



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

**SECOND REPORT**  
**OF**  
**2015**

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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

## SECOND REPORT OF 2015

The committee presents its *Second Report of 2015* to the Senate.

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

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# Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Defence

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 1 of 2015*. The Minister responded to the committee's comments in a letter dated 26 February 2015. A copy of the letter is attached to this report.

*Alert Digest No. 1 of 2015 - extract*

## **Background**

This bill amends the *Defence Act 1903* to:

- clarify the independence, powers and privileges of the Inspector-General ADF;
- provide a statutory basis to support regulatory change including the re-allocation of responsibility for investigation of service-related deaths and the management of the Australian Defence Force redress of grievance process to the Inspector-General ADF; and
- require the Inspector-General ADF to prepare an annual report.

## **Undue trespass on personal rights and liberties—abrogation of the privilege against self-incrimination**

### **Items 9 and 12**

These items make amendments to section 124 of the *Defence Act 1903*.

Item 9 inserts new subsection 124(2AA) which provides that regulations may be made (in relation to Inspector General ADF investigations or inquiries) that require a person to answer questions even if an answer may tend to incriminate the person. Similarly, proposed new subsection 124(2AB) provides that the regulations may make provision for requiring a person appearing as a witness before an Inspector-General ADF appointed inquiry officer or inquiry assistant, or Assistant Inspector-General ADF, to answer a question even if the answer may tend to incriminate the person.

Item 12 inserts new subsection 124(2CA) which provides for a use and derivative use immunity in relation to information and documents which have been required in the course of such investigations or inquiries. This immunity applies in relation to any civil or criminal proceedings in any federal court or court of a State or Territory and to proceedings before a service tribunal. The immunity does not apply to proceedings by way of a prosecution for giving false testimony at the hearing before the Inspector-General ADF or Inspector-General ADF appointed inquiry officer. Existing subsection 124(2B) will also be amended (see item 11) so it applies in relation to these inquiries and investigations. The effect is that a person cannot be compelled to answer a question where an answer may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.

The statement of compatibility (at p. 3) concludes that the abrogation of the common law privilege against self-incrimination should not be considered to unduly compromise the right of people to enjoy a fair trial. It is stated that the government has a 'legitimate interest in making regulations that may require a witness to incriminate themselves in order that the true circumstances and events subject to inquiry by Defence may be ascertained' (p. 3). Further, it is noted that use immunity and the absence of a power to compel witnesses to incriminate themselves in respect of an offence for which they have been charged but not yet tried eliminate 'the possibility of the unfair use of admissions and wrongdoing'.

Although the committee has recognised that the privilege against self-incrimination may, in limited circumstances, be legitimately overridden, it has also regularly insisted that the result is the removal of a privilege that represents a serious loss of personal liberty. As such, the committee's expectation is that explanatory material provides a detailed justification as to why the public benefit in removing the privilege is considered to outweigh this significant loss of liberty. Although the presence of a use and derivative use immunity lessens the harm occasioned by this loss of liberty it does not remove it and the committee therefore expects a clear explanation of the necessity of overriding the privilege even where these immunities are provided.

**For these reasons, the committee seeks further elaboration as to why abrogation of the privilege against self-incrimination is considered necessary in these circumstances, including how the public benefit in removing the privilege is considered to outweigh the significant loss of liberty involved.**

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

**Delegation of legislative power—important matters in regulations  
Items 9 and 12**

The committee further notes that wherever possible any abrogation of important common law rights and principles should be achieved by primary legislation. **The committee therefore also seeks an explanation as to why it is considered appropriate for the abrogation of the privilege against self-incrimination—a matter of considerable importance—to be dealt with in the regulations.**

*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***

I am advised that, under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (2B) and (2C) of the Act. I understand that the Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events - for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

I have also been advised that the changes contained within the Bill have been generated by the ADFs desire to improve the efficiency of the current system, which has been found to be unnecessarily complex, inefficient and legalistic.

Currently, unless I direct otherwise, a Chief of Defence Force Commission of Inquiry must be held into a service related death. These Commissions currently have the ability to require witnesses to answer questions in abrogation of their right against self-incrimination. With the passage of this Bill it is intended that the functional responsibility for the investigation of service related deaths will become the responsibility of the Inspector-General ADF, so for consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope of operation due to the limitations imposed by the new subsection 110C(4) of the Act on the functions of the Inspector-General ADF.

Although the committee has expressed concern that dealing with the abrogation of the privilege against self-incrimination is being left to regulation, I have been advised that the Bill's insertion of sub-sections (2AA), (2AB) and (2CA) into the Act actually form a strong statutory safeguard against abuse of the abrogation.

I trust this additional information will assist the Committee in relation to this issue.

### *Committee Response*

The committee thanks the Minister for this response and notes his advice in relation to existing circumstances involving the abrogation of the privilege, the argument for consistency of approach and the limited scope of the abrogation of the privilege as a result of proposed subsection 110C(4). The committee also notes the importance of item 12, which provides use and derivate use immunities. **The committee emphasises the importance of ensuring that a strong justification for any abrogation of the privilege is included in explanatory memoranda and requests that the key information above be included in the explanatory memorandum to this bill. The committee draws these provisions to the attention of the Senate and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Enhancing Online Safety for Children Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Communications

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 1 of 2015*. The Minister responded to the committee's comments in a letter dated 27 February 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 1 of 2015 - extract*

## **Background**

This bill:

- establishes the Children's e-Safety Commissioner and the Commissioner's functions and powers;
- provides for complaints systems for cyber-bullying material targeted at an Australian child to be removed quickly from large social media sites; and
- establishes a Children's Online Safety Special Account to fund the Commissioner's activities.

