SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2014

18 June 2014

ISSN 0729-6258

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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

SIXTH REPORT OF 2014

The committee presents its *Sixth Report of 2014* to the Senate.

The committee draws the attention of the Senate to responsiveness to requests for information and 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:

Building and Construction Industry (Improving Productivity) Bill 2013

Introduced into the House of Representatives on 14 November 2013
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 9 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2014. The committee requested further advice and the Minister responded in a letter dated 13 May 2014. A copy of the letter is attached to this report.

Alert Digest No. 9 of 2013 - extract

Background

This bill seeks to:

- replace the Office of the Fair Work Building Industry Inspectorate by re-establishing the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments dealing with:
  - self-incrimination;
  - protection of liability against officials;
  - admissible records and documents, protection and disclosure of information; and
  - powers of the Commissioner in certain proceedings, and jurisdiction of courts.

Alert Digest No. 9 of 2013 - extract

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant
Clause 72

Clause 72 confers powers on authorised officers to enter premises for compliance purposes. Although there is a provision which provides that an officer must not enter a part of premises used for residential purposes unless the officer reasonably believes that the work is being performed on that part of the premises, the powers clearly cover both business and residential premises. Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at page 76) states that:

> Legislation should only authorise entry to premises by consent or under a warrant. Any departure from this general rule requires compelling justification.

Although Commonwealth legislation does in some cases depart from this principle, the committee's view is that such departures should be few and thoroughly justified. The *Guide* (at pages 85 and 86) sets out a number of categories of circumstances in which entry without consent or a warrant has been authorised in Commonwealth legislation. One such category relates to 'licensed premises' and this may be thought to be relevant in this context. However, it is not clear that this category of exception is appropriately applied and, in any event, the *Guide* clearly indicates that it is relevant only for entry into non-residential premises.

The committee has accepted that 'situations of emergency, serious danger to public health, or where national security is involved' (Report 4/2000 *Inquiry into Entry and Search Provisions in Commonwealth Legislation*, paras 1.36 and 1.44) may justify the authorisation of entry without consent or warrant. Whether or not this power is justified on this basis would, however, require strong justification.

Further, even if such justification were provided, the committee may see fit to ask whether there has been consideration of the appropriateness of further accountability measures. For example, the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given that the persons who exercise them need not be trained law enforcement officers, is not addressed in the explanatory memorandum.

The only justification for the approach is contained within the statement of compatibility, where the limitation of the powers to instances in which inspectors hold a specified reasonable belief is given emphasis (at page 61). It is also argued that the powers are modelled on the powers granted to Fair Work Inspectors under the *Fair Work Act*, though the 'modifications to reflect additional powers that were granted to inspectors under the BCII Act' are left unelaborated.

It appears that the explanatory materials do not contain a compelling justification for departure from the general principle stated in the *Guide* and supported by the committee that authorised entry to premises be founded upon consent or a warrant. **The committee therefore seeks the Minister's detailed justification of the need for this approach in light of the principles stated in the *Guide* and with reference to the fact that the powers do authorise entry into residential premises**. **The committee also seeks the Minister's advice as to whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given the persons who exercise them need not be trained law enforcement officers.**

> *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

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant
Clause 72

The Committee has sought a justification of the need for the approach taken to the power of authorised inspectors to enter premises under the Bill, particularly whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements and requirements that guidelines for the implementation of these powers be developed.

The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the *Fair Work Act 2009*, with some minor amendments to reflect the approach taken in the *Building and Construction Industry Improvement Act 2005*. The approach in the Bill is accordingly consistent with a long history of inspector powers in industrial legislation. Similar powers are found in other industrial legislation such as the *Work Health and Safety Act 2011*.

The *Guide to Framing Commonwealth Offences* quotes the Committee as stating that entry without consent or judicial warrant should only be allowed in a very limited range of circumstances. It is the Government's view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, this would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore, resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

In relation to senior executive authorisation for the exercise of the powers, such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. The unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

Finally, the Committee has sought views on whether consideration has been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of employment of Fair Work Building Industry Inspectors. As such, ABC inspectors will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such guidelines. Where the ABC Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The ABC Commissioner will also be able to adopt administrative guidelines to inform ABC inspectors on the use of their powers and exercise of their functions. Any such document would be designed to provide practical, up-to-date advice to ABC inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

