SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2016

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Senator the Hon Bill Heffernan	LP, New South Wales
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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

FIFTH REPORT OF 2016

The committee presents its *Fifth Report of 2016* 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 has 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 as 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 31 March 2016

Bill	Portfolio	Correspondence	
		Due	Received
Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016	Health	10/03/16	29/02/16
Appropriation Bill (No. 3) 2015-2016	Finance	10/03/16	15/03/16
Appropriation Bill (No. 4) 2015-2016	Finance	10/03/16	15/03/16
Australian Crime Commission Amendment (National Policing Information) Bill 2015	Justice	18/02/16	29/02/16
Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]	Employment	10/03/16	09/03/16
Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]	Employment	10/03/16	09/03/16
Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016	Social Services	10/03/16	21/03/16
Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015	Communications	18/02/16	16/02/16

Bill	Portfolio	Correspondence	
		Due	**Received**
Corporations Amendment (Crowd-sourced Funding) Bill 2015	Treasury	18/02/16	18/02/16
Counter-Terrorism Legislation Amendment Bill (No. 1) 2015	Attorney-General	10/12/15	25/02/16
Minister's further response		10/03/16	*not yet received*
Courts Administration Legislation Amendment Bill 2015	Attorney-General	18/02/16	22/02/16
Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015	Justice	17/12/15	02/02/16
Minister's further response		18/02/16	15/02/16
Criminal Code Amendment (Firearms Trafficking) Bill 2015	Justice	18/02/16	10/02/16
Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015	Education and Training	18/02/16	24/03/16
Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015	Education and Training	18/02/16	29/02/16
Insolvency Law Reform Bill 2015	Treasury	18/02/16	22/02/16
Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016	Immigration and Border Protection	10/03/16	08/03/16
Narcotic Drugs Amendment Bill 2016	Health	10/03/16	15/03/16
Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016	Industry, Innovation and Science	10/03/16	03/03/16
Regulatory Powers (Standardisation Reform) Bill 2016	Attorney-General	01/04/16	*not yet received*
Social Security Legislation Amendment (Community Development Program) Bill 2015	Indigenous Affairs	18/02/16	29/02/16
Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016	Social Services	01/04/16	14/4/16

Members/Senators responsiveness to 31 March 2016

Bill	Member/Senator	Correspondence Received
Ethical Cosmetics Bill 2016	Ms O'Neil	13/04/16

Appropriation Bill (No. 4) 2015-2016

Introduced into the House of Representatives on 4 February 2016
Portfolio: Finance
This bill received the Royal Assent on 23 March 2016

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter received on 15 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Background

This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2015-2016*.

Delegation of legislative power
Parliamentary scrutiny
Clause 14 and Schedules 1 and 2

Clause 14 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 14 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, ACT, NT and local government may be made: clause 14(2)(a); and
- the amounts and timing of those payments: clause 14(2)(b).

Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum (at p. 11) states that this is:

> …because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.

The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills—see the committee's *Seventh Report of 2015* (at pp 511–516) and *Ninth Report of 2015* (at pp 611–614). In these reports the committee requested that additional explanatory material be included in explanatory memoranda accompanying future even-numbered appropriation bills. In particular, the committee requested:

- additional explanatory material in relation to operation of this standard provision; and
- the inclusion of detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments.

To ensure clarity and ease of use the committee stated that this information should deal only with the proposed appropriations in the relevant bill. The committee noted that this would significantly assist Senators in scrutinising payments to State, Territory and local governments by ensuring that clear explanatory information in relation to the appropriations proposed in the particular bill is readily available in one stand-alone location.

The committee notes that additional material has been provided at pp 11–12 of the explanatory memorandum to this bill. This material emphasises that determinations under clause 14 (or is equivalent in other even-numbered appropriation bills) are rare. This is because for payments to the States, Territories and local government in an even-numbered Appropriation Act, there are generally other legislative or agreed frameworks which determine how the payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. The explanatory memorandum notes that many of these arrangements can be found on the Federal Financial Relations website (http://www.federalfinancialrelations.gov.au/).

