SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

2014

1 October 2014

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Senator Cory Bernardi	LP, South Australia
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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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 2014

The committee presents its *Thirteenth Report of 2014* 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:

Responsiveness to requests for further information

The committee recently resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process, whereby the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness to 30 September 2014

Bill	Portfolio	Correspondence	
		Due	Received
Appropriation Bill (No. 1) 2014-2015	Finance	10/07/14	17/07/14
Asset Recycling Fund Bill 2014	Finance	03/07/14	04/08/14
Business Services Wage Assessment Tool Payment Scheme Bill 2014	Social Services	03/07/14	05/08/14
Carbon Farming Initiative Amendment Bill 2014	Environment	10/07/14	14/07/14
Further response required		08/08/14	14/08/14
Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No.2]	Environment	24/07/14	11/08/14
Clean Energy Legislation (Carbon Tax Repeal) Bill 2014	Environment	11/09/14	25/09/14
Competition and Consumer Amendment (Industry Code Penalties) Bill 2014	Treasury	11/09/14	01/09/14
Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014	Treasury		
Further response required		24/07/14	24/07/14

Bill	Portfolio	Correspondence	
		Due	Received
Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014	Treasury		
Further response required		27/06/14	18/07/14
Response required from amendment section		18/09/14	17/09/14
Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014		11/09/14	25/09/14
Dental Benefits Legislation Amendment Bill 2014	Health		
Further response required		10/07/14	14/07/14
Energy Efficiency Opportunities (Repeal) Bill 2014	Industry	03/07/14	17/07/14
Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014	Environment	03/07/14	08/07/14
Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014	Environment	03/07/14	08/07/14
Fair Entitlements Guarantee Amendment Bill 2014	Employment	09/10/14	*Not yet due*
Fair Work (Registered Organisations) Amendment Bill 2014	Employment	10/07/14	10/07/14
Higher Education and Research Reform Amendment Bill 2014	Education	18/09/14	30/09/14
Migration Amendment (Protection and Other Measures) Bill 2014	Immigration and Border Protection	24/07/14	11/08/14
Further response required		11/09/14	22/09/14
National Security Legislation Amendment Bill (No. 1) 2014	Attorney-General;	16/09/14	18/09/14
Further response required		09/10/14	25/09/14
Public Governance, Performance and Accountability Amendment Bill 2014	Finance	03/07/14	16/07/14

Bill	Portfolio	Correspondence	
		Due	Received
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014	Finance	24/07/14	26/08/14
Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014	Social Services	10/07/14	17/07/14
Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014	Social Services	10/07/14	17/07/14
Student Identifiers Bill 2014	Industry		
Further response required		03/07/14	15/07/14
Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014	Treasury	03/07/14	27/06/14
Tax and Superannuation Laws Amendment (2014 Measures No. 4) Bill 2014	Treasury	11/09/14	04/09/14
Trade Support Loans Bill 2014	Industry	03/07/14	17/07/14

***** not yet received

Members/Senators responsiveness to 30 September 2014

Bill	Member/Senator	Correspondence
		Received
Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014	Senator Siewert	*
Criminal Code Amendment (Harming Australians) Bill 2013	Senator Xenophon	*
Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	Senator Xenophon	*

Bill	Member/Senator	Correspondence Received
Great Barrier Reef Legislation Amendment Bill 2013	Senator Waters	*
Guardian for Unaccompanied Children Bill 2014	Senator Hanson-Young	*
Live Animal Export Prohibition (Ending Cruelty) Bill 2014	Mr Wilkie	*
Motor Vehicle Standards (Cheaper Transport) Bill 2014	Senator Milne	*
Privacy Amendment (Privacy Alerts) Bill 2014	Senator Singh	*
Save Our Sharks Bill 2014	Senator Siewert	*
Stop Dumping on the Great Barrier Reef Bill 2014	Senator Waters	*

***** not yet received

Clean Energy Legislation (Carbon Tax Repeal) Bill 2014

Introduced into the House of Representatives on 14 July 2014
Received the Royal Assent on 17 July 2014
Portfolio: Environment

Introduction

The committee dealt with this bill in *Alert Digest No. 10 of 2014*. The Minister responded to the committee's comments in a letter dated 24 September 2014. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2014 - extract

A similar bill was introduced into the House of Representatives on 13 November 2013 and the committee commented on the bill in *Alert Digest No. 8 of 2013.* The Minister's response to the committee's comments was published in its *First Report of 2014.* The bill was then re-introduced on 23 June 2014 and the committee again commented on the bill in *Alert Digest No. 8 of 2014*. The Minister's response to these comments was published in the *Tenth Report of 2014*. This digest deals only with comments on the new or amended provisions.

Background

This bill is part of a package of bills that seeks to repeal the legislation that establishes carbon pricing mechanism. The bill repeals six Acts and amends 13 Acts consequent on repeals.

The bill also amends the:

- *Competition and Consumer Act 2010* to:
  - prohibit carbon tax-related price exploitation and false or misleading representations about the carbon tax repeal; and
  - provide the Australian Competition and Consumer Commission with additional price monitoring powers, including taking action against businesses that do not pass on cost savings attributable to the carbon tax repeal.
- *Clean Energy (Consequential Amendments) Act 2011* and *Income Tax Assessment Act 1997* to remove the conservation tillage tax offset; and

- *Australian Renewable Energy Agency Act 2011* to change the future funding for the agency; and repeals the *Steel Transformation Plan Act 2011* to cease carbon tax-related assistance to steel industry businesses.

Insufficiently defined administrative powers—legal obligations not clearly defined

Schedule 2, item 3, proposed paragraph 60C(2)(b) and subsection 60D(3) of the Competition and Consumer Act 2010

Proposed paragraph 60C(2)(b) of the *Competition and Consumer Act 2010* provides that an entity engages in price exploitation in relation to the carbon tax repeal if, inter alia, the 'price for the supply does not pass through all of the entity's cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal'. Breach of the carbon tax price reduction obligation results in significant penalties. As such, the committee is concerned that the meaning of cost savings 'directly or indirectly attributable to the carbon tax repeal' does not appear to be defined in the bill and may be subject to different interpretations.

Notably, under proposed subsection 60D(3), the ACCC's opinion, in a notice, that the price for supply did not pass through all of the entity's cost savings relating to the supply that were directly or indirectly attributable to the carbon tax repeal is prima facie evidence in relevant legal proceedings that the carbon tax price reduction obligation has not been fulfilled. It may be considered that this provision therefore makes rights unduly dependent upon insufficiently defined administrative powers, to the extent that uncertainty may attend the question of what cost savings may be indirectly attributable to the carbon tax repeal. This provides a further reason for concern about whether sufficient guidance has been given in the bill.

Although litigation routinely requires courts to settle the meaning of imprecise legislative provisions, **the committee seeks the Minister's advice as to whether consideration has been given to providing public advice as to how costs 'indirectly attributable' to the carbon tax repeal will be calculated.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers in breach of principle 1(a)(ii) of the committee's terms of reference.*

Minister's response - extract

The Committee has queried two of the provisions of this Bill (which has now been enacted), as they amend the *Competition and Consumer Act 2010.* The question in essence

is how clearly defined and understood is the concept of "cost savings directly or indirectly attributable to the carbon tax repeal".

In response, I can inform the Committee that the repeal of the carbon tax means that businesses should pass on all cost savings arising from the repeal. Under section 60C of the *Competition and Consumer Act 2010* businesses that supply 'regulated goods' are under a specific obligation to pass on all savings that are directly and indirectly attributable to the carbon tax. 'Regulated goods' are defined in section 60B to be electricity, natural gas, synthetic greenhouse gas (SGG) or SGG equipment.

Cost savings that are 'directly attributable to the carbon tax repeal' are those that arise from the removal of a supplier's own carbon tax liability. 'Indirectly attributable costs' are those that are passed through to a business by its suppliers. Wherever a supplier of regulated goods increased its prices due to cost increases attributed to the carbon tax, it must reduce its prices by the same amount now that the tax has been repealed.

The Australian Competition and Consumer Commission (ACCC) has produced a detailed guide for businesses to help ensure that all direct and indirect costs are passed on to customers. The guide includes examples to assist businesses and can be found on the ACCC website, here: http://accc.gov.au/business/carbon-tax-repeal/requirements-for-suppliers-of-regulatedgoods/carbon-tax-price-reduction-obligation-guidance.

Businesses and consumers concerned that a supplier of regulated goods has failed to lower their prices in response to the carbon tax repeal arc encouraged to contact the ACCC directly. The ACCC can be reached by visiting their website at https://www.accc.gov.au/contact-us/contactthe-accc/carbon-complaint-form.

I trust that this information is helpful to the Committee in response to its questions.

Committee Response

The committee thanks the Minister for this response and for providing further detail about, and links to publicly available information in relation to, the meaning of costs 'indirectly attributable' to the carbon tax repeal.

The committee notes that this bill has already passed both Houses of Parliament and therefore makes no further comment on these provisions.

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

Introduced into the House of Representatives on 17 July 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 10 of 2014*. The Minister responded to the committee's comments in a letter dated 23 September 2014. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2014 - extract

Background

This bill amends the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995* (the Code), *Customs Act 1901* (the Customs Act), *Financial Transaction Reports Act 1988, International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*.

Schedule 1 amends the Code and the Customs Act to:

- introduce an offence for the importation of all substances that have a psychoactive effect that are not otherwise regulated or banned; and
- ensure that Australian Customs and Border Protection Service and Australian Federal Police officers have appropriate powers in relation to new offences.