## **Delegation of legislative power**

### **Paragraph 5(1)(c)**

This paragraph provides that the legislative rules may add to the conditions which must be satisfied for material to constitute 'cyber-bullying material targeted at an Australian child'. Clearly the definition of what material constitutes cyber-bullying for the purposes of the bill is a matter of central significance to the operation of the regulatory scheme.

The explanatory memorandum (at p. 67) justifies the inclusion of this rule-making power by suggesting that it may be necessary to include other conditions in the test of what constitutes cyber-bullying material 'should it become apparent during the course of administering the legislation, that further conditions should be specified'.

The committee notes that although rule-making may, in some contexts, be considered appropriate on account of the need to make frequent regulatory adjustments in consequence of conditions of uncertainty or rapid change, it is not immediately clear why frequent adjustments to the nature of the basic test for cyber-bullying set out in subclause 5(1) are likely to be necessary. In considering the necessity of this rule-making power, the

committee notes that paragraph 9(1)(b) provides that the legislative rules may specify an electronic service as a ‘social media service’ and paragraph 9(4)(b) provides that the legislative rules may specify that a service is an exempt service. It appears that these rule-making powers provide a mechanism for the regulatory scheme to be adjusted in response to the changing nature of social media.

Overall, it appears that the bill seeks to balance, on the one hand, freedom of expression and, on the other hand, rights protective of honour, reputation and privacy.

Noting the above, and the central importance of the test of ‘cyber-bullying material targeted at an Australian child’ (in clause 5) to the operation of the bill and the fact that this definition is relevant to any consideration of the appropriateness of the balance achieved between competing rights, **the committee seeks the Minister’s advice as to why it is not considered more appropriate that any adjustments to this test be brought directly before the Parliament through proposals to amend the primary Act.**

*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***

#### **1. Clause 5(1)(c) - Delegation of legislative power**

The Committee sought advice as to why it is not considered more appropriate that any adjustments to the test of ‘cyber-bullying material targeted at an Australian child’ be brought directly before the Parliament through proposals to amend the primary Act rather than through legislative rules.

Clause 5 of the *Enhancing Online Safety for Children Bill 2014* (the Bill) sets out the test for when material is considered ‘cyber-bullying material targeted at an Australian child’. Clause 5(1)(c) allows for inclusion of ‘such other conditions (if any) as set out in the legislative rules’. The effect of 5(1)(c) is to enable exceptions to be made to certain types of material from being considered ‘cyber-bullying material targeted at an Australian child’. There may be instances in which it would be warranted to exclude material which might otherwise be considered ‘cyber-bullying material targeted at an Australian child’. One such example is the exception set out in clause 5(4), which relates to authority figures, such as parents, teachers and employers.

However, there is an enormous range of human behaviour exhibited in online communication, and it is not possible to envisage every type of exception to the definition that may be required. Clause 5(1)(c) has been included to allow flexibility in the definition

so that the scheme may be adapted quickly should the Commissioner receive large numbers of complaints about 'cyber-bullying material targeted at an Australian child' which ought not to be captured within the scheme. This will enable a quick response to circumstances that only become apparent during the course of administering the legislation.

I note the Committee's comment that amendments to an Act is ideally preferred to subordinate legislation. However, given the lead times in developing and passing legislative amendments, the ability for legislative rules to set out any additional conditions that may be appropriate greatly increases the timeliness of any response to new trends.

Legislative rules would of course still be subject to Parliamentary scrutiny and disallowance.

### ***Committee Response***

The committee thanks the Minister for this response and notes the explanation in relation to a possible need to respond quickly to exclude conduct 'which ought not to be captured within the scheme'. The committee also notes that the subordinate legislation can only exclude possible conduct rather than extend the scope of the scheme, and notes that any rules will be disallowable.

In light of the intention to rely on delegated legislation for this significant aspect of the scheme, and noting the 'enormous range of human behaviour exhibited in online behaviour' and that it is 'not possible to envisage every type of exception to the definition that may be required', it appears to the committee that the content of any relevant legislative instrument may involve complex and difficult drafting to ensure the exception itself is appropriately constructed. **The committee therefore seeks the Minister's further advice as to whether consideration has been given to ensuring that expert drafters will be involved in the preparation of any subordinate legislation created under paragraph 5(1)(c). In this context, the committee notes that requiring such instruments to be made as regulations (rather than rules) would ensure that these instruments are drafted by the Office of Parliamentary Counsel.**

## ***Alert Digest No. 1 of 2015 - extract***

### **Insufficiently defined administrative powers Clause 16**

Clause 16 provides that the Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of his or her functions.

On its face clause 16 may be considered to provide the Commissioner with inadequately defined discretionary power. However the committee notes that this clause may simply be the legislative expression of an implied incidental power (i.e. the power to do whatever may be fairly regarded as incidental to, or consequential upon, things expressly authorised by the legislature).