The explanatory memorandum (at pp 11–12) also provides some additional detail in relation to the proposed appropriations for payments to the States, Territories and local government in this bill:

> In this Bill, appropriations to the States, ACT, NT and local government are sought for the Department of Agriculture and Water Resources against Outcome 3, and the Department of Infrastructure and Regional Development against Outcome 1 and Outcome 3. Further information may also be found in the portfolio statements for the respective portfolios. The most recent detailed estimates of Commonwealth payments to the States, Territories and local governments from 2015-16 to 2018-19 may be found in Annex A to Attachment D in Part 3 of Mid-Year Economic and Fiscal Outlook 2015-16 which is available at http://www.budget.gov.au/.

The committee thanks the Minister for including this additional explanatory material in response to the committee's requests. The committee considers that this information goes some way to providing further clarity to Senators in relation to the appropriation of money for, and the attachment of conditions to, payments to the

States and Territories. However, the particular purposes to which this money will be directed remains unclear.

The committee notes that the only information provided on the face of the bill in relation to the proposed appropriations for payments to the States, Territories and local government is as follows:

- Department of Agriculture and Water Resources—$3.4 million for outcome 3 (Improve the health of rivers and freshwater ecosystems and water use efficiency through implementing water reforms, and ensuring enhanced sustainability, efficiency and productivity in the management and use of water resources)
- Department of Infrastructure and Regional Development—$302.6 million for outcome 1 (Improved infrastructure across Australia through investment in and coordination of transport and other infrastructure)
- Department of Infrastructure and Regional Development—$23 million for outcome 3 (Strengthening the sustainability, capacity and diversity of regional economies including through facilitating local partnerships between all levels of government and local communities; and providing grants and financial assistance)

Noting the role of Senators in representing the people of their State or Territory and the terms of section 96 of the Constitution (which provides that '...the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'), the committee requests the Minister's advice in relation to:

- **the particular purposes to which the money for payments to the States, Territories and local government to be appropriated in this bill will be directed (including a breakdown of proposed grants by State/Territory); and**
- **the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or similar legislation or agreements) which detail how the terms and conditions to be attached to these particular payments will be determined.**

Pending the Minister's reply, the committee draws Senators' attention to the bill, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference, and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Minister's response - extract

As you are aware, additional information was included in the explanatory memorandum to Appropriation Bill (No. 4) 2015-2016 to reference external sources and publicly available information on the proposed appropriations.

While the concept of a stand-alone location of explanatory information on appropriations including purposes and specific statutory provisions that authorise programs has some appeal, it would be well outside the scope of an explanatory memorandum. The explanatory memoranda to the Bills address technical aspects of the operative clauses of the Bills, rather than specific details of appropriation amounts for proposed Government expenditure. Any further expansive background in the explanatory memoranda to the appropriation Bills would add considerably to production times for Budget documentation, which would be impractical where some decisions can be settled late in the process and final production work ties down available staff in rigorous processes for reconciling financial data and quality assuring documentation for typesetting and preparation of the legislation.

The suite of Budget documentation has been carefully developed over the years and is continually evolving. The detail of proposed Government expenditure, and the detail for the Budget generally, appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The portfolio statements provide the Senate with additional information and facilitate understanding of the proposed appropriations as a 'relevant document' under the *Acts Interpretation Act 1901* for the associated Appropriation Bills.

In practice the interest of the Committee has been in a select number of spending activities, where for example the Committee wants assurance that specific expenditure is appropriately supported by constitutional and legislative power. Such targeted inquiries are capable of being addressed as necessary, as they have been reasonable in number and posed through an orderly Committee process with manageable timeframes for response.

The Senate Estimates committees also have a well designed process specifically for such forensic examination of detail. The principal purpose of the three Estimates sessions held each year is to afford the opportunity for Senators to ask relevant entities about amounts in appropriation bills, or related measures in portfolio statements, or other published Budget documentation. Further details on enabling legislation and purposes of spending activities can also be ascertained through Estimates' Questions on Notice, which allow an extended timeframe for providing additional information on an activity beyond the hearings.