Schedule 2 amends the Code and the Customs Act to introduce international firearms trafficking offences and mandatory minimum sentences and extend existing cross-border disposal or acquisition firearms offences.

Schedule 3 amends the *International Transfer of Prisoners Act 1997* in relation to the international transfer of prisoners regime within Australia.

Schedule 4 amends the Code to clarify that certain slavery offences have universal jurisdiction.

Schedule 5 validates access by the Australian Federal Police to certain investigatory powers in designated State airports from 19 March until 17 May 2014.

Schedule 6 makes minor and technical amendments to the Code, the *Financial Transaction Reports Act 1988* and the *Surveillance Devices Act 2004*.

Trespass on personal rights and liberties—retrospective validation Schedule 5, item 2

This item seeks to validate things done by a member of the AFP, or special member, during the course of investigating an applied State offence at certain airports from 19 March 2014 to 16 May 2014. The problem that this provision seeks to address was caused by the fact that regulations which had the effect of authorising the exercise of standard investigatory powers set out in the Crimes Act were repealed before the commencement of replacement regulations which continued the authorisation for the exercise of these powers. (The relevant powers include coercive powers such as search and seizure powers and powers of arrest.) The explanatory material does not explain the circumstances that led to this problem.

The explanatory material seeks to justify the retrospective validation of the exercise of these coercive powers by noting that:

- the retrospective validation is limited to a defined time and defined places (designated State airports on the day after the commencement of the replacement regulations) (explanatory memorandum, p. 81);
- subsection (3) of item 2 specifies that the item does not affect rights or liabilities arising between parties to proceedings which have commenced prior to the commencement of the schedule (explanatory memorandum, p. 81); and
- schedule 5 does not give retrospective effect to a criminal offence which did not constitute an offence at the time it was committed. (statement of compatibility, p. 25).

On the other hand, the statement of compatibility accepts that the schedule may 'indirectly affect liability for a criminal offence given that it validates Commonwealth powers available to member of the AFP during the investigation of a State offence' (p. 25). It is also noted that the AFP members were, for the most part, able to access alternative State powers to investigate the relevant offences (statement of compatibility p. 25).

The committee generally expresses concern when the exercise of coercive powers is validated retrospectively. It is a fundamental principle that coercive powers are only available if expressly authorised by statute. Allowing for such powers to be retrospectively authorised clearly undermines this basic principle. Given the importance of this principle to the integrity of the legal system (prospective authority for coercive powers is a core component of the 'rule of law' ideal), the committee notes that retrospective validation of such powers should only be considered in exceptional circumstances where a compelling need can be demonstrated. The maintenance of public confidence in the legal system is an important consideration in assessing proposals to retrospectively validate coercive powers.

Given that, according to the statement of compatibility, in most cases it appears that alternative State investigative powers remained available, it is not clear that exceptional circumstances have been demonstrated. It is also noted that the explanatory material does not indicate why the problem arose nor, in light of the availability of alternative State powers, the practical extent of the problem which this item is designed to cure. **The committee acknowledges the information and justification already provided in the explanatory memorandum, but in light of the matters discussed above, the committee seeks the Minister's further justification for the proposed approach noting, in particular, the importance of the principle that prospective legal authorisation should be provided for the exercise of coercive powers.**

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

Minister's response - extract

The Standing Committee for the Scrutiny of Bills (the Committee) has sought further information concerning Schedule 5, Item 2 of the Bill. In particular, the Committee has requested further justification for the proposed approach in the Bill, noting the importance of the principle that prospective legal authorisation should be provided for the exercise of coercive powers.

As outlined in the Explanatory Memorandum to the Bill, subsection 5(3A) of the *Commonwealth Places (Application of Laws) Act 1970* (the COPAL Act) allows the Australian Federal Police (AFP), or special members, to access certain standard investigatory powers set out in the *Crimes Act 1914 (Cth)* within designated state airports. This has been in place since 2011, following enactment of the *Aviation Crimes and Policing Legislation Amendment Act 2011* which supported the 'all-in policing and security model', under which the AFP took responsibility for the policing and security of Australia's eleven major airports. The *Commonwealth Places (Application of Laws) Regulations 1998* (1998 regulations) were updated at this time to prescribe designated state airports for the purposes of the COPAL Act. Designated state airports are Adelaide Airport, Brisbane Airport, Coolangatta (Gold Coast) Airport, Hobart Airport, Melbourne (Tullamarine) Airport, Perth Airport and Sydney (Kingsford Smith) Airport.

The 1998 regulations, as updated, were in force until 18 March 2014, at which time they were inadvertently repealed due to an administrative error as part of work on a recent omnibus repeal regulation, the *Spent and Redundant Instruments Repeal Regulation 2014.* The repeal of the 1998 regulations took effect on 19 March 2014.

The unavailability of these Commonwealth investigative powers was rectified through making of the *Commonwealth Places (Application of Laws) Regulation 2014* which came into force on 17 May 2014 and restored the prior definition of designated state airport.

Retrospective validation under the Bill is necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when these powers were inadvertently not available. These powers were available to the AFP for some three years prior to 19 March 2014, were intended to operate between 19 March 2014 and 16 May 2014 and have again been in force since 17 May 2014. These powers would not be unknown to individuals or the Australian public.

Although alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period. Retrospective validation of any exercise of these powers is therefore necessary to avoid uncertainty which may arise where Commonwealth investigative powers were relied upon. Retrospective validation would also avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.

Committee Response

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum.**

The committee leaves the question of whether the retrospective validation of these coercive powers is appropriate to the Senate as a whole.

Higher Education and Research Reform Amendment Bill 2014

Introduced into the House of Representatives on 28 August 2014
Portfolio: Education

Introduction

The committee dealt with this bill in *Alert Digest No. 11 of 2014*. The Minister responded to the committee's comments in a letter dated 29 September 2014. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2014 - extract

Background

This bill amends various Acts relating to higher education and research.

Schedule 1 reduces subsidies for new students at universities by an average of 20 per cent and deregulates fees for Commonwealth supported students by removing the current maximum student contribution amounts.

Schedule 2 requires providers with 500 or more equivalent full time Commonwealth supported students to establish a new Commonwealth Scholarship Scheme to support disadvantaged students.

Schedule 3 replaces the current CPI indexation of HELP loans with the 10 year Government bond rate.

Schedule 4 establishes a new minimum repayment threshold for HELP loans.

Schedule 5 allows providers to charge Research Training Scheme students capped tuition fees.

Schedule 6 removes the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.

Schedule 7 discontinues the HECS-HELP benefit from 2015.

Schedule 8 replaces the current Higher Education Grants Index (HEGI) with the Consumer Price Index (CPI) from 1 January 2016.

Schedule 9 updates the name of the University of Ballarat to Federation University Australia.

Schedule 10 allows certain New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.

Delayed Commencement
Clause 2

As detailed in the explanatory memorandum (at p. 13), most of the changes proposed by this bill have delayed commencement dates:

Matters to commence on 1 January 2015:

- Schedule 10

Matters to commence on 1 July 2015:

- Schedule 7

Matters to commence on 1 January 2016:

- Schedules 1, 2 and 3
- Parts 2, 3 and 4 of Schedule 5
- Schedule 6
- Schedule 8

Matters to commence on 1 July 2016:

- Schedule 4

The explanatory memorandum does not give an explanation for the delayed commencement of these provisions. Nevertheless, given the nature of the changes to the regulation of the higher education sector proposed in the bill, it may be accepted that delayed commencement is appropriate to enable affected persons to prepare for the proposed new regulatory environment. Moreover, the committee notes that the bill itself provides for fixed commencement dates.

> *In the circumstances, the committee makes no further comment on this provision.*

Minister's response - extract

Delayed Commencement Clause 2

The Committee is correct in assuming that most of the measures in the Bill do not commence until 1 January 2016 which will allow affected stakeholders to prepare for the new funding environment.

Sufficient time is needed to communicate with students and prospective students about the new arrangements and allow for institutions to finalise and advertise their courses.

Higher education institutions, the Department of Education and the Australian Taxation Office need at least 12 months to implement changes to IT systems and business processes to give effect to the reforms.

Committee Response

The committee thanks the Minister for taking the time to provide this additional information.

Alert Digest No. 11 of 2014 - extract

Delegation of legislative power
Schedule 1, item 62, proposed new subsection 41-10(2)
Schedule 1, item 67, proposed new subsection 46-15(3)

Part 2-3 of the *Higher Education Support Act 2003* concerns grants payable to higher education providers and other eligible bodies for a variety of purposes.

Item 62 of this bill repeals and substitutes section 41-10 which deals with which bodies corporate are eligible for Part 2-3 grants. Proposed new subsection 41-10(2) provides that the 'Other Grants Guidelines' may prescribe matters that relate to eligibility to receive a grant for the purposes specified in subsection 41-10(1) and, if they do so, a grant can only be awarded in accordance with these Guidelines.

Similarly, item 67 of the bill repeals and substitutes section 46-15 (which concerns the eligibility of higher education providers to receive grants for certain existing

Commonwealth scholarships). Proposed new subsection 46-15(3) provides that the 'Commonwealth Scholarship Guidelines' may prescribe matters relating to eligibility for grants under subsections 46-15(1) and (2) and, if they do so, providers can only receive grants in accordance with the Guidelines.