**In order for the committee to be able to assess whether the power conferred on the Commissioner by clause 16 is appropriately defined, the committee seeks the Minister's advice as to the intended scope of this power.**

*Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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***

### **2. Clause 16 – Insufficiently defined administrative powers**

The Committee sought advice as to the intended scope of the Commissioner's power under clause 16.

Clause 16 of the Bill is a common legislative provision. It is similar to, for example, section 12 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act) which provides that the 'ACMA has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions'.

Another example is section 10 of the *Australian Information Commissioner Act 2010*, which allows the Information Commissioner 'to do all things necessary or convenient to be done for or in connection with the performance of functions conferred by this section'.

Clause 16 is intended to provide the Commissioner with a general power to act, but the power is limited to whatever is necessary or convenient to be done in connection with the functions of the Commissioner expressly authorised by the legislation.

### ***Committee Response***

The committee thanks the Minister for this response, noting that the power will be 'limited to whatever is necessary or convenient to be done in connection with the functions of the Commissioner expressly authorised by the legislation'.

### ***Alert Digest No. 1 of 2015 - extract***

#### **Broad discretionary power**

##### **Clause 19**

Subclause 19(1) provides that the Commissioner may investigate a complaint made under clause 18. The explanatory memorandum explains that this is a discretionary power and the Commissioner is not obliged to investigate all complaints. Although it may be accepted that there are circumstances in which a decision not to investigate a complaint may be well justified, it is unclear why more guidance about these circumstances cannot be included in the bill. In this respect it is noted that the only avenue to have a decision not to investigate reviewed is by way of judicial review—such decisions are not subject to merits review in the AAT. For this reason, it may be considered desirable that some legislative guidance be given to structure the exercise of this broad discretionary power.

**The committee therefore seeks the Minister's advice as to whether consideration has been given to including further legislative guidance about the criteria relevant to the exercise of this power.**

*Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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*

### **3. Clause 19 – Broad discretionary power**

The Committee sought advice as to whether consideration has been given to including further legislative guidance about the criteria relevant to the exercise of the power under clause 19, which provides that the Commissioner may investigate a complaint made under clause 18.

Clause 19 of the Bill has been modelled on a number of existing provisions in Commonwealth legislation. For example, under clause 27 of Schedule 5 to the *Broadcasting Services Act 1992* (the BSA) ‘if the ACMA thinks that it is desirable to do so, the ACMA may, on its own initiative or in response to a complaint made under Division 1, investigate whether an internet service provider has contravened a code registered under Part 5 of [Schedule 5] applicable to the provider or an online provider rule applicable to the provider’.

Sections 149 and 151 of the BSA also provide that the ACMA ‘may’ investigate certain complaints ‘if the ACMA thinks that it is desirable to do so’.

As the Committee has noted, the Explanatory Memorandum to the Bill provides examples of when a complaint may not be investigated. Examples include:

- when a complaint is of a criminal and serious nature and should be referred to the Australian Federal Police
- when the issue may be best resolved in schools
- when the issue has already been resolved, or
- when a child withdraws consent for a complaint.

As the Bill seeks to regulate human behaviour occurring in a variety of different contexts, each individual complaint received by the Commissioner will involve different considerations. Complaints may involve sensitive issues relating to relationships and the personal feelings of the parties involved. Consideration of whether to investigate, or whether to stop an investigation, will require nuanced judgments weighing a range of competing factors that are difficult to predict. Codifying such considerations in legislation would unduly lessen the Commissioner’s discretion and increase the likelihood of inappropriate outcomes in individual cases.

Therefore, it is not proposed to provide specific legislative guidance about the criteria relevant to the exercise of this power in the Bill.

### ***Committee Response***

The committee thanks the Minister for this response and notes his advice in relation to similar provisions in other legislation and perceived difficulties in codifying relevant considerations in legislation.

The committee is of the view that it would be possible to structure at least some limited legislative guidance without being overly prescriptive and interfering with nuanced judgments when these are required. **The committee draws its views to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as whole.**

### ***Alert Digest No. 1 of 2015 - extract***

#### **Insufficiently defined administrative powers—delegation of administrative power**

##### **Clause 64**

Subclause 64(1) provides that the Commissioner, may, by writing, delegate any or all of his or her functions and powers under Part 3 and 4 (except clauses 35 and 37) of the bill to a body corporate that meets certain criteria—namely, that it is specified in the legislative rules, is registered under Part 2A.2 of the *Corporations Act 2001*, and is a company limited by guarantee. Subclause 64(3) provides for the exchange of information between a delegated corporate entity and the Commissioner that is relevant to the performance of the functions or exercise of powers of the Commissioner.

This power of delegation thus enables non-statutory entities staffed by persons outside of the Australian Public Service to exercise the Commissioner's powers. The committee notes that, while the power to delegate the functions and powers of the Commissioner under clause 63 to government employees is limited by reference to persons who are employed at least at APS 6 or an equivalent position, no similar restrictions are included in the legislation in relation to the employees of a delegated corporate entity who may exercise the Commissioner's powers or perform his or her functions.

Furthermore, while clause 65 provides that employees of a delegated corporate entity may only act under a sub-delegation if they satisfy the conditions set out in the legislative rules, it is not apparent why necessary restrictions on the persons whom can exercise the Commissioner's powers and functions should not be included the primary legislation.

