's comments in a letter dated 8 October 2009. A copy of the letter is attached to this report.

## ***Extract from Alert Digest No. 12 of 2009***

Introduced into the House of Representatives on 10 September 2009  
Portfolio: Employment and Workplace Relations

### **Background**

This bill amends the *Social Security Act 1991*, the *Higher Education Support Act 2003*, the *Military Rehabilitation and Compensation Act 2004*, the *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986* to make wide-ranging changes to income support arrangements for students. The bill implements relevant recommendations from the *Review of Australian Higher Education* conducted by Emeritus Professor Denise Bradley AC, and aims to make higher education generally more accessible by increasing income support for students who need it the most.

In particular, the bill:

- changes the criteria upon which a youth allowance recipient is considered to be 'independent' by reducing the age at which a person is automatically independent from 25 to 22 years (to be phased in over three years commencing in 2010), and prevents a youth allowance claimant from attaining 'independence' through part-time employment or wages;
- makes major changes to means testing for payments to students and youth from 1 January 2010, and increases the personal income-free area for youth allowance and Austudy students, and Australian Apprentices, from 1 July 2012;

- provides for new scholarships for students on income support; and
- exempts merit and equity based scholarships from the income test under social security and veterans' entitlements legislation.

### **Delayed commencement**

#### **Subclause 2(1)**

Item 4 in the table to subclause 2(1) provides that Divisions 3 and 4 of Part 2 of Schedule 1 commence on 1 July 2012. Where there is a delay in commencement of longer than six months, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No 1.3.

In this case, the explanatory memorandum does not provide an explanation for the delayed commencement. The Committee **seeks the Minister's advice** on the reasons for the delayed commencement and **requests that these reasons be included in the explanatory memorandum** to assist readers and those affected by the legislation.

*Pending the Minister's advice, 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.*

### ***Relevant extract from the response from the Acting Minister***

The Committee has expressed concern that Item 4 in the table relating to subclause 2(1) provides that Divisions 3 and 4 of Part 2 of Schedule 1 is legislated to commence on 1 July 2012. This refers to the commencement date for lifting the income free threshold for the personal income test for students from \$236 per fortnight to \$400 per fortnight. The proposed commencement date is scheduled for 1 July 2012.

Ms Dennett's letter suggests that the delay in the date of commencement for this element of the package may be in breach of principle 1(a)(i) of the committee's terms of reference in that it may trespass unduly on personal rights and liberties. It is suggested that this may arise due to the fact that the proposed change to the personal income threshold will start over six months from the enactment of the Bill.

The Committee requests an explanation for this delay and seeks an explanation be provided in the explanatory memorandum to the bill.

The student income support package, announced on 12 May 2009 in the context of the 2009-10 Budget, provides the Australian Government's response to the recommendations of the Bradley Review of Australian Higher Education concerning student income support. The package phases the implementation of various components to maintain cost neutrality over the forward years.

The key change to student income support introduced by the package has been the commitment to expand access to student income support payments by providing a more generous parental income test. Offsetting this cost has been a tightening of the workforce participation criterion. These twin actions form the major part of rebalancing student income support payments to ensure that family circumstances assessed under the parental income tests is the primary means for accessing payments.

This more generous parental income test will allow around 68 000 more young people to qualify as dependents for the student income support payments. Within the overall package, to achieve cost neutrality in the forward years, the package, as announced in May 2009, envisaged an implementation date for changes to the personal income test to commence on 1 January 2011.

In response to concerns from current 'gap year' takers and their parents about changes to the workforce participation criterion, the Government held meetings with students from across Australia. Following discussions at the Student Roundtable in Canberra during August 2009, the Government announced transitional arrangements to the proposed changes to student income support announced in the 2009-10 Budget. Students who completed Year 12 in 2008, have taken a gap year in 2009 and must move more than 90 minutes from home to attend university in 2010 to undertake their chosen course will be entitled to claim independent status for Youth Allowance under the existing workforce participation criterion until 30 June 2010.