Committee's First Response

The committee thanks the Minister for this response. The committee, however, retains its concern about these entry powers. The Minister emphasises the importance of the efficient and effective resolution of investigations and claims to justify entry without consent or warrant. It is not clear to the committee why these concerns are of greater relevance in the industrial relations context than other regulatory contexts in which these powers are not available. As such, the committee is not persuaded that a compelling justification has been established for the proposed powers. **In light of the committee's view, the committee seeks the Minister's further advice as to whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of these powers.**

Further response from the Minister - extract

Thank you for the Senate Scrutiny of Bills Committee's letter of 27 March 2014 seeking my advice about an issue raised in the Committee's *Fourth Report of 2014* in relation to the Building and Construction Industry (Improving Productivity) Bill 2013. The Committee has asked whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of the power in clause 72 for authorised officers to enter premises. I apologise for the delay in responding.

The powers of inspectors to enter premises in the Building and Construction Industry (Improving Productivity) Bill 2013 are primarily based on the provisions of the *Fair Work Act 2009* and the *Building and Construction Industry Improvement Act 2005* (repealed). The powers are consistent with a long history of inspector powers in industrial legislation and ensure that inspectors are only able to exercise entry powers for proper purposes without the use of force.

Currently, Fair Work Building Industry Inspectors have the powers of Fair Work Inspectors under the *Fair Work Act 2009* and there is no legislative requirement that the exercise of these powers be reported to Parliament. Nor was there a requirement to report to Parliament on the exercise of entry powers by inspectors appointed under the *Building and Construction Industry Improvement Act 2005* (repealed).

It is also the case that the Fair Work Building and Construction's *Annual Report* for the 2012-13 financial year includes general information about the number and type of matters that were investigated during that period. Clause 20 of the Building and Construction Industry (Improving Productivity) Bill 2013 will require annual reports of the Australian

Building and Construction Commission to also include this high level information about its investigatory activities.

The Coalition Government does not consider there is sufficient justification for imposing higher reporting requirements on the new Australian Building and Construction Commissioner.

Committee's Further Response

The committee thanks the Minister for his response and notes the advice that the provisions are primarily based on existing and previous provisions. However, this does not, of itself, address the committee's scrutiny concerns. The committee does not consider that the requirements of investigative efficiency or the resource implications of obtaining warrants provide sufficiently compelling justification for the use of such coercive powers. **The committee draws its comments to the attention of Senators and leaves the appropriateness of the proposed approach to the consideration of the Senate as a whole.**

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Introduced into the Senate 27 March 2014
Portfolio: Defence

This bill is substantially similar to a bill introduced in the previous Parliament. The committee commented on the bill in its *Alert Digest No. 6 of 2013.*

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 17 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to establish a framework that provides all non-Defence users within the Woomera Prohibited Area, and industry more generally, with a level of certainty over Defence activity in the area and allows users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill gives effect to the recommendations in the Final Report of the Review of the Woomera Prohibited Area, released on 3 May 2011.

Retrospective validation of action
Schedule 1, item 4, proposed new section 121A

This proposed new section provides that any declaration or past act taken under regulation 35 of the *Defence Force Regulations 1952* in relation to the Woomera Prohibited Area (WPA) is taken to 'always have been valid' (explanatory memorandum at p. 11). Pursuant to regulation 35, the Minister may declare a place to be a prohibited area and then authorise access to such a place subject to conditions.

The explanatory memorandum describes this as a 'technical provision' which has been inserted 'to avoid any doubt on the past applicability of the Defence Force Regulations to Woomera Prohibited Area which may arise as a result of the establishment of the new access regime by the Bill'.

The retrospective validation of regulations and administrative actions means that affected persons are unable to seek review of decisions that, at the time they were taken, lacked a valid source of legal authority. This may have the consequence that personal rights are adversely affected. However, the intention of this provision appears to be to make it certain that some existing users of the WPA (‘including pastoralists, Indigenous groups, the Tarcoola–Darwin railway owner and operators and four existing mining operations’) will continue to operate under their current access arrangements governed by the *Defence Force Regulations 1952*. The committee notes that the explanatory memorandum (at p. 3) states that the access regime established by the bill ‘will apply to new users of the WPA only’. However, noting the possibility that retrospective validation of administrative decisions may adversely affect personal rights and interests, **the committee seeks the Minister’s more detailed advice as to the justification for the proposed approach, including whether it is possible that the approach may adversely affect personal rights or interests.**

> *Pending the Minister’s reply, the committee draws Senators’ attention to this 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

I have considered the committee's request for more detailed advice as to the justification for the validation of the Woomera Prohibited Area (WPA) and actions taken by the Commonwealth as a result of the declaration. Accordingly, I confirm the details in the explanatory memorandum that this is a 'technical provision' which has been inserted to avoid any doubt on the past applicability of the *Defence Force Regulations 1952* to the WPA which may arise as a result of the establishment of the new access regime by the Bill.