The 2015-16 Portfolio Additional Estimates Statements provides information on appropriations for 'Payments to the States, ACT, NT and local government' and related programs. This information is available in the tables in the Entity Resources Statements, Additional Estimates and Variations, and Outcome and Performance sections of the document. For the Appropriation Bill (No. 4) 2015-2016:

- $3.4 million under Outcome 3 of the Department of Agriculture and Water Resources relates to movement of funds for the National Urban Water and Desalination Plan to align with construction schedules;
- $302.6 million under Outcome 1 of the Department of Infrastructure and Regional Development for the Infrastructure Investment Program is the net impact of the *Mid-Year Economic and Fiscal Outlook 2015-16* (MYEFO) measure *Infrastructure Investment Programme - new investments,* movement of funds for Roads to Recovery to align with construction schedules, and estimate adjustments for the Investment element to align with construction schedules;
- $23.0 million under Outcome 3 of the Department of Infrastructure and Regional Development is a total of movement of funds for the Latrobe Valley economic diversification program to align with construction schedules and reclassification of appropriations for the Drought Communities Program to reflect grants to local Government.

The program information can be used in conjunction with the tables in Payments to the States sub-sections of Annex A to Attachment D in Part 3 of MYEFO to obtain the most recent detailed estimates of Commonwealth payments to the States, Territories and local governments from 2015-16 to 2018-19. These tables are available at http://www.budget.gov.au/. The specific statutory or other provisions which detail any terms and conditions for these particular payments can be found in various publicly available sources, such as the relevant entity websites, www.comlaw.gov.au and www.federalfinancialrelations.gov.au.

Committee response

The committee thanks the Minister for this response and for his ongoing engagement with the committee on this matter.

The committee again thanks the Minister for including additional information in the explanatory memorandum accompanying this bill which referenced external sources and publicly available information on the proposed appropriations. **The committee considers that the inclusion of similar information in future explanatory memoranda would assist parliamentary scrutiny.**

continued

The committee takes this opportunity to reiterate the fact that the power to make grants to the States and to determine terms and conditions attaching to them is *conferred on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While, as highlighted by the Minister, some information in relation to grants to the States is publicly available, effective parliamentary scrutiny is difficult because the information is only available in disparate sources. It is appropriate that at least a minimum level of information is readily and easily available as a matter of course in order to enable Senators and others to determine whether further inquiries are warranted.

The committee also notes the Minister's advice that Budget documentation 'has been carefully developed over the years and is continually evolving' and that the 'detail for the Budget generally appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website'.

Noting the above context, the committee seeks the Minister's advice as to:

1. Whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:

(a) the statutory or other provisions which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and

(b) the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and

2. Whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:

(a) the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);

(b) the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or similar legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and

(c) the nature of the terms and conditions attached to these payments.

The committee draws Senators' attention to its comments in relation to this matter.

Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016

Introduced into the House of Representatives on 11 February 2016
Portfolio: Social Services
This bill received the Royal Assent on 18 March 2016

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter received on 21 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Background

This bill amends the *Business Services Wage Assessment Tool Payment Scheme Act 1915* to give effect to a recently mediated settlement agreement between the Commonwealth and the Applicant in a representative proceeding in the Federal Court of Australia (*Duval-Comrie v Commonwealth* VID 1367/2013) by:

- increasing one-off payments from 50 per cent to 70 per cent of the difference between the actual wage paid to an eligible person and the amount they would have been paid had the Business Services Wage Assessment Tool (BSWAT) productivity-only component been applied;
- providing a 'top up' payment for persons who have already received a 50 per cent payment under the BSWAT payment scheme;
- removing the current compulsory requirement to obtain legal advice before any payments are made;
- extending all relevant scheme dates by 12 months;
- clarifying certain administrative arrangements; and
- enabling a deceased person's legal personal representative to engage with the payment scheme on their behalf.

Trespass on personal rights and liberties—fair hearing
Item 29, proposed new paragraph 36(c)

This bill makes a number of amendments to the *Business Services Wage Assessment Tool Payment Scheme Act 2015*. In a class action currently before the Federal Court of Australia, class members have agreed to release the Commonwealth from liability which

may otherwise be established if the amendments are made and the settlement approved by the court. However, as stated in the statement of compatibility, class members have been given an opportunity to opt out of the representative proceedings and commence their own legal proceedings rather than accept an offer under the payment scheme (which is to be amended by this bill). The explanatory memorandum states that '[t]his bill will provide increased one-off payments to around 10,000 eligible people under the BSWAT Payment Scheme Act 2015, and make associated amendments to improve the administration of the payment scheme' (at p. 1).