As the explanatory memorandum does not indicate why the eligibility requirements for these important categories of grants cannot be provided for in the bill, **the committee seeks advice from the Minister as to the justification for the proposed approach.**

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

Minister's response - extract

Delegation of legislative power (Schedule 1, item 62 and 67, proposed new subsections 41-10(2) and 46-15(3))

The Committee is seeking advice about why the eligibility requirements for Other Grants cannot be provided for in the Bill.

Eligibility for Other Grants (section 41-10) and Commonwealth Scholarships (section 46-15) is mostly restricted to Australian universities listed in Tables A and B of the *Higher Education Support Act 2003.* In this way the Act provides for broad eligibility, while a narrower set of eligibility criteria can be determined in legislative guidelines.

The Bill ensures that those providers which are currently eligible for the programmes continue to be eligible, but removes the restrictive requirement that providers be listed on Table A or Table B, as these tables are historical in nature. By removing Table A and B from the eligibility requirements, the Bill allows for the eligibility criteria for each programme to be tailored to meet the programme's unique policy objectives rather than applying a 'blanket' approach. Setting out eligibility criteria in guidelines also provides the Government with the flexibility to respond quickly to the changing needs of the sector and emerging policy priorities.

The Reform Bill makes it clear that existing eligibility for Other Grants programmes and Commonwealth Scholarships will continue until such time as the legislative guidelines are amended. As is the case with all legislative instruments, any amendments that are made to the guidelines must be tabled in Parliament and are subject to a 15 sitting day disallowance period.

Committee Response

The committee thanks the Minister for this response.

The committee notes that it will generally retain scrutiny concerns where important matters are to be provided for in delegated legislation and the main rationale for such an approach is administrative flexibility. However, the committee further notes that any amendments made to the guidelines under these provisions would be subject to disallowance by either House of Parliament.

The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Alert Digest No. 11 of 2014 - extract

Delegation of legislative power
Schedule 2, item 1, proposed subsection 36-75(4)

This proposed subsection provides that a provider's 'eligible amount' (i.e. the amount to be used for the new Commonwealth scholarship scheme introduced by this Schedule) is either 20 per cent of the provider's eligible revenue for the financial year or 'if a lower percentage is prescribed by the Commonwealth Grant Scheme Guidelines—that lower percentage'.

The explanatory memorandum (at p. 62) merely repeats the effect of this provision. Reductions in eligible amounts in accordance with any Commonwealth Grant Scheme Guidelines may involve significant policy choices, which arguably should be determined by the Parliament. **The committee therefore seeks advice from the Minister as to the justification for leaving important material to delegated legislation rather than incorporating (or proposing to incorporate it) into primary legislation.**

> *Pending the Minister's reply, 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.*

Minister's response - extract

Delegation of legislative power (Schedule 2, item 1, proposed subsection 36-75(4))

The Committee is seeking advice about why detailed matters related to the operation of the new Commonwealth Scholarship Scheme have been delegated to guidelines.

The measure requires institutions to allocate 20 per cent of the additional income received as a result of the deregulation of higher education student fees to a new Commonwealth Scholarship Scheme. These funds are to be allocated to assist disadvantaged students to access and succeed in higher education. Each institution is to manage its own Commonwealth Scholarship Scheme.

The Government included subsection 36-75(4)(b) in the Reform Bill to allow the Minister to determine, by legislative instrument, a lesser proportion of additional income that institutions must allocate to the fund. This provision will allow the Minister discretion to vary the requirement through legislative instrument to take account of circumstances within the sector, should this ever become necessary.

If such a change were required the Minister would table an instrument in Parliament and this would be subject to a 15 sitting day disallowance period.

Thank you for reviewing the Higher Education and Research Reform Amendment Bill 2014.

Committee Response

The committee thanks the Minister for this response.

The committee notes that it will generally retain scrutiny concerns where important matters are to be provided for in delegated legislation and the main rationale for such an approach is administrative flexibility. The committee notes that if there were changes in the higher education sector which necessitated a reduction in the allocation of institutions' additional income to the Commonwealth Scholarship Scheme it would be appropriate for the Parliament to consider such matters. However, the committee notes that such a change would at least be subject to disallowance by either House of Parliament.

The committee draws this issue to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

National Security Legislation Amendment Bill (No. 1) 2014

Introduced into the Senate on 16 July 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 11 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 16 September 2014. The committee sought further information and the Attorney-General responded in a letter received 25 September 2014. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2014 - extract

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and the *Intelligence Services Act 2001* (the IS Act) to implement the Government's response to recommendations in Chapter 4 of the Parliamentary Joint Committee on Intelligence and Security's *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (tabled in June 2013) relating to reforms of the legislation governing the Australian Intelligence Community.

Schedule 1 amends ASIO's statutory employment framework.

Schedule 2 amends ASIO's warrant based intelligence collection powers, including in relation to computer access warrants, surveillance devices and warrants against an identified person of security concern.

Schedule 3 provides ASIO employees and affiliates with certain protection from criminal and civil liability in authorised covert intelligence operations (referred to as 'special intelligence operations').

Schedule 4 amends the statutory framework for ASIO's co-operative and information-sharing activities.

Schedule 5 amends the IS Act to enable the Australian Secret Intelligence Service (ASIS) to undertake a new function of co-operating with ASIO in relation to the production of intelligence on Australian persons in limited circumstances. This schedule will also:

- create a new ground of ministerial authorisation in relation to the protection of ASIS's operational security;
- allow ASIS to train certain individuals in the use of weapons and self-defence techniques;
- extend immunity for IS Act agencies for actions taken in relation to an overseas activity of an agency; and
- provide a limited exception for the use of a weapon or self-defence technique in a controlled environment.

Schedule 6 amends secrecy offences in the IS Act and ASIO Act in relation to unauthorised communication of intelligence-related information.

Schedule 7 provides for the renaming of the Defence Imagery and Geospatial Organisation (DIGO) as the Australian Geospatial Intelligence Organisation (AGO) and the Defence Signals Directorate (DSD) and the Australian Signals Directorate (ASD).

General comment by the Attorney-General

Your Committee has sought additional information from me about four aspects of the above Bill, further to my letter of 16 September responding to the Committee's Alert Digest No 11 of 2014 as tabled on 3 September. These matters relate to proposed amendments to the *Australian Security Intelligence Organisation Act 1979* in Schedules 1-3 to the Bill.

My responses to these questions are enclosed. Given that the Bill is presently being debated in the Senate, and its timely passage is a Government priority in the current security environment, I intend to table a copy of this correspondence in the Senate on 25 September. My aim is to ensure that all Senators participating in the debate will have an opportunity to consider my responses alongside your Committee's report in the coming days.

I also note that your Committee has recommended that a number of the explanations provided in my letter of 16 September are included in the Explanatory Memorandum (EM) to the Bill. I confirm that I intend to issue a revised EM in response to these recommendations. I note that several matters identified by the Committee are already included in the replacement EM I tabled in the Senate on 24 September, prior to the tabling of your Committee's report.

I trust that this information is of assistance to the Committee.

Committee Response

The Committee thanks the Attorney-General for indicating that he intends to issue a revised explanatory memorandum in response to the committee's requests to include further explanatory detail in a number of areas.

Alert Digest No. 11 of 2014 - extract

Insufficiently defined administrative power—authorisation of a person to exercise significant powers
Schedule 1, item 9, proposed subsection 23(6), ***Australian Security Intelligence Organisation Act 1979***
Schedule 1, items 34 and 35, proposed subsection 90F(1) and proposed paragraph 90F(2)(b), ***Australian Postal Corporation Act 1989***

Subsection 23(6) of the *Australian Security Intelligence Organisation Act 1979* currently provides that:

> The Director-General, or a senior officer of the Organisation appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may authorise, in writing, an officer or employee of the Organisation, or a class of such officers or employees, for the purposes of this section.

The powers that may be exercised under this section are significant powers to request information or documents from operators of aircraft or vessels (and failure to comply with a request is an offence). The effect of the proposed new subsection 23(6) in this bill is that the Director-General or a senior-position holder may instead authorise 'a person, or a class of persons' (rather than 'an officer or employee of the Organisation') to exercise such functions.

The explanatory memorandum (at p. 40) argues that the amendment is:

- necessary to accommodate the broad range of persons who could reasonably be expected to be authorised to exercise these powers; and
- reflects the operational requirements of the organisation and is consistent with the exercise of other powers across the ASIO Act.

Neither of these arguments is elaborated further though it is noted that the powers are conferred on the basis that the Director-General 'believes such a person should reasonably be able to exercise that power'.

The committee notes that similar issues arise in relation to items 34 and 35 of Schedule 1 which propose amendments to subsection 90F(1) and paragraph 90F(2)(b) of the *Australian Postal Corporation Act 1989*.

It is a matter of concern to the committee that the legislation appears to contain no criteria or limitations on the class of persons who may be authorised to exercise these coercive powers. **The committee therefore seeks more detailed advice from the Attorney-General as to the justification for the proposed approach, including a more detailed elaboration of the above arguments.**

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.*

Attorney-General's response - extract

Amending items 9, 34 and 35 replace references in the relevant provisions to officers and employees of ASIO, consequential to the updating of employment-related terminology in amending item 1 of Schedule 1 to the Bill.

Amending item 8 replaces the reference in s 23(1) of the ASIO Act to "an authorised officer or employee" with a reference to "an authorised person". Amending item 9 similarly amends the Director-General's power of authorisation under s 23(6) to authorise persons for the purpose of s 23(1).