Finally, the committee notes that a delegate of the Commissioner has coercive information gathering powers similar to those currently possessed by the ACMA under Part 13 of the *Broadcasting Services Act 1992* (see Part 1 of the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014).

**Noting the above, and the fact that neither (1) the rationale for this power of delegation (to non-government decision-makers), nor (2) the question of whether appropriate accountability mechanisms will be maintained for the performance of the Commissioner's functions and exercise of the Commissioner's powers are addressed in the explanatory memorandum, the committee seeks the Minister's advice in relation to these matters.**

*Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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***

#### **4. Clause 64 – Insufficiently defined administrative powers – delegation of administrative power.**

The Committee sought advice on:

- The rationale for the power of delegation to non-government decision-makers; and
- Whether appropriate accountability mechanisms will be maintained for the performance of the Commissioner's functions and exercise of the Commissioner's powers.

#### **Rationale for the power to delegate to a body corporate**

As the Committee noted, clause 64 of the Bill provides the Commissioner with the discretionary power to, by writing, delegate any or all of his or her functions and powers under Parts 3 and 4 (except clauses 35 and 37) of the Bill to a body corporate that meets certain criteria. This power has been included to allow the Commissioner to delegate certain functions and powers to a body corporate if it becomes apparent that it would be more effective and efficient to do so.

In New Zealand, 'Netsafe', an independent, non-profit organisation established in 1998, plays a key role in promoting confident, safe and responsible use of online technologies. Netsafe receives complaints about a number of 'online incidents' including cyber-bullying, offences against children, child pornography, 'objectionable material', spam and attacks on

computer systems. Netsafe also provides resources to address cyber-safety and support digital citizenship.

Currently in Australia, there is no equivalent organisation that has been established and is well suited for the Commissioner to delegate his or her functions and powers under clause 64. However, if such an Australian organisation were developed, clause 64 may be used to delegate specific functions and powers of the Commissioner where it would be more effective and efficient to do so rather than being performed by a government agency.

### Restrictions on delegation to a body corporate

As the Committee has noted, the power to delegate the Commissioner's functions and powers to government employees under clause 63 of the Bill is limited by reference to persons who are employed at least at APS 6 or an equivalent position. However no similar restrictions have been included in relation to employees of a delegated corporate entity. This is due to the differing natures of bodies corporate. Bodies corporate can have differing structures and different classifications or descriptions for employees. It is therefore not proposed to place restrictions by reference to the position of persons employed by bodies corporate in the legislation.

However, clause 64 of the Bill ensures that there are appropriate accountability mechanisms in place on bodies corporate who have been delegated certain functions and powers of the Commissioner. The Commissioner can only delegate his or her functions and powers to a body corporate that is:

- Specified in the legislative rules; and
- Is a company that is registered under Part 2A.2 of the *Corporations Act 2001*; and
- Is a company limited by guarantee.

Moreover, a delegate must comply with any written directions of the Commissioner as per subclause 64(2). The Commissioner would be able to limit the extent of sub-delegation by the body corporate using this power.

Similarly, under clause 65 of the Bill, employees of a body corporate who have been sub-delegated certain functions and powers of the Commissioner, will be bound by conditions set out in the legislative rules and any written directions of the body corporate or the Commissioner. The nature of any delegation would need to be considered in the context of any particular proposal that comes forward, rather than be set out in the Bill.

### Information gathering powers

The Committee noted that the delegate of the Commissioner has coercive information gathering powers similar to those currently possessed by the ACMA under Part 13 of the BSA.

Clause 64 of the Bill provides the Commissioner with the discretionary power to, by writing, delegate any or all of his or her functions and powers under Parts 3 and 4 (except clauses 35 and 37) of the Bill to a body corporate. Clause 19 of the Bill provides the Commissioner with the power to investigate complaints, including the power to obtain information for the purposes of an investigation, subject to Part 13 of the BSA.

A delegation to a body corporate of the Commissioner's power to investigate complaints can be restricted. As stated earlier, under clause 64(2), the Commissioner can set any appropriate arrangements for undertaking investigations by a written direction.

Moreover, as previously mentioned, a delegation to a body corporate can only arise if the body corporate is specified in the legislative rules, meaning the appointment of a body corporate to undertake any of the Commissioner's powers and functions would be subject to Parliamentary scrutiny.

### ***Committee Response***

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

The committee notes that although written directions may limit and control delegations of power to a private body corporate, the bill does not *require* that appropriate arrangements for the exercise of these powers be put in place. The committee further notes that involving a particular body corporate in the operation of the regulatory scheme arguably involves significant questions of policy that are more appropriately determined by Parliament in consideration of a specific legislative proposal (in primary legislation), than through the exercise of general powers enabling the Commissioner to delegate powers to a private entity.

**The committee draws these issues, and the Minister's response, to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Higher Education and Research Reform Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Education

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 1 of 2015*. The Minister responded to the committee's comments in a letter dated 26 February 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 1 of 2015 - extract*

A similar bill was introduced into the House of Representatives on 28 August 2014 and the committee dealt with the bill in *Alert Digest 11 of 2014*. The Minister responded to the committee's comments which were published in the committee's *Thirteen Report of 2014*. This similar bill was negatived in the Senate on 2 December 2014.