The inclusion in the Bill of the proposed s 121A is designed to ensure that there can be no doubt about the validity of the 1989 declaration of the WPA.

The purpose of s 121A is to address technical arguments that could be raised in relation to the 1989 declaration and some acts taken pursuant to it. The only perceived basis for this is that the *Defence Force Regulations 1952* did not fully provide for just terms compensation for any acquisitions of property consequent on that declaration or those acts for the purposes of s 51(xxxi) of the Constitution (although the Department of Defence is not aware of any particular cases in which this may have occurred). Section 121A rectifies any constitutional deficiencies by providing just terms compensation in accordance with s 51(xxxi).

There are no *pending* or *completed* proceedings that would be affected by the proposed s 121A. Nor is Defence aware of any circumstances that would give rise to *new* proceedings in relation to the pe1iod covered by the proposed s 121A.

Any persons who, since 1989, have suffered loss or damage as a result of the declaration or anything done under it have been either compensated in accordance with reg 36 of the *Defence Force Regulations 1952* or have a right to compensation under the proposed s.121A. This provision ensures that rights will be protected against any possible, though remote, effect on personal rights arising through loss or damage.

Committee Response

The committee thanks the Minister for his detailed response and notes that it addresses the committee's concerns.

Migration Legislation Amendment (No. 1) Bill 2014

Introduced into the House of Representatives 27 March 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 3 June 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

Background

This bill seeks to amend the *Migration Act 1958* to:

- clarify the limitations or prohibitions on valid applications by persons who have been refused a visa or who held a visa that was cancelled;
- ensure that a bridging visa application is not an impediment to removal;
- apply debt recovery provisions to all convicted people smugglers and illegal foreign fishers;
- clarify the obligation of the Migration Review Tribunal and the Refugee Review Tribunal to provide documents to an authorised recipient;
- clarify the role of an authorised recipient and the extent of the obligation to notify an authorised recipient of direct communications made with the person who authorised them; and
- clarify the procedural fairness provisions relating to giving of certain information to a visa applicant; and remove redundant references.

The bill also seeks to amend the *Australian Citizenship Act 2007* and *Migration Act 1958* to provide access to, and use of, material and information obtained under certain search warrants.

Undue trespass on personal rights and liberties
Schedule 3, item 4

The amendments proposed in Schedule 3 expand the circumstances which lead to a person being liable to pay the Commonwealth for costs associated with their immigration detention and removal. Under the existing provision, detention and removal debts cannot be recovered from illegal foreign fishers and people smugglers who are not initially detained under subsection 250(2) of the *Migration Act* 1958. Under the proposed approach, this requirement is removed.

Subitem 4(1) provides that the amendments apply to a conviction for an offence that occurs on or after the day the amendments commence. However, subitem 4(2) provides that the amendments apply to costs incurred before that day. Although it may be argued that this application provision is not technically retrospective—as the new provision prescribes a rule for the future based on antecedent facts (i.e. costs being incurred for detention)—there is a question of fairness that arises to the extent affected persons could not have been in a position to determine the legal consequences of costs being incurred due to them being placed in immigration detention. Rendering persons liable to pay costs for their detention and removal in circumstances where they have been convicted of an offence may, in practical result, be considered to increase the penalty retrospectively in circumstances where some of those costs have already been incurred. **The committee therefore seeks the Minister's further advice as to the justification for the proposed approach, particularly in relation to the rationale for applying the new approach to costs incurred prior to the day the amendments commence**.

> *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

Undue trespass on personal rights and liberties
The committee therefore seeks the Minister's further advice as to the justification for the proposed approach, particularly in relation to the rationale for applying the new approach to costs incurred prior to the day the amendments commence.