Consideration was given to limiting the persons able to be authorised under s 23(6) for the purpose of s 23(1) to ASIO employees and ASIO affiliates (as proposed to be defined in s 4 by amending item 1 of Schedule 1). However, such a limitation was not considered appropriate from an operational perspective. It may not always be possible to locate an ASIO employee or ASIO affiliate at the same location as an aircraft or vessel operator in order to ask questions, or make a request for information. It would be unnecessarily restrictive to operational realities for the legislation to require an ASIO employee or ASIO affiliate to be physically at a particular, and often unplanned, location of the aircraft or vessel (noting that such aircraft and vessels may also depart from that location at short notice). It was considered an operational and administrative necessity that, for the purposes of carrying out ASIO's functions, another person (or class of persons) may need to be authorised to undertake that activity on ASIO's behalf. For example, it would not be unreasonable to authorise such persons as, but not limited to, Customs officers, or law enforcement officers to undertake this activity on behalf of ASIO.

The proposed amendments to ss 90F(l) and 90F(2)(b) of the *Australian Postal Corporation Act 1989* (amending items 34 and 35 of Schedule 1) are in a similar category, noting that information or documents relating to articles carried by post, or articles in the course of post, may also be available at unplanned locations that may rapidly change.

While the Committee has observed that s 23 is a "significant powers to request information or documents from operators of aircraft or vessels", the amendments proposed to s 23 are consistent with other powers for the collection of information across the ASIO Act. For example, s 24 of the ASIO Act, as currently enacted, provides for an officer, employee, or other people, to be authorised to exercise the authority of a warrant issued under the ASIO Act. (I acknowledge, however, that the Committee has also commented on the proposed amendments to s 24. My response to those comments is provided below.)

To take account of the Committee's comments on amending item 6 of Schedule 1, I have asked my Department to revise the Explanatory Memorandum to elaborate on the justification for these items, in line with my remarks above.

Committee Response

The committee thanks the Attorney-General for this detailed response and for indicating that the explanatory memorandum to the bill will be revised to include an explanation of the above matters.

The committee notes that the Attorney-General considers that it would be too restrictive to limit the class of persons who may be authorised to exercise these powers to ASIO employees and affiliates. However, the committee reiterates its general preference that limits are placed on the categories of persons who may be authorised to exercise such powers. The committee therefore remains concerned about the breadth of the power to authorise ‘a person’ in these provisions. **To assist the committee in further examining these provisions, the committee requests further advice from the Attorney-General in relation to whether consideration has been given to placing limits on the breadth of the power by, for example, limiting the class of persons authorised to exercise the powers to ASIO employees and affiliates, Customs officers and law enforcement officers.**

Attorney-General's further response - extract

As I indicated at page 5 of my response to the Committee of 16 September 2014, consideration was given to possible limitations on the power of authorisation conferred by s 23(6), for the purpose of exercising the intelligence-gathering powers in s 23(1). (Subsection 23(1) enables an authorised person to require an operator of an aircraft or vessel to answer certain questions, and to require such operators to produce certain documents.)

I indicated that consideration was given to limiting the persons able to be authorised under s 23(6) to ASIO employees and ASIO affiliates (as these terms are proposed to be defined in s 4, by amending item 1 of Schedule 1 to the Bill). I re-iterate my advice that such a limitation was not considered appropriate from an operational perspective, as it may not always be possible to locate an ASIO employee or an ASIO affiliate to be present at a particular location of an aircraft or vessel. In some circumstances, the locations of such aircraft or vessels may be remote, unforeseen and may change rapidly as the aircraft or vessel departs for another location. As such, ASIO needs to have a range of people available in order to flexibly utilise resources and respond quickly to emerging threats. It is necessary to ensure that s 23(6) accommodates this legitimate need. If the classes of authorised persons were limited to ASIO employees and ASIO affiliates, there is a credible risk that ASIO may be unable to access vital intelligence in time critical circumstances because it is impossible to organise the attendance of an ASIO employee or an ASIO affiliate at the relevant location while an aircraft or vessel is present.

Consideration was also given to potentially limiting the power of authorisation in s 23(6) to classes of persons other than ASIO employees or ASIO affiliates, such as Customs or law enforcement officers. As I indicated in my response to the Committee of 16 September, such persons are merely illustrative of some of the classes of persons who might be authorised, in appropriate circumstances, to exercise powers under s 23(1) on behalf of ASIO. For the reasons I have identified above, it is critical that s 23(6) accommodates the contingency that specified classes of persons may not be able to attend the particular location of a vessel or aircraft in relation to a matter of security interest.

The identity or credentials of appropriate persons to be authorised under s 23(6) for the purpose of s 23(1) may, in some instances, be highly dependent on the circumstances of individual intelligence operations. Failure to accommodate this contingency - in favour of applying a rigid rule that classes of persons must be particularised in the power of authorisation - raises a significant risk that ASIO is unable to collect critical intelligence relevant to security.

I further note that ASIO's activities in authorising persons under s 23(6) are subject to rigorous and appropriate controls. In exercising the power of authorisation in favour of

individual persons, the Director-General of Security (and, by extension, the other persons invested with the power to grant authorisations) is required to adhere to the obligations placed on him or her under s 20 of the ASIO Act. This includes an obligation to take reasonable steps to ensure that the work of the Organisation is limited to what is necessary for the purpose of the discharge of its functions. It further includes an obligation to take reasonable steps to ensure that the Organisation is kept free from any influences or considerations not relevant to its functions.

In addition, the persons granting authorisations under s 23(6) must adhere to relevant requirements in the Attorney-General's Guidelines to ASIO, issued under s 8A of the ASIO Act. The Guidelines relevantly require the authorising person to consider whether the authorisation being considered is proportionate to the gravity of the threat posed and the probability of the occurrence. Further, the authorisation of persons and their actions under an authorisation are subject to the independent oversight of the Inspector-General of Intelligence and Security (IGIS) in accordance with the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Individuals, including operators of aircraft and vessels subject to the exercise of powers under s 23(1) can make complaints to the IGIS about the conduct of authorised persons.

Accordingly, I consider that the broad power of authorisation to 'a person' is operationally necessary and is caveated by appropriate safeguards, which are additional to the limited nature of the power in s 23(1) that authorised persons may exercise. I note that this power is limited to questioning operators of aircraft or vessels about the matters specified in paragraphs (a) and (b). (That is, asking questions or requesting the production of documents relating to the aircraft or vessel, its cargo, crew, passengers, stores or voyage.)

Committee's further response

The committee thanks the Attorney-General for this detailed response and **requests that the key additional information above be included in the explanatory memorandum**.

The committee notes the Attorney-General's view that operational necessity and appropriate safeguards justify the approach but reiterates its general preference that limits be placed on the categories of persons authorised to exercise significant powers.

The committee notes that this bill has already been passed by the Senate and therefore makes no further comment in relation to these provisions.

Alert Digest No. 11 of 2014 - extract

Undue trespass on personal rights and liberties
Schedule 2, item 10, proposed new paragraph 25(4)(aa)
Schedule 2, item 19, proposed new paragraph 25A(4)(aaa)

Proposed new paragraph 25(4)(aa) provides that an authorised person in the execution of a search warrant may enter any premises for the purposes of gaining entry to or exiting the subject premises. The explanatory memorandum (at p. 66) states that:

> …it may occasionally be necessary for an authorised person to enter premises (specifically, third party premises) other than the subject premises in order to enter or exit the subject premises. This may be because there is no other way to gain access to the subject premises (for example, in an apartment complex where it is necessary to enter the premises through shared or common premises). It may also occur where, for operational reasons, entry through adjacent premises is more desirable (for example, where entry through a main entrance may involve a greater risk of detection). The need to access third party premises may also arise in emergency circumstances (for example, where a person enters the subject premises unexpectedly during a search and it is necessary to exit through third party premises to avoid detection and conceal the fact that things have been done under a warrant).

The committee recognises that it may *occasionally* be necessary for an authorised person to enter third-party premises in order to enter or exit the subject premises (as in the circumstances described above). However, the proposed provision is broadly drafted and therefore does not recognise the fact that such a power (noting the potential impact on third parties) should be limited to reflect the exceptional nature of the power.

The committee notes that similar issues arise in relation to computer access warrants in item 19 of Schedule 2.

Noting the above comments, the committee seeks the Attorney-General's advice as to whether it would be possible to constrain the power to enter third-party premises. If it is thought that it would not be possible to further constrain this power in the legislation, a detailed rationale as to why that is the case (and details of any internal safeguards or procedures in place to constrain this power) would assist the committee in assessing the appropriateness of this provision.

> *Pending the Attorney-General's reply, 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.*

Attorney-General's response - extract

In my view it would unduly limit the ability of ASIO to carry out its functions if further constraints were placed on the proposed power to enter third party premises. Consideration has been given to submissions made to the PJCIS inquiry into the Bill suggesting that the power to enter third party premises be authorised subject to a 'necessity' test.

Rationale

The purpose of the amendment is to enable ASIO to enter or exit third-party premises where necessary, but also where such entry or exit serves an operational imperative. For example, where entry via adjoining premises allows ASIO to reduce a risk of detection, or where a person unexpectedly arrives at target premises and the safest means of exit is via third party premises. In such circumstances, a requirement to meet a 'necessity test' may preclude ASIO from acting in the most operationally effective and appropriate manner.

The power to enter third party premises does not provide any power to search or otherwise collect intelligence on the third party premises - it is limited to entry to the premises.