In the current economic climate, the Government's proposed package of student income support reform is designed to be budget-neutral. To meet the additional costs of the transitional arrangements, the Government proposes now to postpone the implementation of the changes to the personal income test threshold from 1 January 2011 to 1 July 2012. The later date is reflected in the legislation introduced into the House of Representatives on 10 September 2009.

While the implementation date for the personal income test will be delayed beyond 6 months from the expected date for Royal Assent, this has been necessary in order to maintain the overall balance of the package in a fiscally responsible manner. The Bill enfranchises all aspects of the reform package and ensures that the package as a whole will be implemented as a balanced response to the Bradley Review's recommendations.

I would note that no student will be made worse off as a result of the delay in implementing the proposed changes to the personal income test threshold. The

threshold for the personal income test has not been increased since 1993. Under this package of reforms, following implementation of this component, the personal income threshold for students will increase annually in line with the Consumer Price Index.

I am pleased to inform you that I will be amending the explanatory memorandum to the Bill to include the reasons for the proposed delay in the commencement date of changes to the personal income test thresholds as explained above.

I trust this information is of assistance to the Committee.

The Committee thanks the Acting Minister for his informative response, and welcomes his undertaking to amend the explanatory memorandum to include the reasons for the delayed commencement of the relevant provisions.

Senator the Hon Helen Coonan  
Chair



THE HON NICOLA ROXON MP  
MINISTER FOR HEALTH AND AGEING

Senator the Hon Helen Coonan  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

RECEIVED

21 OCT 2009

Senate Standing C'ttee  
for the Scrutiny of Bills

Dear Senator Coonan

Thank you for the letter of 17 September 2009 from your Committee Secretary, Ms Julie Dennett, drawing my attention to the Committee's *Alert Digest No. 12 of 2009* (16 September 2009) regarding the Australian National Preventive Health Agency Bill 2009 (the Bill).

I provide the following responses in the order in which they appear in the Digest.

**Legislative Instruments Act – exemption  
Subclauses 41(8) and 42(5)**

The Committee reported that the explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*. Subclauses 41(8) and 42(5) are merely declaratory of the law and included for the avoidance of doubt. They do not refer to a policy intention to exempt an instrument which is legislative in character from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

In accordance with the Committee's request to amend the explanatory memorandum to include the appropriate explanations, I will table a correction to the explanatory memorandum to clarify that subclauses 41(8) and 42(5), as well as subclauses 43(4) and 46(4), have been included for the sake of clarity only, to assist the reader, and do not amount to an exemption from the *Legislative Instruments Act 2003*.

**Standing (special) appropriation  
Clause 50**

The Committee also sought advice on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured.

Part 7, Division 1 of the Bill provides that the Australian National Preventive Health Agency (the Agency) will have a Special Account. As noted on page 3 of the explanatory memorandum to the Bill, the purpose for which the Special Account has been set up is to provide the Agency with the capability to manage pooled funds, as other organisations such as the State and Territory Governments, industry, non-governmental organisations and the community sector may wish to contribute financially to the Agency's operations.

The States and Territories have indicated a willingness to contribute to the Agency's operations in the future if appropriate provisions are made so that their funds could be transparently managed.

Paragraph 11(1)(h) of the Bill outlines that one of the functions of the Chief Executive Officer of the Agency is to encourage initiatives relating to preventive health matters through partnerships with industry, non-governmental organisations and the community sector. In forming partnerships, these bodies may want to contribute financially to joint projects, but as noted above, would require appropriate safeguards to ensure that the funds contributed would only be available for their agreed purpose.


It is not possible to place boundaries on the credits to the Special Account under clause 51 as contributions from other organisations may be one-off in nature, time limited or vary significantly from year to year.

The amounts to be credited and debited to the Special Account will be subject to parliamentary scrutiny through the Senate Standing Committee on Community Affairs, and disclosed annually in the Health and Ageing Portfolio Budget Statement, the Australian National Preventive Health Agency Annual Report, the Consolidated Financial Statements and Budget Paper No. 4: Agency Resourcing.

In accordance with the Committee's request that the explanatory memorandum be amended to include this information, I will table a correction to the explanatory memorandum at the earliest opportunity.

I appreciate the opportunity to address the Committee's comments on the Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nicola Roxon', written in a cursive style.