Schedule 3 of the Bill seeks to provide that all convicted people smugglers and people who have been convicted of an offence relating to the control of fishing (illegal foreign fishers), regardless of whether they are in immigration detention when the conviction occurred and regardless of whether or not they were detained because of subsection 250(2) of the *Migration Act 1958* (the Act), are liable to the Commonwealth for the costs associated with their immigration detention and removal.

Under existing legislative arrangements, convicted people smugglers and illegal foreign fishers who are detained because of section 250 of the Act, remain liable to the Commonwealth for their detention and removal costs. The Act also contains a number of provisions that facilitate the recovery of these debts. However, under current provisions of the Act, a person is not liable for costs arising from their immigration detention and removal if they were not initially detained because of section 250, or because they were not in immigration detention at the time of their conviction, or because they have since been granted a visa (for example, a criminal justice stay visa while in prison). Accordingly, the debt liability provisions cannot be applied to all people smugglers and illegal foreign fishers, regardless of how or if they were detained and whether they have been granted a visa.

This inability to apply the debt liability provisions of the Act consistently to all convicted people smugglers and illegal foreign fishers, negates any financial disincentive to these persons to participate in people smuggling or illegal foreign fishing.

Subitem 4(2) of Schedule 3 of the Bill provides that the amendments made by Schedule 3 also apply to costs incurred before the day this item commences in relation to a conviction mentioned in Subitem 4(1) of the Bill.

The objective of this amendment is to strengthen the debt recovery provisions within the Act to ensure these provisions can be consistently applied to all convicted people smugglers and people convicted of an offence against a law relating to the control of fishing, irrespective of the initial power used to detain them. The proposed amendments clearly link the liability of detention debt to the fact of conviction.

The amendment will not only enable consistent application of this power and reduce costs to the Australian community, but also serve as a powerful deterrent to immediately prevent offenders from benefitting from their activities.

Thank you for considering this advice.

Committee Response

The committee thanks the Minister for this response. The committee is especially interested in the rationale for applying the new provisions to costs incurred prior to the day the amendments commence. While the committee notes the Minister's advice that this is 'to strengthen the debt recovery provisions to ensure these provisions can be consistently applied' and is linked to a requirement for a conviction, the committee remains particularly concerned that the practical effect may be considered to increase the applicable penalty retrospectively. **The committee draws its concerns to the attention of Senators and leaves the appropriateness of the proposed approach to the consideration of the Senate as a whole.**

Student Identifiers Bill 2014

Introduced into the House of Representatives 27 March 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2014*. The Minister responded to the committee's comments in a letter dated 28 May 2014. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2014 - extract

This bill is substantially similar to a bill introduced in the previous Parliament. The committee commented on the bill in its *Alert Digest No. 5 of 2013.*

Background

This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015 by:

- providing for how the student identifier may be assigned, collected, used and disclosed;
- providing for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken;
- establishing the Student Identifiers Registrar to administer the scheme; and
- providing for the functions, powers, appointment and terms and conditions of the registrar.

Undue trespass on personal rights and liberties—privacy
Various provisions

As recognised in the statement of compatibility, the bill may impact on privacy interests of persons in a number of ways. **In general, the committee leaves the question of whether limitations on privacy are reasonable for achieving the bill's policy objectives to the Senate as a whole. However, the committee is interested to better understand whether further protections of individual privacy have been considered or might be considered in relation to clauses 18 and 25 of the bill (see below).**

Delegation of legislative power
Parliamentary scrutiny
Clauses 18 and 25

Clauses 18 and 25 enable the use of disclosure information (that will include personal information) if the use of the information is for the purposes of research and, among other things, that the disclosure 'meets the requirements specified by the Ministerial Council'.

When the committee considered the predecessor to this bill, it expressed concern that the protocols relied upon to adequately protect privacy interests would not be subject to parliamentary scrutiny. The committee requested a more detailed explanation from the Minister as to why the approach was necessary and considered appropriate (see *Alert Digest No. 5 of 2013*, pp 88–89).