Item 29 removes the requirement that a person obtain legal advice from a legal practitioner before he or she can make an effective acceptance under the BSWAT Payment Scheme. The explanatory memorandum indicates that access 'to free legal advice will continue on a voluntary basis and in accordance with the BSWAT Rules' (at p. 3). Although a completed legal advice certificate (which complies with section 36 of the BSWAT Act) will still be necessary, it need only be completed by a legal practitioner if the person elects to receive legal advice.

The key change made by item 29 is thus to make legal advice prior to electing to opt into the BSWAT payment scheme (and thus forgo the right to pursue legal action) optional, not compulsory. The statement of compatibility emphasises that this provides 'greater choice and control to applicants' (at p. 2). The statement also suggests that making access to legal advice voluntary will 'reduce the red-tape burden on an individual applicant' and that requiring legal advice 'may be an impediment to the take-up of offers under the payment scheme and, in any event, members of the representative proceeding who choose to accept a payment under the scheme may not require further legal advice' (at p. 4).

The committee notes this advice, but is concerned about the removal of the existing requirement for compulsory legal advice (freely provided by the Commonwealth), especially as at least some persons affected suffer from a variety of disabilities. **The committee therefore seeks the Minister's more detailed explanation for this change.**

> *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 terms of reference.*

Minister's response - extract

As you are aware, the Bill gives effect to the settlement agreement between the Commonwealth and the Applicant in a representative proceeding in the Federal Court of Australia. Among other matters, the settlement agreement provides that the requirement for participants to obtain legal advice before receiving a payment under the scheme should be optional rather than mandatory.

The amendment provides greater choice and control to participants. Currently, a participant cannot accept an offer under the scheme if they have not received legal advice from an eligible adviser. The amendment provides participants the option to choose whether they want to access legal advice funded by the Commonwealth before accepting an offer under the scheme.

The Bill strikes a balance between the needs of class members, who comprise the large majority of people eligible to participate in the scheme, and the needs of eligible participants who have opted out of the representative proceeding. By continuing to fund legal advice for those who choose to obtain it, the Bill removes an undue and unnecessary burden from class members who do not want to obtain further legal advice, protects the rights of non-class members and allows the Government to make payments more quickly to some participants of the scheme.

Class members of the representative proceedings have had the opportunity to receive legal advice from Maurice Blackburn Lawyers, the Applicant's legal representative, during the course of the representative proceedings. Any further legal advice they would receive under the scheme may be unnecessary and may discourage class members from applying for the scheme.

Committee response

The committee thanks the Minister for this detailed response and notes that the key points would have been helpful in the explanatory memorandum.

Noting that the bill has already passed both Houses of Parliament the committee makes no further comment in relation to this matter.

Ethical Cosmetics Bill 2016

Introduced into the House of Representatives on 29 February 2016
By: Ms O'Neil

Introduction

The committee dealt with this bill in *Alert Digest No. 4 of 2016*. Ms O'Neil responded to the committee's comments in a letter received on 13 April 2016. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2016 - extract

Background

This bill amends the *Industrial Chemicals (Notification and Assessment) Act 1989* to ban live animal testing for cosmetics and live animal testing for substances if the dominant purpose of testing was for the substance's use in a cosmetic.

Delegation of legislative power
Schedule 1, item 1, proposed sections 81B and 81C

Proposed section 81C provides that the 'dominant purpose of testing that is conducted on a live animal at a particular time is to be worked out in accordance with rules' that must be made by the Director. The issue of 'dominant purpose' is included as an element of the offence in subsection 81B(2): that 'the dominant purpose of the testing relates to the substance's use in a cosmetic'. A question therefore arises as to why it is appropriate that the content of an offence be determined by reference to a legislative instrument rather than being included in the primary legislation.

The committee seeks the Member's advice as to why it is appropriate to include this significant matter in delegated legislation.

> *Pending the Member'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.*

Member's response - extract

In considering the Bill the Committee made note of the role of the Director and their role in establishing the rules which determine the dominant purpose of testing a substance. Specifically, the Committee questioned:

"why it is appropriate that the content of an offence be determined by reference to a legislative instrument rather than being included in the primary legislation."