**NICOLA ROXON**

23 OCT 2009





The Hon Anthony Albanese MP

Minister for Infrastructure,  
Transport, Regional Development  
and Local Government  
Leader of the House

RECEIVED

18 SEP 2009

Senate Standing Committee  
for the Scrutiny of Bills

Reference: 6653-2009

18 SEP 2009

Ms Julie Dennett  
Secretary  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dennett

Thank you for your letter dated 10 September 2009 in relation to the Aviation Transport Security Amendment Regulations 2009 (No. 1) Bill 2009 (the Bill).

I note that you have requested that the explanatory memorandum to the Bill be amended to include the reasons for the delayed commencement of Part 1 of Schedule 1 to the Bill, which are to allow for industry consultation on the matter, and to ensure that no action will be taken which would be inconsistent to the outcomes of the Aviation White Paper.

I advise that the Department of Infrastructure, Transport, Regional Development and Local Government is currently working with the Table Offices of the Senate and the House of Representatives to make the necessary arrangements for a revised explanatory memorandum to be re-tabled in Parliament.

I trust this letter addresses the concerns of the Committee and I thank the Committee for bringing this matter to my attention.

Yours sincerely



ANTHONY ALBANESE



**The Hon Chris Bowen MP**  
**Minister for Human Services**  
**Minister for Financial Services, Superannuation and Corporate Law**

RECEIVED

14 OCT 2009

Senate Standing Committee  
for the Scrutiny of Bills

8 OCT 2009

**Senator the Hon Helen Coonan**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Bills**  
**Parliament House**  
**CANBERRA ACT 2600**

Dear Senator Coonan

Thank you for the letter of 10 September 2009 seeking supplementary information on the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009. Below is my response to your Committee's comments.

**Schedule 1, item 22, new subsection 200E(2C)**

As you are aware, the Bill contains a new provision prohibiting directors and executives from participating in the shareholder vote to approve their own termination benefit. This improves the integrity of the shareholder vote and removes the conflict of interest which exists with a person voting to approve their own termination benefit. Subsection 200E(2C) of the Bill allows the regulations to provide otherwise.

The Committee seeks clarification on whether regulations could be made to vary the provisions in the Bill to enable a director or executive to participate in the shareholder vote to "remedy a perceived defect in their treatment".

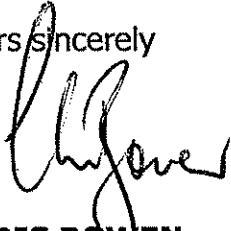
The purpose of the regulation making power in subsection 200E(2C) is not to remedy a perceived defect in the treatment of directors and executives and their ability to participate in the shareholder vote. Rather, the purpose of the regulation making power is to provide flexibility in cases that could legitimately warrant the participation of directors and executives in the shareholder vote.

As I noted in my previous response, one such instance has already been identified in subsection 200E(2B) of the Bill, where a director or executive is casting a vote as a proxy on behalf of another person who is entitled to vote.

The regulation making power will enable other such instances to be addressed, which may not have been apparent at the time of drafting. As such, I consider the regulation making power to be an effective mechanism to address any future instances that may arise where it would be appropriate for directors and executives to participate in the shareholder vote. I expect that a significant and genuine need for further exceptions would need to be identified before any such exception would be provided for in the regulations.

I trust this information will be of assistance to you.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Bowen". The signature is written in a cursive, flowing style with a large initial "C".

**CHRIS BOWEN**



**THE HON BRENDAN O'CONNOR MP**  
Minister for Home Affairs

09/16142, MC09/15382

RECEIVED

16 SEP 2009

Senate Standing C'ttee  
for the Scrutiny of Bills

Ms Julie Dennett  
Secretary  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dennett

Thank you for your letter of 10 September 2009 seeking my response to matters raised by the Senate Scrutiny of Bills Committee in relation to the Crimes Amendment (Working With Children-Criminal History) Bill 2009.

My response to the issues raised by the Committee is set out below.

*Breadth of the Bill's application*

In seeking to establish whether the Bill trespasses unduly on personal rights and liberties through disclosure of criminal history information, the Committee sought advice and clarification about the breadth of the Bill's application.