The explanatory memorandum accompanying this bill contains a fuller explanation of the Ministerial Council requirements and indicates that these requirements will ensure the integrity of the scheme and provide a further layer of protection of individual privacy. The statement of compatibility (at p. 7) states that research related use and disclosures will 'ultimately be for the benefit of students and the wider community'. More particularly, it is argued in the explanatory memorandum (at pp 45–46) that:

> Strict protocols governing research will be developed in conjunction with all states and territories through the Ministerial Council, to ensure that the integrity of the scheme is maintained. It is expected that the protocols could require research proposals to demonstrate, for example, that the information is reasonably necessary for the proposed research, or the compilation or analysis of statistics, and that these are is in the public interest; provide an assurance that, if the information could reasonably be expected to identify individuals, the information will not be published in generally available publications. The protocols are also expected to provide for an appropriate process to examine and approve disclosures for research purposes on the basis that the public interest in the research substantially outweighs the public interest in the protection of privacy.
>
> The strict protocols governing disclosure of student identifiers for research purposes reflect an appropriate balance between providing a high level of privacy protection for individuals regarding the collection, use and disclosure of student identifiers, and allowing sufficient flexibility to accommodate the wide range of legitimate requests for access to student identifiers by researchers

It remains unclear why protocols designed to protect privacy in relation to research related use and disclosure could not be included in the primary legislation. Further, although it may be accepted that these protocols may have these beneficial outcomes, it is a matter of concern that they are not subject to any form of parliamentary accountability as they are not described as legislative instruments.

The committee thanks the Assistant Minister for providing further information in relation to the Ministerial Council requirements in the explanatory memorandum,

however the committee remains concerned that the protocols may not adequately protect privacy interests given that they will not be subject to parliamentary scrutiny. The committee therefore requests a more detailed explanation from the Assistant Minister as to why this approach is considered appropriate. It is noted that if the protocols cannot be subjected to parliamentary scrutiny that consideration could be given to whether the bill could at least require the involvement of the Information Commissioner in the development of the protocols or review of the protocols. (Under clause 24 of the bill the Information Commissioner is given additional functions.)

> *Pending the Assistant 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 and they may also 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.*

Minister's response - extract

The matter about which the Committee is seeking a more detailed explanation relates to clauses 18 and 25 of the Bill that enable the use or disclosure of the student identifier and personal information for research related purposes, where the use or disclosure meets the requirements specified by the Ministerial Council. The Committee has noted the Explanatory Memorandum (EM) accompanying the Bill, which states that strict protocols governing research will be developed and sets out the requirements that research proposals could be expected to meet under those protocols. However, the Committee remains concerned that the protocols may not adequately protect privacy interest as they will not be subject to parliamentary scrutiny. The Committee goes on to suggest that the Bill should require the involvement of the Information Commissioner in the development or review of the protocols.

As the Committee may be aware, the Office of the Australian Information Commissioner (OAIC) has welcomed the approach to privacy protection adopted in the Bill, and noted that its provisions reflect the security and access principles in the Privacy Act. I can also assure the Committee that as clause 24 of the Bill confers additional functions on the Information Commissioner, the development of the protocols governing the release of information for research purposes will be undertaken with the advice of, and in consultation with, the Information Commissioner. The Committee may be interested to learn that my Department and the Office of the Australian Information Commissioner have signed a Memorandum of Understanding specifically to ensure that the design and implementation of the student identifiers scheme takes into account privacy implications and to support the independent regulatory privacy oversight of the scheme.

I would also like to point out that the student identifier protections in the Bill will operate in conjunction with, and are not intended to displace, existing privacy regimes.

In summary, the Bill provides general privacy protections as well as requiring the research protocols to be agreed jointly by all state and territory ministers and the Commonwealth minister the protocols, as noted in the EM to the Bill, will be based on a rigorous public interest test and will be developed with the involvement of the Australian Information Commissioner, who will also be responsible for investigating any breaches of the protocols that interfere with privacy. Therefore, while there is no direct parliamentary scrutiny of the research protocols, I submit that the arrangements outlined above provide appropriate safeguards for the privacy interests of individuals.

Committee Response

The committee thanks the Minister for this detailed response and notes the advice that the Office of the Australian Information Commissioner (OAIC) has welcomed the approach to privacy protection adopted in the bill. The committee also notes that the department and the OAIC have signed a MOU and, as the bill confers additional functions on the Information Commissioner, the development of the protocols governing the release of information for research purposes is intended to be undertaken with the advice of, and in consultation with, the Information Commissioner.