In drafting this Bill, consideration was given to the technical nature of the matters being legislated and ensuring the proposed amendments were consistent with the Industrial Chemical Notification Scheme Act (the Act), which this Bill amends.

The Act covers an extensive array of chemical substances. In determining the dominant purpose of testing consideration has to be given to the composition of the substance being tested, the substance's intended use and the context in which the tests have occurred. These are extremely technical in nature and change from substance to substance. Allowing the Director to establish how this is determined provides flexibility to the administering body (the National Industrial Chemicals Notification and Assessment Scheme) and allows for variations in industry practice.

Further, the Act delegates the responsibility of determining approved tests (s23 (12)). Given that the Director is establishing the tests which must be undertaken, the Director is best placed to determine the parameters to establish the dominant purpose of those tests.

The Bill establishes the broad intention of the offence whilst allowing the Director to determine the technical and quantifiable aspects. Parliamentary scrutiny can still occur regarding the nature of the offence. Given the variety of tests and substances covered by the Act it was deemed inappropriate to establish the measures by which the offence is determined within the primary legislation.

Committee response

The committee thanks the Member for this detailed response and **requests that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.**

In light of the explanation provided the committee makes no further comment on this matter.

Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015

Introduced into the House of Representatives on 2 December 2015
Portfolio: Education and Training

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2016*. The Minister responded to the committee's comments in a letter received on 24 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends various Acts in relation to family assistance.

Schedule 1 amends the *A New Tax System (Family Assistance) Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to:

- cease the child care benefit and child care rebate;
- introduce a child care subsidy (CCS) which is subject to both an income and an activity test;
- introduce various rates of additional child care subsidy (ACCS) that are available in certain circumstances; and
- make amendments in relation to CCS and ACCS claims, reviews of decisions, provider approvals, and compliance obligations of approved providers of child care services.

Schedule 2 provides for amendments contingent on the passage of other bills currently before the Parliament and also makes consequential amendments.

Schedule 3 enables the Secretary to reassess service approvals at any time from 1 July 2016 and also closes enrolment advances and allows for their recovery.

Schedule 4 provides for provisions relating to:

- the cessation date of eligibility to child care benefit (CCB) and child care rebate (CCR) and the commencement of CCS and ACCS;
- the saving of certain laws in relation to CCB and CCR (to ensure, for example, that debts and reviews can continue to be dealt with); and

- transitional provisions to enable existing claimants and recipients to be eligible for CCS and for services to transition to the CCS system from 3 July 2017.

Review rights—notice of a deemed refusal
Schedule 1, item 1, subsections 85CE(5) and 85CH(5)

Subsection 27A(1) of the AAT Act will not apply to a deemed refusal under these proposed provisions. **As the explanatory memorandum does not include a justification, the committee seeks the Minister's advice as to the rationale for the proposed approach.**

> *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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Review rights – notice of a deemed refusal – Schedule 1, item 1, subsections 85CE(4) and 85CH(5)

The Committee asked for the rationale for the proposed approach where subsection 27A(l) of the *Administrative Appeals Tribunal 1975* (the AAT Act) will not apply to a deemed refusal under subsections 85CE(4) and 85CH(5) of the *A New Tax System (Family Assistance) Act 1999* (FA Act).

Subsections 85CE(3) (child at risk) and 85CH(4) (temporary financial hardship) of the Bill require the Secretary to either make a determination, or to refuse an application, within 28 days of receipt of that application, and, where the Secretary does so, s/he would be required to give notice of the decision in accordance with subsection 27A(1) of the AAT Act. In the current FA Act there are no timeframes for which the Secretary is required to make a determination in relation to 'at risk' or 'temporary financial hardship' applications. As such, timeframes for response to these applications could drag out and the applicants would have no clear timeframe for when a decision will be made. The rationale for the inclusion of a 28 day timeframe is to ensure a timely response from the Department where there are children and families in these vulnerable circumstances. The Department of Education and Training is committed to making every attempt to deal with applications in a timely manner and expects to do so within the 28 days.

The deemed refusal provisions in subsections 85CE(4) and 85CH(5) were included for the purposes of providing certainty to applicants (that is, the child care service in relation to children at risk and families in relation to temporary financial hardship) in the rare event that their application is not determined in a timely manner. Significant work is, however,

underway to reduce the chance of rare and unfortunate situations when an application is lost in the mail, or an application is not processed due to administrative oversight. In such circumstances, where the Secretary has neither made a determination nor refused the application, the application is taken to be refused under subsections 85CE(4) and 85CH(5) so that there is a clear outcome for an applicant.