In particular, the Committee sought advice about whether the Bill covers all of a person's criminal history information and, if so, why this is considered necessary and appropriate in the context of the stated purpose of the Bill.

I confirm that the Bill will allow the disclosure and use of a person's full criminal history, including spent, pardoned and quashed convictions, and that it is not limited to information pertaining to offences such as sexual assault or violence. This is consistent with the agreement by the Council of Australian Governments on 29 November 2008.

In assessing whether he or she poses a risk to children if employed in child related work, it is appropriate to consider a person's full criminal history for several reasons. First, the nature and circumstances of the offence of which a person is convicted may be relevant in assessing the person's suitability to work with children even if it is not a violent or sexual offence. For example, convictions for a range of offences where the victim is a child may be relevant. Other types of offences such as drug trafficking offences or offences of menacing or harassing another person may also be relevant. Restricting the exchange of criminal history information to certain categories of offences would create a risk that relevant information could not be

disclosed to a screening unit and would undermine the comprehensiveness of the screening process.

Second, the jurisdictional authorised screening units that assess a person's suitability to work with children are required to have risk assessment frameworks and appropriately skilled staff to assess risks to children's safety and to comply with the principles of natural justice. This will ensure that, when a screening unit receives a person's full criminal history information, it undertakes a rigorous process to determine the relevance of a particular conviction to a person's suitability to work with children and provides the individual concerned an opportunity to challenge that determination.

The Attorney-General's Department has been advised by all current jurisdictional screening units that they have appeals processes in place for decisions made in relation to working with children checks. Each jurisdictional authorised screening unit is also required to undertake the following activities as part of their standard process, when a decision to issue a negative notice to an application is made:

- disclosure of the criminal history information to the individual
- allowing the individual a reasonable opportunity to be heard, and
- consideration of the individual's response prior to the finalisation of the screening decision.

*Reasons for the application of the amendments to offences that have been 'quashed'*

The Committee sought advice about why the amendments allow the disclosure of criminal history information pertaining to offences that have been 'quashed'.

The fact that a person's conviction for an offence has been quashed does not necessarily make the facts and circumstances of that offence irrelevant to an assessment of the risk that the person poses to children if employed in child related work. A person's conviction may be quashed for reasons that do not negate the credibility of evidence on which the conviction was based.

It is appropriate that screening units be able to have access to information on quashed convictions so they can assess the weight that can reasonably be placed on that information in all the circumstances. As set out above, screening units have rigorous risk assessment frameworks, skilled staff and natural justice processes in place to ensure a careful and comprehensive approach.

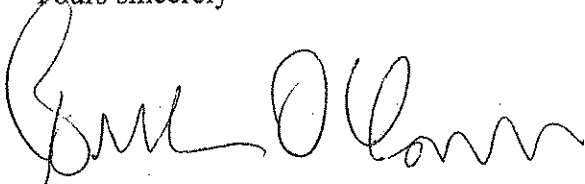
In many cases, a person whose conviction has been quashed may be re-tried for the same offence. For example, the Commonwealth Director of Public Prosecutions reported that, of the 22 convicted defendants who had some or all of the charges against them quashed on appeal in 2008-09, further prosecution action is underway in relation to the quashed charges in eight of those cases. Accordingly, these defendants may ultimately be reconvicted. In such cases, the comprehensiveness of the screening process could be undermined if screening units were prevented from obtaining access to information about the quashed conviction prior to any reconviction.

*Whether the exchange of information is mandatory*

The Committee also sought advice about whether the exchange of information is mandatory or would simply allow relevant information to be exchanged in particular circumstances. The Bill removes the legislative barriers to the exchange of criminal history information, in accordance with the relevant Council of Australian Governments (COAG) agreement of 29 November 2009. The Bill does not require the exchange of this information; it simply allows it to be exchanged.

The officer responsible for this matter in the Attorney-General's Department is Sarah Chidgey who can be contacted on (02) 6141 2800.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brendan O'Connor', written in a cursive style.