Safeguards and procedures that would constrain this power

The range of existing safeguards provide an appropriate and effective framework of checks and balances in respect of ASIO's use of its powers and ensures that ASIO's activities are necessary and proportionate.

The proposed power to enter third party premises can only be exercised under the authority of a warrant. Before I issue a warrant, I must be satisfied that certain thresholds are met. Before entry onto third party premises can be authorised in the warrant, I must consider it appropriate in the circumstances to authorise such entry. In addition, the Attorney-General's Guidelines to ASIO, issued under s 8A of the ASIO Act, require all activities to be done with as little intrusion into individual privacy as possible. Third-party premises would only be accessed in accordance with these Guidelines. Consistent with the Guidelines, ASIO's methodology and operating procedures place an emphasis on the principle of 'proportionality', and are designed to ensure an appropriate and proportionate response, having close regard to both individual privacy considerations and the potential gravity of the threat being investigated. All warrants are available to the IGIS for inspection pursuant to the IGIS Act.[1]

[1] See further, AGD and ASIO, joint supplementary submission to the PJCIS (unclassified) 29 August 2014, p. 60; and AGD, supplementary submission (8 September 2014), p. 6.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum.**

The committee emphasises the importance of robust safeguards in relation to potentially intrusive powers (such as access to third party premises by ASIO) and notes the safeguards outlined by the Attorney-General. To assist the committee in further examining these provisions, the committee requests further advice from the Attorney-General in relation to what the legal consequences of a breach of the principle of proportionality contained in the Guidelines (and ASIO's operating procedures) would be and whether consideration has been given to the inclusion of a proportionality requirement in the legislation.

Attorney-General's further response - extract

Legal consequences of a breach of ASIO's Guidelines or operating procedures

ASIO is under an obligation to adhere to the Attorney-General's Guidelines issued under s 8A of the ASIO Act in relation to all of its activities, including entering third party premises for the purpose of executing a warrant. While contravention of the Guidelines or ASIO's operating procedures does not, of itself, attract criminal or civil liability, there may be administrative consequences for an individual ASIO employee or an ASIO affiliate who fails to adhere to them. This may include internal investigation under the ASIO Code of Conduct, or investigation by the IGIS under s 8 of the IGIS Act, and a possible loss of employment. Any member of the public who is concerned about possible inappropriate activity by ASIO, including a suspected disproportionate intrusion into an individual's privacy by entering their premises, may raise their concerns with the IGIS. The IGIS has broad powers to investigate such complaints against ASIO.

Should the Guidelines be more broadly misused, the IGIS could also make recommendations to the Government in respect of the specific breach or breaches, and make proposals to address any failures in procedure.

Consideration of including a 'proportionality' requirement in the ASIO Act

The Committee has asked whether consideration has been given to the inclusion of a 'proportionality' requirement in the ASIO Act in respect of the power to enter third party premises, where authorised under a warrant, for the purpose of executing that warrant.

Consistent with my correspondence of 16 September, I am of the view that the Attorney-General's Guidelines to ASIO make adequate provision for the proportionality of access to third party premises in accordance with a warrant. As noted above, the Guidelines impose requirements on ASIO relating to the proportionality of any intrusion into individual privacy, having regard to the gravity of the threat posed and the probability of its occurrence.

In particular, clause 10.4 of the Guidelines requires that any means used for obtaining information 'must be proportionate to the gravity of the threat posed and the probability of its occurrence...arid [investigations] should be undertaken using as little intrusion into individual privacy as is possible'. Accordingly, ASIO is not able to request the issue of a warrant unless the Director-General is satisfied that less intrusive means of obtaining information are not possible and that the obtaining of the information through warranted means of collection is proportionate to the gravity of the threat and the probability of its occurrence. ASIO's adherence to these Guidelines is the subject of independent oversight by the IGIS.

In addition, as I have noted above, the Director-General has a special responsibility under s 20 of the ASIO Act to take all reasonable steps to ensure that the work of the organisation is limited to what is necessary for the purposes of the discharge of its functions; and that the organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

For these reasons, I am of the view that it is unnecessary to include a 'proportionality' or 'privacy impact' test in the ASIO Act.

Committee's further response

The committee thanks the Attorney-General for this detailed response and **requests that the key additional information above be included in the explanatory memorandum**.

The committee notes that breach of the proportionality requirement in the Attorney-General's Guidelines has no legal consequences, though it is possible that administrative sanction may follow or that the conduct leading to a breach may be investigated by IGIS.

The committee notes that this bill has already been passed by the Senate and therefore makes no further comment in relation to these provisions.

Alert Digest No. 11 of 2014 - extract

Undue trespass on personal rights and liberties—immunity from civil and criminal liability
Schedule 3, item 3, proposed section 35K

This provision protects a person from civil and criminal liability as a result of their 'participation' in a special intelligence operation if specified conditions are met. The explanatory memorandum (p. 108) explains that:

> The application of the immunity is subject to satisfaction of the conditions specified in subsections 35K(1) and (2), which ensure that it is limited strictly to authorised conduct under an SIO, and that the immunity is proportionate to the purpose of an SIO by excluding from its scope several serious offences including those in the nature of entrapment.

The explanatory memorandum includes a detailed outline of the scope of the provision and justification for it. In addition to detailing the specific requirements that will need to be met, the explanatory memorandum (pp 108–109) notes that:

> A number of safeguards apply to the immunity conferred by section 35K. These safeguards [described further in the EM], ensure that its application is duly limited and is subject to independent oversight, and that there remains scope for the payment of compensation to aggrieved individuals in appropriate cases.

The committee notes this justification, however the committee requests further advice from the Attorney-General as to whether this approach (including in relation to payment of compensation in respect of damage to property and personal injury and the status of civilian participants in operations) is consistent with that taken in relation to the controlled operations scheme in Part IAB of the *Crimes Act 1914* and, if it is not, a rationale as to why a different approach is required for special intelligence operations.

> *Pending the Attorney-General's reply, 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.*

Attorney-General's response - extract

As noted in my response to question 11 above, a detailed explanation is provided at pages 38-40 of the Department and ASIO's joint supplementary submission to the PJCIS of 29 August 2014, a copy of which is provided at **Enclosure 2** to this response.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes that the submission referred to by the Attorney-General indicates that both proposed section 35K of the ASIO Act and Division 3 of Part IAB of the Crimes Act provide limited protection from legal liability to participants in special intelligence operations and controlled operations. Both sets of provisions expressly require that the conduct must have been undertaken in accordance with an authority; and that it did not involve the causation of death or serious injury, the commission of a sexual offence, serious loss of, or damage to, property, or conduct in the nature of 'entrapment'. However, the submission indicates that there are some differences in these protections (relating to civil liability, conditions of protection from liability for civilian participants, and compensation and notification requirements. **The committee draws Senators attention to these differences as outlined at pages 38–40 of the Attorney-General's Department/ASIO joint supplementary submission to the PJCIS.**

In relation to proposed section 35K, the committee also takes this opportunity to **request further advice from the Attorney-General as to the definitions of 'serious injury', 'serious loss of, or damage to, property' and 'conduct in the nature of 'entrapment'' for the purposes of the limited protection from legal liability proposed in section 35K. The committee is interested in examples of conduct that would not be necessary or proportionate to the effective performance by ASIO of its special intelligence functions, or the effective operation of the SIO scheme (explanatory memorandum, pp 108–109).**

The committee also notes that paragraphs 15HA(2)(d) and 15HB(d) of the Crimes Act provide protection from criminal responsibility and indemnification against civil liability if the relevant conduct 'does not involve the participant engaging in any conduct that is likely to (i) cause the death of, or serious injury to, any person; or (ii) involve the commission of a sexual offence against any person. **The committee notes that equivalent paragraph in this bill (proposed paragraph 35K(1)(e)) does not include the words 'is likely to' and seeks the Attorney-General's advice as to the impact of, and rationale for, this difference between the two schemes.**

Attorney-General's further response - extract

Background

The limited immunity from criminal and civil liability in s 35K applies to the authorised conduct of participants in an authorised special intelligence operation. Under s 35C(2)(e), an authorising officer (who will now be the Minister, consistent with Government amendments to the Bill) may only grant an authority if satisfied there are reasonable grounds on which to believe that any conduct involved in the special intelligence operation will not:

(i) cause the death of, or serious injury to, any person; or

(ii) involve the commission of a sexual offence against any person; or

(iii) result in significant loss of, or serious damage to, property.[2]

In addition, under s 35C(2)(d), the authorising officer must be satisfied there are reasonable grounds on which to believe that the special intelligence operation "will not be conducted in such a way that a person is likely to be induced to commit an offence against the law of the Commonwealth, a State or a Territory that the person would not otherwise have intended to commit".

Corresponding exclusions are applied to the immunity in ss 35K(l)(d) and (e). The result is that, not only is such conduct unable to be authorised as part of a special intelligence operation, it is also expressly excluded from the immunity to remove any doubt that it is subject to legal liability.

These forms of conduct have been excluded because the Government is of the view that they can never be necessary or proportionate to the effective performance of ASIO of its statutory functions, or the effective operation of the SIO scheme. As such, the Explanatory Memorandum to the Bill notes that the matters listed in the provisions I have cited above "reflect a policy judgment" to this effect. Accordingly, to the extent that the Committee is "interested in examples of conduct that would not be necessary or proportionate to the effective performance of ASIO by its special intelligence functions, or the effective operation of the SIO scheme", such examples are found in the abovementioned provisions themselves.