The committee is aware of the government's Budget decision to disband the OAIC by 1 January 2015. Given the department's close engagement with the OAIC, and the fact that the bill confers additional functions on the Information Commissioner, **the committee requests advice as to the impact of the disbandment of the OAIC on the operation of the bill and, in particular, the consideration of privacy implications in the design, implementation and oversight of the student identifiers scheme.**

Senator Helen Polley
Chair

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

13 MAY 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen,

Thank you for the Senate Scrutiny of Bills Committee's letter of 27 March 2014 seeking my advice about an issue raised in the Committee's *Fourth Report of 2014* in relation to the Building and Construction Industry (Improving Productivity) Bill 2013. The Committee has asked whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of the power in clause 72 for authorised officers to enter premises. I apologise for the delay in responding.

The powers of inspectors to enter premises in the Building and Construction Industry (Improving Productivity) Bill 2013 are primarily based on the provisions of the *Fair Work Act 2009* and the *Building and Construction Industry Improvement Act 2005* (repealed). The powers are consistent with a long history of inspector powers in industrial legislation and ensure that inspectors are only able to exercise entry powers for proper purposes without the use of force.

Currently, Fair Work Building Industry Inspectors have the powers of Fair Work Inspectors under the *Fair Work Act 2009* and there is no legislative requirement that the exercise of these powers be reported to Parliament. Nor was there a requirement to report to Parliament on the exercise of entry powers by inspectors appointed under the *Building and Construction Industry Improvement Act 2005* (repealed).

It is also the case that the Fair Work Building and Construction's *Annual Report* for the 2012–13 financial year includes general information about the number and type of matters that were investigated during that period. Clause 20 of the Building and Construction Industry (Improving Productivity) Bill 2013 will require annual reports of the Australian Building and Construction Commission to also include this high level information about its investigatory activities.

The Coalition Government does not consider there is sufficient justification for imposing higher reporting requirements on the new Australian Building and Construction Commissioner.

Should the Senate Scrutiny of Bills Committee require further information, please contact my adviser Mr Shamim Saeedi on (02) 6277 7320 or at shamim.saeedi@employment.gov.au.

Thank you for raising this matter.

Yours sincerely

ERIC ABETZ

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Our Ref MC14-004309

Senator the Hon David Johnston
Minister for Defence

MA14-001547

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Parliament House
CANBERRA ACT 2600

Dear Chair

I write in regard to the committee's letter of 15 May 2014 regarding the Scrutiny of Bills Committee's assessment of the *Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014* (the Bill).

I have considered the committee's request for more detailed advice as to the justification for the validation of the Woomera Prohibited Area (WPA) and actions taken by the Commonwealth as a result of the declaration. Accordingly, I confirm the details in the explanatory memorandum that this is a 'technical provision' which has been inserted to avoid any doubt on the past applicability of the *Defence Force Regulations 1952* to the WPA which may arise as a result of the establishment of the new access regime by the Bill.

The inclusion in the Bill of the proposed s 121A is designed to ensure that there can be no doubt about the validity of the 1989 declaration of the WPA.

The purpose of s 121A is to address technical arguments that could be raised in relation to the 1989 declaration and some acts taken pursuant to it. The only perceived basis for this is that the *Defence Force Regulations 1952* did not fully provide for just terms compensation for any acquisitions of property consequent on that declaration or those acts for the purposes of s 51(xxxi) of the Constitution (although the Department of Defence is not aware of any particular cases in which this may have occurred). Section 121A rectifies any constitutional deficiencies by providing just terms compensation in accordance with s 51(xxxi).

There are no *pending* or *completed* proceedings that would be affected by the proposed s 121A. Nor is Defence aware of any circumstances that would give rise to *new* proceedings in relation to the period covered by the proposed s 121A.

Any persons who, since 1989, have suffered loss or damage as a result of the declaration or anything done under it have been either compensated in accordance with reg 36 of the *Defence Force Regulations 1952* or have a right to compensation under the proposed s 121A. This provision ensures that rights will be protected against any possible, though remote, effect on personal rights arising through loss or damage.

Yours sincerely

David Johnston

17 JUN 2014

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Migration Legislation Amendment Bill (No.1) 2014

Thank you for your letter dated 15 May 2014 in relation to comments made in the Committee's *Alert Digest No. 5 of 2014* concerning the Migration Legislation Amendment Bill (No.1) 2014 (the Bill). I would like to provide the following advice to the Committee as a result of the comments in the Alert Digest.

Undue trespass on personal rights and liberties
The committee therefore seeks the Minister's further advice as to the justification for the proposed approach, particularly in relation to the rationale for applying the new approach to costs incurred prior to the day the amendments commence.