**Brendan O'Connor**



RECEIVED

25 SEP 2009

Senate Standing Committee  
for the Scrutiny of Bills

**THE HON JULIA GILLARD MP**  
**DEPUTY PRIME MINISTER**

Parliament House  
Canberra ACT 2600

23 SEP 2009

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Coonan

Thank you for Ms Dennett's letter of 10 September 2009 regarding the Senate Standing Committee for the Scrutiny of Bills' comments in *Alert Digest No. 11 of 2009* concerning the Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009 (ESOS Bill).

I note that the Committee has raised concerns about proposed new section 9B of the *Education Services for Overseas Students Act 2000* (ESOS Act), to be inserted by item 11 of Schedule 1. In particular, the Committee is concerned that proposed new paragraph 9B(1)(b), which specifies that paragraphs 9(2)(ca) and 9A(2)(e) do not apply to providers 'entitled to receive funds under a law of the Commonwealth for recurrent expenditure for the provision of education or training, other than one excluded by the regulations from the scope of this paragraph', may be considered to be an inappropriate delegation of legislative powers. The Committee is concerned that this 'exclusion' is an inappropriate delegation of legislative powers.

Subsection 9B(1) is not a new provision. Instead, it simply replicates current subsection 9(5) (which is to be repealed by virtue of item 8 of Schedule 1 of the ESOS Bill) and applies it to both the registration of new providers under section 9 and the re-registration of providers under proposed section 9A.

The international education industry is undergoing extraordinary growth in a rapidly changing environment. Given this, and in order to manage the integrity of registration processes, it is important to maintain the flexibility for the regulations to continue to be able to exclude providers in receipt of Commonwealth recurrent expenditure funding for education and training from the fit and proper exemption. I note that no such regulations have been made to date.

In addition, any regulations to be made under proposed paragraph 9B(1)(b) would be subject to Parliamentary scrutiny and potential disallowance (during the disallowance period) in both Houses of Parliament.

I therefore do not consider there to be an inappropriate delegation of regulation-making powers.

I also note that the Committee has raised concerns about item 31 of Schedule 1, which applies section 9 (as amended) to 'pending matters'. The Committee queries whether this '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'.

Once amended, section 9 will, amongst other things, require state and territory designated authorities to provide the Secretary with a certificate stating that providers they recommend for registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) have met two new quality criteria to be introduced by the ESOS Bill. These new criteria are that a provider must have the principal purpose of providing education and the clearly demonstrated capacity to provide education of a satisfactory standard. The criteria will apply to both new applicants for registration on CRICOS (under section 9 as amended) and also to providers to be re-registered by 31 December 2010 (under proposed new section 9A).

In these circumstances, I consider that it makes sense for section 9 as amended to also apply to 'pending matters'. If this does not happen, and a pending new provider is registered before the ESOS Bill measures take effect, the provider would still need to go through the re-registration process whereby the new criteria would be applied.

I trust this information enables the Committee to finalise its consideration of the ESOS Bill.

Yours sincerely



**Julia Gillard**  
**Minister for Education**





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22 OCT 2009

Senate Standing Committee  
for the Scrutiny of Bills

**THE HON JULIA GILLARD MP**  
**DEPUTY PRIME MINISTER**

Parliament House  
Canberra ACT 2600

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

19 OCT 2009

Dear Senator Coonan

Thank you for Ms Dennett's letter of 17 September 2009 regarding the Senate Standing Committee for the Scrutiny of Bills' comments in *Alert Digest No. 12 of 2009* concerning the Higher Education Support Amendment (VET FEE-HELP and Tertiary Admission Centres) Bill 2009 (the Bill).

I note that the Committee has raised concerns about proposed new subparagraphs 78(1)(d)(iii) and (iv) of Schedule 1A to the *Higher Education Support Act 2003* (the Act) and particularly the imposition of absolute liability in these proposed new subsections. The Committee has asked whether the explanatory memorandum to the Bill might be amended to include reasons and justification for the imposition of absolute liability in these proposed new subsections.