## **Background**

This bill includes a range of amendments in response to recommendations made by the Senate Education and Employment Legislation Committee following its inquiry into the Higher Education and Research Reform Amendment Bill 2014, tabled on 28 October 2014.

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

Schedule 1 makes the following amendments:

- 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.
- removes limits currently placed on student contribution amounts providers can charge;
- amends the HELP loan programs currently available to Commonwealth supported and full fee-paying students and removes the FEE-HELP and the VET FEE-HELP lifetime limits and loan fee.

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 retains the Consumer Price Index (CPI) as the indexation rate of HELP debts and introduces indexation relief arrangements for primary carers of children aged under five.

Schedule 4 establishes a new minimum repayment threshold for HELP debts of two per cent when a person's income reaches \$50,638 in 2016-17.

Schedule 5 enables universities to charge Research Training Scheme students a capped tuition fee which will be deferrable through HELP. It also amends the ARC Act to allow additional investment in research through the Future Fellowships scheme, apply indexation and add an additional forward estimate amount.

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 with the (CPI) from 1 January 2016.

Schedule 9 will update the name of the University of Ballarat to Federation University Australia.

Schedule 9A amends the Higher Education Participation Programme requirements and introduces three programmes to increase access and participation in higher education by students from disadvantaged backgrounds.

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

### **Broad discretionary power Schedule 9A, item 9**

This item repeals sections 1.40 to 1.85 of the Other Grants Guidelines (Higher Education Participation and Partnerships Program) and substitutes new sections 1.40 to 1.86. These new sections will implement three new participation programs: (1) an Access and Participation Program, (2) a Scholarships Fund, and (3) a National Priorities Pool.

In approving grants (or determining the amount of a grant) under each program it is stated in 'notes' that the Minister may take account of factors, and examples are given of relevant factors. It is further stated that 'it is expected that these factors will be published on the Department's website'. Given the significance of these programs it is not clear why the relevant considerations for making grants (or determining the amount of a grant) should not at least be included in the guidelines so they will be subject to a level of parliamentary oversight. **The committee therefore seeks the Minister's advice as to why it is not possible to structure what appears to be a broad discretionary power to make grants**

**under these programs by including the considerations relevant to the exercise of the grant-making power in the guidelines (which are a disallowable instrument).**

*Pending the Minister's advice, 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 HEPP is designed to provide flexibility to support a broad range of activities to promote equality of opportunity in higher education, targeted to those providers which support access for students from low socio-economic backgrounds and achieve successful outcomes for these students. The proposed HEPP provisions will allow flexibility to respond to changing priorities and ensure the programme is effective in improving access, participation and success of disadvantaged students in higher education.

This approach is consistent with current practice. I draw your attention to the Other Grants Guidelines (Education) 2012 (the Guidelines) which contain a range of programmes under which the Minister has broad discretion to approve grants, determine the amount of grants and impose conditions on which grants are made.

Subsection 41-15 (2) of the *Higher Education Support Act 2003* (HESA) provides that the Guidelines *may* specify all or any of the matters listed in that subsection including the method by which the amount of grants under the programme will be determined. Under the proposed HEPP provisions, the method by which grant amounts are determined is not specified in the Guidelines but instead, I will be determining the amount in writing by relying on the power vested in me under subsection 41-30(b) of HESA.

In order to assist providers it is expected that any factors that I may consider in determining a grant amount under subsection 41-30 (b) of HESA would be made available on the Department of Education and Training website. This approach will ensure these arrangements are transparent. The details, including the method for calculating grants, will be determined in consultation with the higher education sector, and will be published at: <http://education.gov.au/higher-education-participation-programme-bepp>.

Thank you for writing to me on this important matter.

***Committee Response***

The committee thanks the Minister for this response, and notes the Minister's advice that the approach is consistent with current practice.

**The committee draws this provision (which provides a broad discretionary power to the Minister) to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Introduced into the House of Representatives on 30 October 2014

Portfolio: Attorney-General

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 16 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 4 February 2015. The committee sought further information and the Attorney-General responded in a letter dated 25 February 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 16 of 2014 - extract*

## **Background**

This bill amends the *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications Act 1997* to introduce a statutory obligation for telecommunications service providers to retain defined telecommunications data for two years.

### *Attorney-General's general comment*

The Committee has indicated concerns about the impact of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in relation to the right to privacy. It has also recommended that the Bill be amended so that a range of matters are dealt with in the primary legislation rather than through delegated legislation and instruments.

Alternatively, if the Bill is not amended, the Committee has requested advice from the Government about other mechanisms to increase Parliamentary oversight in relation to regulations prescribing the data set, those prescribing additional services to which the data set will apply and Ministerial declarations of further authorities and bodies to be a 'criminal law enforcement agency'.

## Right to privacy

The Committee's analysis of the Bill refers to the *Fifteenth Report on the 44th Parliament* by the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR has requested further information about the Bill to which I will shortly respond separately. However, I take this opportunity to note that the Bill contains significant oversight mechanisms designed to safeguard privacy and other fundamental freedoms.

The retention of a limited set of telecommunications data that is required to support investigations serves the legitimate objective of protecting national security, public safety and addressing crime. To avoid unlawful and arbitrary interference with the right to privacy, the Bill sets out the types of data which will be retained, reduces the number and range of agencies which can access telecommunications data and extends the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of telecommunications data under Chapter 4 of the TIA Act. These safeguards supplement existing controls limiting the purposes for which telecommunications data may be used, and offences for the unlawful use of telecommunications data.