In situations where a deemed refusal has occurred, the applicant will have full access to review rights (both merits review through internal review and subsequently through the Administrative Appeals Tribunal, and judicial review). For example, the applicant may contact the Department to ask about the progress of their application, and the Secretary would be able to initiate an own motion review of the refusal decision. Alternatively, the person may make a formal application for an internal review of the refusal decision. In addition, there is also nothing to prevent an applicant whose application is deemed to be refused from making a new application.

Subsection 27A(1) of the AAT Act provides that a person who makes a reviewable decision must take reasonable steps to give to an affected person a written notice of the decision and of their review rights. It would not be appropriate to require the Secretary to give a decision notice advising of review rights in relation to deemed refusals under subsections 85CE(4) and 85CH(5), because deemed refusals only come into effect in circumstances where the Secretary, (or his or her delegate), has failed to personally make a decision: in other words, no actual decision was made by an officer. Accordingly, proposed subsections 85CE(4) and 85CH(5) simply reflect that it would be inappropriate to oblige the Secretary to notify of the act of not making an active decision. As such, the exemption from the notification requirement merely reflects the practical reality that any deemed refusals are likely to occur without the Secretary's actual and active knowledge.

Committee response

The committee thanks the Minister for this detailed response and in light of the information provided makes no further comment.

Alert Digest No. 1 of 2016 - extract

Delegation of legislative power—Henry VIII clause
Schedule 1, item 202, proposed section 199G
Schedule 4, item 12 (transitional rules)

The explanatory memorandum (at pp 54–55) states that proposed section 199G may be characterised as a Henry VIII clause because it appears to 'provide a broad modification power of principal legislation'. Although the explanatory memorandum states that it is 'intended to operate in a purely beneficial way to deal with any anomalies that may arise where an approval is taken to be backdated in time'. Nevertheless, the proposed section itself does not appear to include a limitation which ensures that it is only used beneficially.

A similar issue arises in relation to item 12 of Schedule 4 for the power to make transitional rules. The explanatory memorandum (at p. 65) indicates that power is intended to only be exercised beneficially, but again there is no legislative provision requiring this approach.

The committee seeks the Minister's advice as to whether these clauses can be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).

> *Pending the Minister's advice, 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 202, proposed section 199G

The Committee asked for the rationale for the proposed sections of the Bill which provide broad powers of modification of the principal legislation.

The Secretary may approve a provider for the purposes of the family assistance law under section 194B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the FAA Act). Under subsection 194B(5) an approval can take effect on a date prior to the date of the approval decision, but no earlier than the date of the application. This means that there may be cases where an applicant is taken to have been approved in the time prior to

notification of the approval decision. This in turn may mean that providers are retrospectively required to meet obligations by timeframes that have already passed and they could possibly be in a position where they are in breach of those requirements (such as the requirement to submit attendance reports under new section 204B). Similarly, it is possible that suspensions of services could be revoked with retrospective effect, again retrospectively requiring providers to meet obligations in the past.

In view of this, proposed section 199G gives Ministerial power to make rules which modify the FAA Act, so that it operates without anomalous or unfair consequences for providers where their approval takes effect during a past period. Such modifications would be beneficial for providers as they would ensure providers are not unfairly exposed to obligations in the past that they are unable to meet. One such possible modification, for example, would be to extend the time in which attendance reports under section 204B are required to be provided where providers are taken to have been approved in a past period.

Although it may be possible to include limiting words to ensure the provisions are only used beneficially, amendments of this nature could be equivocal and possibly confusing due to difficulties in defining what a 'benefit' is in the context of lifting obligations relating to backdated approvals. I note that any rules made in accordance with section 199G will be subject to further parliamentary scrutiny through the disallowance process for legislative instruments, which means that Parliament will be able to disallow any rules that are considered non-beneficial or otherwise unfair.

Committee response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901***.