Clause 78 of Schedule 1A of the Act provides that a person commits an offence punishable by up to 2 years imprisonment if:

- o the person causes unauthorised access to or modification of VET personal information that is held in a computer to which access is restricted by an access control system; and
- o the person intends to cause the access or modification; and
- o the person knows that the access or modification is unauthorised; and
- o the VET personal information is held in a computer of a VET provider or held on behalf of a VET provider.

All of the above elements must be met in order for a person to be found guilty of an offence. Subclause 78(2) provides that absolute liability applies to the element of the offence which requires the VET information be held in a computer of a VET provider or on behalf of a VET provider.

The proposed amendments to this clause contained in the Bill will extend the offence contained in clause 78 of Schedule 1A to VET personal information which is held in the computer of a Tertiary Admission Centre (TAC) or held on behalf of a TAC. As the Committee has identified, this includes extending absolute liability to the element of the offence which requires the VET information be held in a computer of a TAC or on behalf of a TAC.

The effect of applying absolute liability to this element of the offence is that it will not be necessary to prove that the person was aware that the VET personal information that they accessed was held on the computer of a TAC or was held on behalf of a TAC. Further, as the Committee has noted, the defence of mistake of fact will not be available against this element of the offence.

I consider the use of absolute liability in these circumstances is justified when it is considered in context with the other elements of the offence. Although absolute liability removes the requirement to establish fault with regards to one element of the offence, it will still be necessary to prove fault in the other elements of the offence. An offence under clause 78 can only arise where the person *intends* to cause access to, or modification of, VET personal information and the person *knows* that the access or modification is unauthorised.

Given that elements of the offence already clearly require the establishment of fault and that the person is aware of the nature of the information they accessed or modified, having to prove that a person knows that the information they accessed was held in the computer of a TAC or on behalf of a TAC would be an unnecessary burden which may undermine the offence. Proving that the person was aware the information they accessed or modified was held on the computer of a TAC or on behalf of a TAC is likely to be difficult and, were absolute liability not attached to this element of the offence, a person may be able to escape liability for an offence under clause 78 of Schedule 1A through claiming that they were unaware that the information they accessed was held on a computer of a TAC or on behalf of a TAC. The purpose of attaching absolute liability to this element of the offence is to prevent a person from being able to escape liability for the offence by making such a claim despite the existence of all of the other elements of the offence.

I draw to the Committee's attention that this proposed provision is consistent with other provisions contained in the Act concerning unauthorised access to, or modification of, VET personal information being held by VET providers and with information being held by Open Universities Australia.

I am pleased to inform you that I will be amending the explanatory memorandum to the Bill to include the reasons and justification for the proposed imposition of absolute liability as explained above.

I trust this information is of assistance to the Committee.

Yours sincerely



**Julia Gillard**  
**Minister for Education**



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27 OCT 2009

**Senator Chris Evans**  
Leader of the Government in the Senate Senate Standing Order  
for the Scrutiny of Bills  
Minister for Immigration and Citizenship

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator

I refer to the recent consideration by the Standing Committee for the Scrutiny of Bills of the Migration Amendment (Complementary Protection) Bill 2009 (the "Bill") and the Committee's invitation to comment on an issue raised by the Committee (see *Alert Digest No. 12 of 2009*, 16 September 2009).

As the Committee is aware, proposed subsection 36(2A) to be inserted into the *Migration Act 1958* ("the Act") (item 13 of Schedule 1 of the Bill) begins with the words "The proposed matters are". The Committee seeks my views on this drafting matter. The Alert Digest states that this functional statement is inelegant and provides little context or description.

If the Bill were to pass as proposed, I am of the view that taking section 36 of the Act in its entirety, the reader would grasp the context of proposed subsection 36(2A), despite it beginning with the opening words "The proposed matters are". I note that this language links back to proposed paragraph 36(2)(aa) (to be inserted by item 11 of the Bill) that ends with "...because of a matter mentioned in subsection (2A)".

Thank you for seeking my views on this matter.