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[2] The Government will further move amendments to include conduct constituting torture in the list of matters ins 35C(2)(e) that cannot be authorised as part of a special intelligence operation. A corresponding amendment will also be made to the limited immunity from criminal and civil liability in s 35K.

Interpretation of terms

The Committee has further sought my advice on the interpretation of the terms "serious injury", "significant loss of property" and "serious damage to property" as they appear in the provisions cited above. I note that these terms are readily capable of interpretation in individual cases, having regard to their ordinary meanings and case law on their interpretation. For example, the concept of 'serious injury' or 'serious harm' is commonly used in criminal offence provisions and offences at common law. (For example, the Commonwealth Criminal Code defines 'serious harm' as that which "endangers or is likely to endanger a person's life" or "is likely to be significant and longstanding". This definition, which was included in the Model Criminal Code, is also adopted in the criminal legislation of States and Territories.) The object of the terms 'serious' and 'significant' is to exclude injury, loss or damage that is trivial from the ambit of the authorisation criteria in s 35C and the limited immunity in s 35K.

I further note that references in the Explanatory Memorandum to "conduct in the nature of entrapment" is a shorthand form of expression to describe the provisions in ss 35C(2)(d) and 35K(l)(d), in respect of a person who "intentionally induc[es] another person to commit an offence against a law of the Commonwealth, a State or a Territory that the other person would not otherwise have intended to commit". These provisions are, in my view, readily capable of interpretation according to their ordinary meaning.

Committee's further response

The committee thanks the Attorney-General for this detailed response and **requests that the key additional information above be included in the explanatory memorandum**.

The committee notes that this bill has already been passed by the Senate and therefore makes no further comment in relation to this matter.

Background

The exclusions from the limited immunity from legal liability in s 35K(l)(e) have not adopted the phrase "likely to cause" or "likely to involve" the excluded conduct, as is used in the above provisions of the Crimes Act. Rather, the exclusions apply to conduct that "causes" or "involves" the excluded conduct. (That is, conduct causing death, serious injury, significant loss of or damage to property, or involving the commission of a sexual offence.)

Conduct causing death, serious injury or significant loss of or damage to property

The exclusions for conduct that "causes" death, serious injury or significant loss of or damage to property reflect the security requirement for intelligence collection operations in high risk environments. This may arise, for example, where an authorised participant or participants may be required to enter and operate within high-risk environments to obtain vital intelligence - with such risk only mitigated by these participants' high levels of skill, training and preparation. Applying the exclusion to conduct that is likely to cause death, serious injury or significant loss of or damage to property (as distinct from conduct that causes these outcomes) would limit the effectiveness of the scheme in obtaining intelligence for security purposes, such as the collection of intelligence on terrorist organisations either in Australia or overseas.

Conduct involving the commission of a sexual offence

I acknowledge that the exclusion ins 35K(l)(e)(ii) applies to any conduct that "involves the commission of a sexual offence against any person" as distinct from conduct that is likely to involve the commission of such an offence. (This is due to the fact that - for the operational reasons outlined above in relation to subparagraphs (i) and (iii) - the introductory words to paragraph (e) do not contain the words "likely to" which would apply to all of the conduct listed in subparagraphs (i)-(iii).)

I do not consider the omission of the words "likely to" in s 35K(l)(e)(ii) lessen the prohibitions on the commission of sexual offences in any way, for two reasons. First, there can be no suggestion that there could, under any circumstances, be a legitimate operational reason to engage in conduct constituting a sexual offence, since such conduct bears no sensible connection to ASIO's statutory functions. Indeed, such conduct cannot be authorised as part of a special intelligence operation by reason of the express exclusion in s 35C(l)(e)(ii).

Secondly, there is not, in my view, a material difference between conduct that meets the description of being "likely to" involve the commission of a sexual offence and conduct that meets the description of "involving" the commission of such an offence. Sexual offences are based on a person's intentional conduct, and his or her knowledge of, or recklessness as to, the other person's lack of consent or capacity to consent (or strict or absolute liability may apply to this circumstance in some instances). Given the elements of these offences, I do not accept that there can be a category of conduct that is "likely to" involve the commission of a sexual offence – and which is capable of satisfying the authorisation criteria in s 35C(2)(a)-(d) – and which falls short of involving the commission of such an offence.

Committee's further response

The committee thanks the Attorney-General for this detailed response and **requests that the key additional information above be included in the explanatory memorandum**.

The committee notes that there is a material difference between the operation of the exclusions from the limited immunity from legal liability in s 35K(1)(e) in this bill and the equivalent provisions in the Crimes Act in relation to controlled operations. The Crimes Act provides immunity if the relevant conduct does not involve the participant engaging in any conduct that is likely to cause death or serious injury, etc. However, the equivalent provision in this bill provides immunity if the relevant conduct does not involve the participant engaging in any conduct that causes death or serious injury, etc.

The committee notes that this bill has already been passed by the Senate and therefore makes no further comment in relation to this matter.

Senator Helen Polley
Chair

The Hon Greg Hunt MP

Minister for the Environment

MC14-018924

24 SEP 2014

Senator Helen Polley
Chair
Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley Helen

I refer to the letter from Committee Secretary Toni Dawes of 28 August 2014, concerning information requested in relation to the *Clean Energy Legislation (Carbon Tax Repeal) Bill 2014*.

The Committee has queried two of the provisions of this Bill (which has now been enacted), as they amend the *Competition and Consumer Act 2010*. The question in essence is how clearly defined and understood is the concept of "cost savings directly or indirectly attributable to the carbon tax repeal".

In response, I can inform the Committee that the repeal of the carbon tax means that businesses should pass on all cost savings arising from the repeal. Under section 60C of the *Competition and Consumer Act 2010* businesses that supply 'regulated goods' are under a specific obligation to pass on all savings that are directly and indirectly attributable to the carbon tax. 'Regulated goods' are defined in section 60B to be electricity, natural gas, synthetic greenhouse gas (SGG) or SGG equipment.

Cost savings that are 'directly attributable to the carbon tax repeal' are those that arise from the removal of a supplier's own carbon tax liability. 'Indirectly attributable costs' are those that are passed through to a business by its suppliers. Wherever a supplier of regulated goods increased its prices due to cost increases attributed to the carbon tax, it must reduce its prices by the same amount now that the tax has been repealed.

The Australian Competition and Consumer Commission (ACCC) has produced a detailed guide for businesses to help ensure that all direct and indirect costs are passed on to customers. The guide includes examples to assist businesses and can be found on the ACCC website, here: http://accc.gov.au/business/carbon-tax-repeal/requirements-for-suppliers-of-regulated-goods/carbon-tax-price-reduction-obligation-guidance.

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7920 Greg.Hunt.MP@environment.gov.au

Businesses and consumers concerned that a supplier of regulated goods has failed to lower their prices in response to the carbon tax repeal are encouraged to contact the ACCC directly. The ACCC can be reached by visiting their website at https://www.accc.gov.au/contact-us/contact-the-accc/carbon-complaint-form.

I trust that this information is helpful to the Committee in response to its questions.

Yours sincerely

Greg Hunt

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/18450

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

Dear Senator Polley

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills in *Alert Digest No. 10 of 2014* concerning the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*.

The Standing Committee for the Scrutiny of Bills (the Committee) has sought further information concerning Schedule 5, Item 2 of the Bill. In particular, the Committee has requested further justification for the proposed approach in the Bill, noting the importance of the principle that prospective legal authorisation should be provided for the exercise of coercive powers.

As outlined in the Explanatory Memorandum to the Bill, subsection 5(3A) of the *Commonwealth Places (Application of Laws) Act 1970* (the COPAL Act) allows the Australian Federal Police (AFP), or special members, to access certain standard investigatory powers set out in the *Crimes Act 1914 (Cth)* within designated state airports. This has been in place since 2011, following enactment of the *Aviation Crimes and Policing Legislation Amendment Act 2011* which supported the 'all-in policing and security model', under which the AFP took responsibility for the policing and security of Australia's eleven major airports. The *Commonwealth Places (Application of Laws) Regulations 1998* (1998 regulations) were updated at this time to prescribe designated state airports for the purposes of the COPAL Act. Designated state airports are Adelaide Airport, Brisbane Airport, Coolangatta (Gold Coast) Airport, Hobart Airport, Melbourne (Tullamarine) Airport, Perth Airport and Sydney (Kingsford Smith) Airport.

The 1998 regulations, as updated, were in force until 18 March 2014, at which time they were inadvertently repealed due to an administrative error as part of work on a recent omnibus repeal regulation, the *Spent and Redundant Instruments Repeal Regulation 2014*. The repeal of the 1998 regulations took effect on 19 March 2014.

The unavailability of these Commonwealth investigative powers was rectified through making of the *Commonwealth Places (Application of Laws) Regulation 2014* which came into force on 17 May 2014 and restored the prior definition of designated state airport.

Retrospective validation under the Bill is necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when these powers were inadvertently not available. These powers were available to the AFP for some three years prior to 19 March 2014, were intended to operate between 19 March 2014 and 16 May 2014 and have again been in force since 17 May 2014. These powers would not be unknown to individuals or the Australian public.

Although alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period. Retrospective validation of any exercise of these powers is therefore necessary to avoid uncertainty which may arise where Commonwealth investigative powers were relied upon. Retrospective validation would also avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.

I trust that this information is of assistance to your Committee.