### *Committee's first response*

The committee thanks the Attorney-General for this additional information.

The committee welcomes measures in the bill designed to avoid unlawful and arbitrary interference with the right to privacy, such as the reduction in the number and range of agencies which can access telecommunications data and the extension of the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of, telecommunications data under Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

In relation to the extension of the Ombudsman's remit, the committee notes that the efficacy of the increased oversight will depend upon the Ombudsman being appropriately resourced to undertake its increased oversight responsibilities. More generally, a similar case may be made in relation to oversight of intelligence agencies by the IGIS.

**The committee therefore seeks the Attorney-General's advice in relation to whether any additional funding or resources will be provided to the Ombudsman and/or the IGIS to ensure that they are able to conduct their important oversight responsibilities effectively.**

### ***Attorney-General's response - extract***

As part of the national security measures announced by the Government on 5 August 2014, the Government will increase the budget of the independent Office of the IGIS to support its role in the effective oversight of the proposed reforms. The Government is committed to continuing to work with the Office of the IGIS to ensure continued independent oversight.

My Department is separately engaged in ongoing discussions with the Ombudsman in relation to resources it requires to support its new role in oversight of access to telecommunications data. Funding for the proposed new oversight role is most appropriately addressed through the budget process.

I note that the proposed amendments, including the Ombudsman's expanded role, would not commence until six months after Royal Assent, which would be within the 2015/16 financial year.

### ***Committee Response***

The committee thanks the Attorney-General for this response and notes that the government will increase the budget of the Office of the IGIS to support its role in overseeing the proposed reforms. The committee welcomes this and the Government's commitment to working with the Office of the IGIS to ensure continued independent oversight.

In relation to determining resources to support the Ombudsman's new role in oversight of access to telecommunications data, the committee notes the Attorney-General's advice that 'funding for the proposed new oversight role is most appropriately addressed through the budget process'.

The committee also notes recommendation 29 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) report into the bill. The PJCIS recommended 'that the Government consider the additional oversight responsibilities of the Commonwealth Ombudsman set out in the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 and ensure that the Office of the Commonwealth Ombudsman is provided with additional financial resources to undertake its enhanced oversight responsibilities.'

*continued*

**The committee restates its view that the efficacy of the increased oversight by the Ombudsman will depend upon the Ombudsman being appropriately resourced to undertake the increased oversight responsibilities.**

Senator Helen Polley  
Chair



## The Hon Kevin Andrews Minister for Defence

MC15-000368

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

Dear Senator Polley

A handwritten signature in cursive script that reads 'Helen'.

Thank you for the Committee's letter of 12 February 2015 regarding the Defence Legislation Amendment (Military Justice Enhancements - Inspector-General ADF) Bill 2014 (the Bill).

That letter, when read in conjunction with Alert Digest No. 1 of 2015 sought, on behalf of the Senate's Scrutiny of Bills Committee:

- further elaboration as to why abrogation of the privilege against self-incrimination is considered necessary in these circumstances; and
- an explanation as to why it is considered appropriate for the abrogation of the privilege against self-incrimination to be dealt with in the regulations.

I am advised that, under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (2B) and (2C) of the Act. I understand that the Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events – for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

I have also been advised that the changes contained within the Bill have been generated by the ADF's desire to improve the efficiency of the current system, which has been found to be unnecessarily complex, inefficient and legalistic.

Currently, unless I direct otherwise, a Chief of Defence Force Commission of Inquiry must be held into a service related death. These Commissions currently have the ability to require witnesses to answer questions in abrogation of their right against self-incrimination. With the passage of this Bill it is intended that the functional responsibility for the investigation of service related deaths will become the responsibility of the Inspector-General ADF, so for consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope of operation due to the limitations imposed by the new subsection 110C(4) of the Act on the functions of the Inspector-General ADF.

Although the committee has expressed concern that dealing with the abrogation of the privilege against self-incrimination is being left to regulation, I have been advised that the Bill's insertion of sub-sections (2AA), (2AB) and (2CA) into the Act actually form a strong statutory safeguard against abuse of the abrogation.

I trust this additional information will assist the Committee in relation to this issue.

Yours sincerely



**KEVIN ANDREWS MP**

26 FEB 2015



The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

27 FEB 2015

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

By email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

### **The Enhancing Online Safety for Children Bill 2014**

Dear Senator Polley

I am writing to respond to four issues raised by the Senate Scrutiny of Bills Committee in relation to the *Enhancing Online Safety for Children Bill 2014*:

1. Clause 5(1)(c) – Delegation of legislative power;
2. Clause 16 – Insufficiently defined administrative powers;
3. Clause 19 – Broad discretionary power; and
4. Clause 64 – Insufficiently defined administrative powers – delegation of administrative power.

I note that the Committee has no comment on the *Enhancing Online Safety for Children (Consequential Amendments) Bill 2014*.

**Attachment A** sets out the responses to the issues raised by the Committee.

Thank you for providing the opportunity to respond to these issues.