Yours sincerely

CHRIS EVANS

26/10/09



RECEIVED  
14 OCT 2009  
Senate Standing Committee  
for the Scrutiny of Bills

**SENATOR THE HON MARK ARBIB**  
Minister for Employment Participation  
Minister Assisting the Prime Minister for Government Service Delivery

08 OCT 2009

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Coonan

I am writing in response to the Committee's letter, sent by Ms Julie Dennett on 17 September 2009, regarding the Senate Standing Committee for the Scrutiny of Bills' comments in *Alert Digest* No. 12 of 2009 concerning the Social Security and other Legislation Amendment (Income Support for Students) Bill 2009.

The Committee has expressed concern that Item 4 in the table relating to subclause 2(1) provides that Divisions 3 and 4 of Part 2 of Schedule 1 is legislated to commence on 1 July 2012. This refers to the commencement date for lifting the income free threshold for the personal income test for students from \$236 per fortnight to \$400 per fortnight. The proposed commencement date is scheduled for 1 July 2012.

Ms Dennett's letter suggests that the delay in the date of commencement for this element of the package may be in breach of principle 1(a)(i) of the committee's terms of reference in that it may trespass unduly on personal rights and liberties. It is suggested that this may arise due to the fact that the proposed change to the personal income threshold will start over six months from the enactment of the Bill.

The Committee requests an explanation for this delay and seeks an explanation be provided in the explanatory memorandum to the bill.

The student income support package, announced on 12 May 2009 in the context of the 2009-10 Budget, provides the Australian Government's response to the recommendations of the Bradley Review of Australian Higher Education concerning student income support. The package phases the implementation of various components to maintain cost neutrality over the forward years.

The key change to student income support introduced by the package has been the commitment to expand access to student income support payments by providing a more generous parental income test. Offsetting this cost has been a tightening of the workforce participation criterion. These twin actions form the major part of rebalancing student income support payments to ensure that family circumstances assessed under the parental income tests is the primary means for accessing payments.

This more generous parental income test will allow around 68 000 more young people to qualify as dependents for the student income support payments. Within the overall package, to achieve cost neutrality in the forward years, the package, as announced in May 2009, envisaged an implementation date for changes to the personal income test to commence on 1 January 2011.

In response to concerns from current 'gap year' takers and their parents about changes to the workforce participation criterion, the Government held meetings with students from across Australia. Following discussions at the Student Roundtable in Canberra during August 2009, the Government announced transitional arrangements to the proposed changes to student income support announced in the 2009–10 Budget. Students who completed Year 12 in 2008, have taken a gap year in 2009 and must move more than 90 minutes from home to attend university in 2010 to undertake their chosen course will be entitled to claim independent status for Youth Allowance under the existing workforce participation criterion until 30 June 2010.

In the current economic climate, the Government's proposed package of student income support reforms is designed to be budget-neutral. To meet the additional costs of the transitional arrangements, the Government proposes now to postpone the implementation of the changes to the personal income test threshold from 1 January 2011 to 1 July 2012. The later date is reflected in the legislation introduced into the House of Representatives on 10 September 2009.

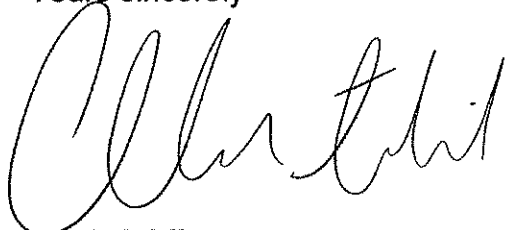
While the implementation date for the personal income test will be delayed beyond 6 months from the expected date for Royal Assent, this has been necessary in order to maintain the overall balance of the package in a fiscally responsible manner. The Bill enfranchises all aspects of the reform package and ensures that the package as a whole will be implemented as a balanced response to the Bradley Review's recommendations.

I would note that no student will be made worse off as a result of the delay in implementing the proposed changes to the personal income test threshold. The threshold for the personal income test has not been increased since 1993. Under this package of reforms, following implementation of this component, the personal income threshold for students will increase annually in line with the Consumer Price Index.

I am pleased to inform you that I will be amending the explanatory memorandum to the Bill to include the reasons for the proposed delay in the commencement date of changes to the personal income test thresholds as explained above.

I trust this information is of assistance to the Committee.

Yours sincerely



**Mark Arbib**  
**Acting Minister for Education**