Yours sincerely

Michael Keenan

23 SEP 2014

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

Our Ref MC14-009701

29 SEP 2014

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

Dear Senator

The Secretary of the Senate Standing Committee for the Scrutiny of Bills has written to advise me that the Committee has tabled its *Alert Digest No.11 of 2014*, which includes a request for me to provide information about issues identified in relation to the Higher Education and Research Reform Amendment Bill 2014 (the Reform Bill).

The information below responds to this request.

Delayed Commencement Clause 2
The Committee is correct in assuming that most of the measures in the Bill do not commence until 1 January 2016 which will allow affected stakeholders to prepare for the new funding environment.

Sufficient time is needed to communicate with students and prospective students about the new arrangements and allow for institutions to finalise and advertise their courses.

Higher education institutions, the Department of Education and the Australian Taxation Office need at least 12 months to implement changes to IT systems and business processes to give effect to the reforms.

Delegation of legislative power (Schedule 1, item 62 and 67, proposed new subsections 41-10(2) and 46-15(3))
The Committee is seeking advice about why the eligibility requirements for Other Grants cannot be provided for in the Bill.

Eligibility for Other Grants (section 41-10) and Commonwealth Scholarships (section 46-15) is mostly restricted to Australian universities listed in Tables A and B of the *Higher Education Support Act 2003*. In this way the Act provides for broad eligibility, while a narrower set of eligibility criteria can be determined in legislative guidelines.

The Bill ensures that those providers which are currently eligible for the programmes continue to be eligible, but removes the restrictive requirement that providers be listed on Table A or Table B, as these tables are historical in nature. By removing Table A and B from the eligibility requirements, the Bill

allows for the eligibility criteria for each programme to be tailored to meet the programme's unique policy objectives rather than applying a 'blanket' approach. Setting out eligibility criteria in guidelines also provides the Government with the flexibility to respond quickly to the changing needs of the sector and emerging policy priorities.

The Reform Bill makes it clear that existing eligibility for Other Grants programmes and Commonwealth Scholarships will continue until such time as the legislative guidelines are amended. As is the case with all legislative instruments, any amendments that are made to the guidelines must be tabled in Parliament and are subject to a 15 sitting day disallowance period.

Delegation of legislative power (Schedule 2, item 1, proposed subsection 36-75(4))
The Committee is seeking advice about why detailed matters related to the operation of the new Commonwealth Scholarship Scheme have been delegated to guidelines.

The measure requires institutions to allocate 20 per cent of the additional income received as a result of the deregulation of higher education student fees to a new Commonwealth Scholarship Scheme. These funds are to be allocated to assist disadvantaged students to access and succeed in higher education. Each institution is to manage its own Commonwealth Scholarship Scheme.

The Government included subsection 36-75(4)(b) in the Reform Bill to allow the Minister to determine, by legislative instrument, a lesser proportion of additional income that institutions must allocate to the fund. This provision will allow the Minister discretion to vary the requirement through legislative instrument to take account of circumstances within the sector, should this ever become necessary.

If such a change were required the Minister would table an instrument in Parliament and this would be subject to a 15 sitting day disallowance period.

Thank you for reviewing the Higher Education and Research Reform Amendment Bill 2014.

Yours sincerely

Christopher Pyne MP

ATTORNEY-GENERAL

CANBERRA

14/12474

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

scrutiny.sen@aph.gov.au

Dear Chair

National Security Legislation Amendment Bill (No 1) 2014

I refer to your Committee's Twelfth Report of 2014, as tabled on 24 September 2014.

Your Committee has sought additional information from me about four aspects of the above Bill, further to my letter of 16 September responding to the Committee's Alert Digest No 11 of 2014 as tabled on 3 September. These matters relate to proposed amendments to the *Australian Security Intelligence Organisation Act 1979* in Schedules 1-3 to the Bill.

My responses to these questions are enclosed. Given that the Bill is presently being debated in the Senate, and its timely passage is a Government priority in the current security environment, I intend to table a copy of this correspondence in the Senate on 25 September. My aim is to ensure that all Senators participating in the debate will have an opportunity to consider my responses alongside your Committee's report in the coming days.

I also note that your Committee has recommended that a number of the explanations provided in my letter of 16 September are included in the Explanatory Memorandum (EM) to the Bill. I confirm that I intend to issue a revised EM in response to these recommendations. I note that several matters identified by the Committee are already included in the replacement EM I tabled in the Senate on 24 September, prior to the tabling of your Committee's report.

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

Encl. Responses to requests for further information in the Twelfth Report of 2014.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Enclosure

National Security Legislation Amendment Bill (No 1) 2014

Responses to Senate Standing Committee for the Scrutiny of Bills Twelfth Report of 2014

Authorisation of classes of persons, s 23(6) (items 9, 34, 35 of Sch 2)

Committee question 1 (p. 593)

The committee notes that the Attorney-General considers that it would be too restrictive to limit the class of persons who may be authorised to exercise these powers to ASIO employees and affiliates. However, the committee reiterates its general preference that limits are placed on the categories of persons who may be authorised to exercise such powers. The committee therefore remains concerned about the breadth of the power to authorise 'a person' in these provisions.

To assist the committee in further examining these provisions, the committee requests further advice from the Attorney-General in relation to whether consideration has been given to placing limits on the breadth of the power by, for example, limiting the class of persons authorised to exercise the powers to ASIO employees and affiliates, Customs officers and law enforcement officers.

As I indicated at page 5 of my response to the Committee of 16 September 2014, consideration was given to possible limitations on the power of authorisation conferred by s 23(6), for the purpose of exercising the intelligence-gathering powers in s 23(1). (Subsection 23(1) enables an authorised person to require an operator of an aircraft or vessel to answer certain questions, and to require such operators to produce certain documents.)

I indicated that consideration was given to limiting the persons able to be authorised under s 23(6) to ASIO employees and ASIO affiliates (as these terms are proposed to be defined in s 4, by amending item 1 of Schedule 1 to the Bill). I re-iterate my advice that such a limitation was not considered appropriate from an operational perspective, as it may not always be possible to locate an ASIO employee or an ASIO affiliate to be present at a particular location of an aircraft or vessel. In some circumstances, the locations of such aircraft or vessels may be remote, unforeseen and may change rapidly as the aircraft or vessel departs for another location. As such, ASIO needs to have a range of people available in order to flexibly utilise resources and respond quickly to emerging threats. It is necessary to ensure that s 23(6) accommodates this legitimate need. If the classes of authorised persons were limited to ASIO employees and ASIO affiliates, there is a credible risk that ASIO may be unable to access vital intelligence in time critical circumstances because it is impossible to organise the attendance of an ASIO employee or an ASIO affiliate at the relevant location while an aircraft or vessel is present.

Consideration was also given to potentially limiting the power of authorisation in s 23(6) to classes of persons other than ASIO employees or ASIO affiliates, such as Customs or law enforcement officers. As I indicated in my response to the Committee of 16 September, such persons are merely illustrative of some of the classes of persons who might be authorised, in appropriate circumstances, to exercise powers under s 23(1) on behalf of ASIO. For the reasons I have identified above, it is critical that s 23(6) accommodates the contingency that specified classes of persons may not be able to attend the particular location of a vessel or aircraft in relation to a matter of security interest.

The identity or credentials of appropriate persons to be authorised under s 23(6) for the purpose of s 23(1) may, in some instances, be highly dependent on the circumstances of individual intelligence operations. Failure to accommodate this contingency – in favour of applying a rigid rule that classes of persons must be particularised in the power of authorisation – raises a significant risk that ASIO is unable to collect critical intelligence relevant to security.

I further note that ASIO's activities in authorising persons under s 23(6) are subject to rigorous and appropriate controls. In exercising the power of authorisation in favour of individual persons, the Director-General of Security (and, by extension, the other persons invested with the power to grant authorisations) is required to adhere to the obligations placed on him or her under s 20 of the ASIO Act. This includes an obligation to take reasonable steps to ensure that the work of the Organisation is limited to what is necessary for the purpose of the discharge of its functions. It further includes an obligation to take reasonable steps to ensure that the Organisation is kept free from any influences or considerations not relevant to its functions.

In addition, the persons granting authorisations under s 23(6) must adhere to relevant requirements in the Attorney-General's Guidelines to ASIO, issued under s 8A of the ASIO Act. The Guidelines relevantly require the authorising person to consider whether the authorisation being considered is proportionate to the gravity of the threat posed and the probability of the occurrence. Further, the authorisation of persons and their actions under an authorisation are subject to the independent oversight of the Inspector-General of Intelligence and Security (IGIS) in accordance with the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Individuals, including operators of aircraft and vessels subject to the exercise of powers under s 23(1) can make complaints to the IGIS about the conduct of authorised persons.

Accordingly, I consider that the broad power of authorisation to 'a person' is operationally necessary and is caveated by appropriate safeguards, which are additional to the limited nature of the power in s 23(1) that authorised persons may exercise. I note that this power is limited to questioning operators of aircraft or vessels about the matters specified in paragraphs (a) and (b). (That is, asking questions or requesting the production of documents relating to the aircraft or vessel, its cargo, crew, passengers, stores or voyage.)

Entry to third party premises (ss 25(4)(aa), 25A(4)(aaa) (items 10, 19 of Sch 2)

Committee question 2. (p. 602)

The committee emphasises the importance of robust safeguards in relation to potentially intrusive powers (such as access to third party premises by ASIO) and notes the safeguards outlined by the Attorney-General.