Yours sincerely

/ Malcolm Turnbull

**1. Clause 5(1)(c) - Delegation of legislative power**

The Committee sought advice as to why it is not considered more appropriate that any adjustments to the test of 'cyber-bullying material targeted at an Australian child' be brought directly before the Parliament through proposals to amend the primary Act rather than through legislative rules.

Clause 5 of the *Enhancing Online Safety for Children Bill 2014* (the Bill) sets out the test for when material is considered 'cyber-bullying material targeted at an Australian child'. Clause 5(1)(c) allows for inclusion of 'such other conditions (if any) as set out in the legislative rules'. The effect of 5(1)(c) is to enable exceptions to be made to certain types of material from being considered 'cyber-bullying material targeted at an Australian child'.

There may be instances in which it would be warranted to exclude material which might otherwise be considered 'cyber-bullying material targeted at an Australian child'. One such example is the exception set out in clause 5(4), which relates to authority figures, such as parents, teachers and employers.

However, there is an enormous range of human behaviour exhibited in online communication, and it is not possible to envisage every type of exception to the definition that may be required.

Clause 5(1)(c) has been included to allow flexibility in the definition so that the scheme may be adapted quickly should the Commissioner receive large numbers of complaints about 'cyber-bullying material targeted at an Australian child' which ought not to be captured within the scheme. This will enable a quick response to circumstances that only become apparent during the course of administering the legislation.

I note the Committee's comment that amendments to an Act is ideally preferred to subordinate legislation. However, given the lead times in developing and passing legislative amendments, the ability for legislative rules to set out any additional conditions that may be appropriate greatly increases the timeliness of any response to new trends.

Legislative rules would of course still be subject to Parliamentary scrutiny and disallowance.

**2. Clause 16 – Insufficiently defined administrative powers**

The Committee sought advice as to the intended scope of the Commissioner's power under clause 16.

Clause 16 of the Bill is a common legislative provision. It is similar to, for example, section 12 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act) which provides that the 'ACMA has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions'.

Another example is section 10 of the *Australian Information Commissioner Act 2010*, which allows the Information Commissioner ‘to do all things necessary or convenient to be done for or in connection with the performance of functions conferred by this section’.

Clause 16 is intended to provide the Commissioner with a general power to act, but the power is limited to whatever is necessary or convenient to be done in connection with the functions of the Commissioner expressly authorised by the legislation.

### **3. Clause 19 – Broad discretionary power**

The Committee sought advice as to whether consideration has been given to including further legislative guidance about the criteria relevant to the exercise of the power under clause 19, which provides that the Commissioner may investigate a complaint made under clause 18.

Clause 19 of the Bill has been modelled on a number of existing provisions in Commonwealth legislation. For example, under clause 27 of Schedule 5 to the *Broadcasting Services Act 1992* (the BSA) ‘if the ACMA thinks that it is desirable to do so, the ACMA may, on its own initiative or in response to a complaint made under Division 1, investigate whether an internet service provider has contravened a code registered under Part 5 of [Schedule 5] applicable to the provider or an online provider rule applicable to the provider’.

Sections 149 and 151 of the BSA also provide that the ACMA ‘may’ investigate certain complaints ‘if the ACMA thinks that it is desirable to do so’.

As the Committee has noted, the Explanatory Memorandum to the Bill provides examples of when a complaint may not be investigated. Examples include:

- when a complaint is of a criminal and serious nature and should be referred to the Australian Federal Police
- when the issue may be best resolved in schools
- when the issue has already been resolved, or
- when a child withdraws consent for a complaint.

As the Bill seeks to regulate human behaviour occurring in a variety of different contexts, each individual complaint received by the Commissioner will involve different considerations. Complaints may involve sensitive issues relating to relationships and the personal feelings of the parties involved. Consideration of whether to investigate, or whether to stop an investigation, will require nuanced judgments weighing a range of competing factors that are difficult to predict. Codifying such considerations in legislation would unduly lessen the Commissioner’s discretion and increase the likelihood of inappropriate outcomes in individual cases.

Therefore, it is not proposed to provide specific legislative guidance about the criteria relevant to the exercise of this power in the Bill.

#### **4. Clause 64 – Insufficiently defined administrative powers – delegation of administrative power.**

The Committee sought advice on:

- The rationale for the power of delegation to non-government decision-makers; and
- Whether appropriate accountability mechanisms will be maintained for the performance of the Commissioner's functions and exercise of the Commissioner's powers.

##### Rationale for the power to delegate to a body corporate

As the Committee noted, clause 64 of the Bill provides the Commissioner with the discretionary power to, by writing, delegate any or all of his or her functions and powers under Parts 3 and 4 (except clauses 35 and 37) of the Bill to a body corporate that meets certain criteria. This power has been included to allow the Commissioner to delegate certain functions and powers to a body corporate if it becomes apparent that it would be more effective and efficient to do so.

In New Zealand, 'Netsafe', an independent, non-profit organisation established in 1998, plays a key role in promoting confident, safe and responsible use of online technologies. Netsafe receives complaints about a number of 'online incidents' including cyber-bullying, offences against children, child pornography, 'objectionable material', spam and attacks on computer systems. Netsafe also provides resources to address cyber-safety and support digital citizenship.

Currently in Australia, there is no equivalent organisation that has been established and is well suited for the Commissioner to delegate his or her functions and powers under clause 64. However, if such an Australian organisation were developed, clause 64 may be used to delegate specific functions and powers of the Commissioner where it would be more effective and efficient to do so rather than being performed by a government agency.