Schedule 3 of the Bill seeks to provide that all convicted people smugglers and people who have been convicted of an offence relating to the control of fishing (illegal foreign fishers), regardless of whether they are in immigration detention when the conviction occurred and regardless of whether or not they were detained because of subsection 250(2) of the *Migration Act 1958* (the Act), are liable to the Commonwealth for the costs associated with their immigration detention and removal.

Under existing legislative arrangements, convicted people smugglers and illegal foreign fishers who are detained because of section 250 of the Act, remain liable to the Commonwealth for their detention and removal costs. The Act also contains a number of provisions that facilitate the recovery of these debts. However, under current provisions of the Act, a person is not liable for costs arising from their immigration detention and removal if they were not initially detained because of section 250, or because they were not in immigration detention at the time of their conviction, or because they have since been granted a visa (for example, a criminal justice stay visa while in prison). Accordingly, the debt liability provisions cannot be applied to all people smugglers and illegal foreign fishers, regardless of how or if they were detained and whether they have been granted a visa.

This inability to apply the debt liability provisions of the Act consistently to all convicted people smugglers and illegal foreign fishers, negates any financial disincentive to these persons to participate in people smuggling or illegal foreign fishing.

Subitem 4(2) of Schedule 3 of the Bill provides that the amendments made by Schedule 3 also apply to costs incurred before the day this item commences in relation to a conviction mentioned in Subitem 4(1) of the Bill.

The objective of this amendment is to strengthen the debt recovery provisions within the Act to ensure these provisions can be consistently applied to all convicted people smugglers and people convicted of an offence against a law relating to the control of fishing, irrespective of the initial power used to detain them. The proposed amendments clearly link the liability of detention debt to the fact of conviction.

The amendment will not only enable consistent application of this power and reduce costs to the Australian community, but also serve as a powerful deterrent to immediately prevent offenders from benefitting from their activities.

Thank you for considering this advice. The contact officer in my Department is Greg Phillipson, Assistant Secretary, Legal Framework Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
3 / 6 /2014

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

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MC14-001284

28 MAY 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
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Dear Senator Polley Helen

I am writing to provide additional information about the issues identified by the Standing Committee for the Scrutiny of Bills in relation to the Student Identifiers Bill 2014 in its Alert Digest No. 5 of 2014.

The matter about which the Committee is seeking a more detailed explanation relates to clauses 18 and 25 of the Bill that enable the use or disclosure of the student identifier and personal information for research related purposes, where the use or disclosure meets the requirements specified by the Ministerial Council. The Committee has noted the Explanatory Memorandum (EM) accompanying the Bill, which states that strict protocols governing research will be developed and sets out the requirements that research proposals could be expected to meet under those protocols. However, the Committee remains concerned that the protocols may not adequately protect privacy interest as they will not be subject to parliamentary scrutiny. The Committee goes on to suggest that the Bill should require the involvement of the Information Commissioner in the development or review of the protocols.

As the Committee may be aware, the Office of the Australian Information Commissioner (OAIC) has welcomed the approach to privacy protection adopted in the Bill, and noted that its provisions reflect the security and access principles in the Privacy Act. I can also assure the Committee that as clause 24 of the Bill confers additional functions on the Information Commissioner, the development of the protocols governing the release of information for research purposes will be undertaken with the advice of, and in consultation with, the Information Commissioner. The Committee may be interested to learn that my Department and the Office of the Australian Information Commissioner have signed a Memorandum of Understanding specifically to ensure that the design and implementation of the student identifiers scheme takes into account privacy implications and to support the independent regulatory privacy oversight of the scheme.

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I would also like to point out that the student identifier protections in the Bill will operate in conjunction with, and are not intended to displace, existing privacy regimes.

In summary, the Bill provides general privacy protections as well as requiring the research protocols to be agreed jointly by all state and territory ministers and the Commonwealth minister; the protocols, as noted in the EM to the Bill, will be based on a rigorous public interest test and will be developed with the involvement of the Australian Information Commissioner, who will also be responsible for investigating any breaches of the protocols that interfere with privacy. Therefore, while there is no direct parliamentary scrutiny of the research protocols, I submit that the arrangements outlined above provide appropriate safeguards for the privacy interests of individuals.

Yours sincerely

Ian Macfarlane