To assist the committee in further examining these provisions, the committee requests further advice from the Attorney-General in relation to what the legal consequences of a breach of the principle of proportionality contained in the Guidelines (and ASIO's operating procedures) would be and whether consideration has been given to the inclusion of a proportionality requirement in the legislation.

Legal consequences of a breach of ASIO's Guidelines or operating procedures

ASIO is under an obligation to adhere to the Attorney-General's Guidelines issued under s 8A of the ASIO Act in relation to all of its activities, including entering third party premises for the purpose of executing a warrant. While contravention of the Guidelines or ASIO's operating procedures does not, of itself, attract criminal or civil liability, there may be administrative consequences for an individual ASIO employee or an ASIO affiliate who fails to adhere to them. This may include internal investigation under the ASIO Code of Conduct, or investigation by the IGIS under s 8 of the IGIS Act, and a possible loss of employment. Any member of the public who is concerned about possible inappropriate activity by ASIO, including a suspected disproportionate intrusion into an individual's privacy by entering their premises, may raise their concerns with the IGIS. The IGIS has broad powers to investigate such complaints against ASIO.

Should the Guidelines be more broadly misused, the IGIS could also make recommendations to the Government in respect of the specific breach or breaches, and make proposals to address any failures in procedure.

Consideration of including a 'proportionality' requirement in the ASIO Act

The Committee has asked whether consideration has been given to the inclusion of a 'proportionality' requirement in the ASIO Act in respect of the power to enter third party premises, where authorised under a warrant, for the purpose of executing that warrant.

Consistent with my correspondence of 16 September, I am of the view that the Attorney-General's Guidelines to ASIO make adequate provision for the proportionality of access to third party premises in accordance with a warrant. As noted above, the Guidelines impose requirements on ASIO relating to the proportionality of any intrusion into individual privacy, having regard to the gravity of the threat posed and the probability of its occurrence.

In particular, clause 10.4 of the Guidelines requires that any means used for obtaining information 'must be proportionate to the gravity of the threat posed and the probability of its occurrence... and [investigations] should be undertaken using as little intrusion into individual privacy as is possible'. Accordingly, ASIO is not able to request the issue of a warrant unless the Director-General is satisfied that less intrusive means of obtaining

information are not possible and that the obtaining of the information through warranted means of collection is proportionate to the gravity of the threat and the probability of its occurrence. ASIO's adherence to these Guidelines is the subject of independent oversight by the IGIS.

In addition, as I have noted above, the Director-General has a special responsibility under s 20 of the ASIO Act to take all reasonable steps to ensure that the work of the organisation is limited to what is necessary for the purposes of the discharge of its functions; and that the organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

For these reasons, I am of the view that it is unnecessary to include a 'proportionality' or 'privacy impact' test in the ASIO Act.

Special intelligence operations – limited immunity from liability (s 35K (item 3 of Sch 3)

Committee question 3 (p. 626)

In relation to proposed section 35K, the committee also takes this opportunity to request further advice from the Attorney-General as to the definitions of 'serious injury', 'serious loss of, or damage to, property' and 'conduct in the nature of 'entrapment" for the purposes of the limited protection from legal liability proposed in section 35K.

The committee is interested in examples of conduct that would not be necessary or proportionate to the effective performance by ASIO of its special intelligence functions, or the effective operation of the SIO scheme (explanatory memorandum, pp 108–109).

Background

The limited immunity from criminal and civil liability in s 35K applies to the authorised conduct of participants in an authorised special intelligence operation. Under s 35C(2)(e), an authorising officer (who will now be the Minister, consistent with Government amendments to the Bill) may only grant an authority if satisfied there are reasonable grounds on which to believe that any conduct involved in the special intelligence operation will not:

(i) cause the death of, or serious injury to, any person; or

(ii) involve the commission of a sexual offence against any person; or

(iii) result in significant loss of, or serious damage to, property.[1]

In addition, under s 35C(2)(d), the authorising officer must be satisfied there are reasonable grounds on which to believe that the special intelligence operation "will not be conducted in such a way that a person is likely to be induced to commit an offence against the law of the

1 The Government will further move amendments to include conduct constituting torture in the list of matters in s 35C(2)(e) that cannot be authorised as part of a special intelligence operation. A corresponding amendment will also be made to the limited immunity from criminal and civil liability in s 35K.

Commonwealth, a State or a Territory that the person would not otherwise have intended to commit".

Corresponding exclusions are applied to the immunity in ss 35K(1)(d) and (e). The result is that, not only is such conduct unable to be authorised as part of a special intelligence operation, it is also expressly excluded from the immunity to remove any doubt that it is subject to legal liability.

These forms of conduct have been excluded because the Government is of the view that they can never be necessary or proportionate to the effective performance of ASIO of its statutory functions, or the effective operation of the SIO scheme. As such, the Explanatory Memorandum to the Bill notes that the matters listed in the provisions I have cited above "reflect a policy judgment" to this effect. Accordingly, to the extent that the Committee is "interested in examples of conduct that would not be necessary or proportionate to the effective performance of ASIO by its special intelligence functions, or the effective operation of the SIO scheme", such examples are found in the abovementioned provisions themselves.

Interpretation of terms

The Committee has further sought my advice on the interpretation of the terms "serious injury", "significant loss of property" and "serious damage to property" as they appear in the provisions cited above. I note that these terms are readily capable of interpretation in individual cases, having regard to their ordinary meanings and case law on their interpretation. For example, the concept of 'serious injury' or 'serious harm' is commonly used in criminal offence provisions and offences at common law. (For example, the Commonwealth Criminal Code defines 'serious harm' as that which "endangers or is likely to endanger a person's life" or "is likely to be significant and longstanding". This definition, which was included in the Model Criminal Code, is also adopted in the criminal legislation of States and Territories.) The object of the terms 'serious' and 'significant' is to exclude injury, loss or damage that is trivial from the ambit of the authorisation criteria in s 35C and the limited immunity in s 35K.

I further note that references in the Explanatory Memorandum to "conduct in the nature of entrapment" is a shorthand form of expression to describe the provisions in ss 35C(2)(d) and 35K(1)(d), in respect of a person who "intentionally induc[es] another person to commit an offence against a law of the Commonwealth, a State or a Territory that the other person would not otherwise have intended to commit". These provisions are, in my view, readily capable of interpretation according to their ordinary meaning.

Committee question 4 (p. 627)

The committee also notes that paragraphs 15HA(2)(d) and 15HB(d) of the Crimes Act provide protection from criminal responsibility and indemnification against civil liability if the relevant conduct 'does not involve the participant engaging in any conduct that is likely to (i) cause the death of, or serious injury to, any person; or (ii) involve the commission of a sexual offence against any person. The committee notes that equivalent paragraph in this bill (proposed paragraph 35K(1)(e)) does not include the words 'is likely to' and seeks the Attorney-General's advice as to the impact of, and rationale for, this difference between the two schemes.

Background

The exclusions from the limited immunity from legal liability in s 35K(1)(e) have not adopted the phrase "likely to cause" or "likely to involve" the excluded conduct, as is used in the above provisions of the Crimes Act. Rather, the exclusions apply to conduct that "causes" or "involves" the excluded conduct. (That is, conduct causing death, serious injury, significant loss of or damage to property, or involving the commission of a sexual offence.)

Conduct causing death, serious injury or significant loss of or damage to property

The exclusions for conduct that "causes" death, serious injury or significant loss of or damage to property reflect the security requirement for intelligence collection operations in high risk environments. This may arise, for example, where an authorised participant or participants may be required to enter and operate within high-risk environments to obtain vital intelligence – with such risk only mitigated by these participants' high levels of skill, training and preparation. Applying the exclusion to conduct that is <u>likely to</u> cause death, serious injury or significant loss of or damage to property (as distinct from conduct that causes these outcomes) would limit the effectiveness of the scheme in obtaining intelligence for security purposes, such as the collection of intelligence on terrorist organisations either in Australia or overseas.

Conduct involving the commission of a sexual offence

I acknowledge that the exclusion in s 35K(1)(e)(ii) applies to any conduct that "<u>involves</u> the commission of a sexual offence against any person" as distinct from conduct that is <u>likely to</u> involve the commission of such an offence. (This is due to the fact that – for the operational reasons outlined above in relation to subparagraphs (i) and (iii) – the introductory words to paragraph (e) do not contain the words "likely to" which would apply to all of the conduct listed in subparagraphs (i)-(iii).)

I do not consider the omission of the words "likely to" in s 35K(1)(e)(ii) lessen the prohibitions on the commission of sexual offences in any way, for two reasons. First, there can be no suggestion that there could, under any circumstances, be a legitimate operational reason to engage in conduct constituting a sexual offence, since such conduct bears no sensible connection to ASIO's statutory functions. Indeed, such conduct cannot be authorised as part of a special intelligence operation by reason of the express exclusion in s 35C(1)(e)(ii).

Secondly, there is not, in my view, a material difference between conduct that meets the description of being "likely to" involve the commission of a sexual offence and conduct that meets the description of "involving" the commission of such an offence. Sexual offences are based on a person's intentional conduct, and his or her knowledge of, or recklessness as to, the other person's lack of consent or capacity to consent (or strict or absolute liability may apply to this circumstance in some instances). Given the elements of these offences, I do not accept that there can be a category of conduct that is "likely to" involve the commission of a sexual offence – and which is capable of satisfying the authorisation criteria in s 35C(2)(a)-(d) – and which falls short of involving the commission of such an offence.