##### Restrictions on delegation to a body corporate

As the Committee has noted, the power to delegate the Commissioner's functions and powers to government employees under clause 63 of the Bill is limited by reference to persons who are employed at least at APS 6 or an equivalent position. However no similar restrictions have been included in relation to employees of a delegated corporate entity.

This is due to the differing natures of bodies corporate. Bodies corporate can have differing structures and different classifications or descriptions for employees. It is therefore not proposed to place restrictions by reference to the position of persons employed by bodies corporate in the legislation.

However, clause 64 of the Bill ensures that there are appropriate accountability mechanisms in place on bodies corporate who have been delegated certain functions and powers of the Commissioner. The Commissioner can only delegate his or her functions and powers to a body corporate that is:

- Specified in the legislative rules; and
- Is a company that is registered under Part 2A.2 of the *Corporations Act 2001*; and

- Is a company limited by guarantee.

Moreover, a delegate must comply with any written directions of the Commissioner as per subclause 64(2). The Commissioner would be able to limit the extent of sub-delegation by the body corporate using this power.

Similarly, under clause 65 of the Bill, employees of a body corporate who have been sub-delegated certain functions and powers of the Commissioner, will be bound by conditions set out in the legislative rules and any written directions of the body corporate or the Commissioner. The nature of any delegation would need to be considered in the context of any particular proposal that comes forward, rather than be set out in the Bill.

#### Information gathering powers

The Committee noted that the delegate of the Commissioner has coercive information gathering powers similar to those currently possessed by the ACMA under Part 13 of the BSA.

Clause 64 of the Bill provides the Commissioner with the discretionary power to, by writing, delegate any or all of his or her functions and powers under Parts 3 and 4 (except clauses 35 and 37) of the Bill to a body corporate. Clause 19 of the Bill provides the Commissioner with the power to investigate complaints, including the power to obtain information for the purposes of an investigation, subject to Part 13 of the BSA.

A delegation to a body corporate of the Commissioner's power to investigate complaints can be restricted. As stated earlier, under clause 64(2), the Commissioner can set any appropriate arrangements for undertaking investigations by a written direction.

Moreover, as previously mentioned, a delegation to a body corporate can only arise if the body corporate is specified in the legislative rules, meaning the appointment of a body corporate to undertake any of the Commissioner's powers and functions would be subject to Parliamentary scrutiny.





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

Our Ref MC15-000472

26 FEB 2015

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

Dear  Senator

Thank you for your letter of 12 February 2015 concerning the Higher Education Participation Programme (HEPP) provisions contained in the Higher Education and Research Reform Bill 2014 (the Bill).

The HEPP is designed to provide flexibility to support a broad range of activities to promote equality of opportunity in higher education, targeted to those providers which support access for students from low socio-economic backgrounds and achieve successful outcomes for these students. The proposed HEPP provisions will allow flexibility to respond to changing priorities and ensure the programme is effective in improving access, participation and success of disadvantaged students in higher education.

This approach is consistent with current practice. I draw your attention to the Other Grants Guidelines (Education) 2012 (the Guidelines) which contain a range of programmes under which the Minister has broad discretion to approve grants, determine the amount of grants and impose conditions on which grants are made.

Subsection 41-15 (2) of the *Higher Education Support Act 2003* (HESA) provides that the Guidelines *may* specify all or any of the matters listed in that subsection including the method by which the amount of grants under the programme will be determined. Under the proposed HEPP provisions, the method by which grant amounts are determined is not specified in the Guidelines but instead, I will be determining the amount in writing by relying on the power vested in me under subsection 41-30 (b) of HESA.

In order to assist providers it is expected that any factors that I may consider in determining a grant amount under subsection 41-30 (b) of HESA would be made available on the Department of Education and Training website. This approach will ensure these arrangements are transparent. The details, including the method for calculating grants, will be determined in consultation with the higher education sector, and will be published at: <http://education.gov.au/higher-education-participation-programme-hepp>.

Thank you for writing to me on this important matter.

Yours sincerely

**Christopher Pyne MP**



ATTORNEY-GENERAL

CANBERRA

**RECEIVED**

26 FEB 2015

Senate Standing C'ttee  
for the Scrutiny  
of Bills

MC15/01664

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

25 FEB 2015

Dear Senator Polley

I refer to Ms Toni Dawes' letter of 12 February 2015 on behalf of the Committee seeking advice on resourcing of the Ombudsman and Inspector-General of Intelligence and Security (IGIS) to support their oversight roles under the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.

As part of the national security measures announced by the Government on 5 August 2014, the Government will increase the budget of the independent Office of the IGIS to support its role in the effective oversight of the proposed reforms. The Government is committed to continuing to work with the Office of the IGIS to ensure continued independent oversight.

My Department is separately engaged in ongoing discussions with the Ombudsman in relation to resources it requires to support its new role in oversight of access to telecommunications data. Funding for the proposed new oversight role is most appropriately addressed through the budget process.

I note that the proposed amendments, including the Ombudsman's expanded role, would not commence until six months after Royal Assent, which would be within the 2015/16 financial year.

The responsible adviser for this matter in my Office is Justin Bassi who can be contacted on 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)