The committee remains concerned about the breadth of the power in section 199G which allows rules (delegated legislation) to override the operation of the primary legislation. While the committee notes that the intention is for modifications to be beneficial, the argument that that limiting words 'could be equivocal and possibly confusing' is not a compelling justification for broadening the scope of delegated powers.

The committee draws the breadth and nature of this power to the attention of Senators and, noting that any rules made in accordance with section 199G will be subject to disallowance, leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Delegation of legislative power – Schedule 4, item 12 (transitional rules)

I intend that this power will be used in a beneficial way to ensure a smooth transition into the new system, including to ensure that: provider approvals happen seamlessly and without unintended or unfair consequences for child care services with existing approval under family assistance law; payment arrangements for individuals transitioning to the new Child Care Subsidy can operate without unexpected complications; and the public purse is appropriately protected by ensuring that outstanding debt or compliance matters on transition can still be dealt with under the new system. I consider that the power to make transitional rules needs to be worded as broadly as possible to ensure that any unforeseen and unintended consequences of repealing and amending legislation can be remedied promptly and flexibly by legislative instrument.

I consider this broad power is justified and proportionate given it can only operate for a limited period of two years, and any rules made would be subject to further parliamentary scrutiny through the process of disallowance of legislative instruments. Any rules that attempt to broadly modify the Act other than to assist transition would be beyond power and ineffective.

Committee response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901***.

The committee notes the justification provided, in particular that the disallowance process will apply and that the operation of the provision will be limited to two years. In light of this information, **the committee leaves the question of whether the scope of this delegation of legislative power is appropriate to the Senate as a whole.**

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 1 of 2016 - extract

Trespass on personal rights and liberties—strict liability
Schedule 1, Item 202, new part 8A, various provisions

This part contains a number of strict liability offences. The statement of compatibility (at p. 8) provides the following global justification for all of these offences:

> These offences are proportionate to the value of maintaining adequate safeguards in relation to public money. It is considered reasonable in these cases to impose strict liability offences to ensure the integrity of payments. It is intended that prosecution action will only be taken in relation to strict liability offences in serious or repeated cases.

The explanatory memorandum provides little further justification except that in relation to each of the offences it is stated that an offence would not be prosecuted in respect of honest or reasonable mistakes (see, e.g., at p. 56). However, advice as to expectations about how prosecutorial discretion will be exercised is not a sufficient justification for the imposition of strict liability offences. The committee expects a detailed justification of each instance of the application of strict liability and that justification should include reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. **The committee therefore seeks the Minister's advice addressing these points for each proposed strict liability offence.**

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

Minister's response - extract

Trespass on personal rights and liberties – strict liability – Schedule 1, Item 202, new part 8A, various provisions

The Committee has asked for a detailed justification of each instance of the application of strict liability, with reference to the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (developed by the Attorney-General's Department to assist officers in Australian Government departments to frame criminal offences that are intended to become part of Commonwealth law).

Strict liability provisions exist in the current FAA Act in relation to a range of contraventions by operators of child care services. These have been expanded upon in the Bill for the purposes of addressing systemic non-compliance in the child care sector. In addition, new penalties have been included to address compliance issues that have emerged in relation to the administration of the child care payment system under existing legislation.

The Australian National Audit Office 2014-15 Financial Statements audit report estimates that $692.9 million was inappropriately claimed by child care service providers in 2014-15. As such, the increased compliance measures in the Bill (including strict liability) are aimed at deterring inappropriate practices and penalising those providers that continue to disregard their legal obligations under the FA and FAA Act.

The integrity of the subsidy system relies on child care services engaging in a range of important administrative and business practices to ensure that the financial benefit of child care subsidy payments are passed onto families, including by appropriate record keeping, invoicing practices and reporting attendance and enrolment of children. A new child care information technology system will support services to be able to meet their obligations under the Bill while reducing regulatory burden.

Besides the criminal offences created under the Bill, the compliance regime outlined by the Bill also provides for the possibility of pursuing non-compliance through 'sanction' processes (including by cancelling or suspending provider or service approval) as well as through an infringement notice and civil penalty regime. The imposition of strict liability offences in relation to the contravention of obligations offers the ability for criminal prosecution only where a contravention is considered to be sufficiently serious to pursue in this manner. Strict liability offences are only proposed in relation to contraventions that would have a significant impact on the payment integrity of the new child care regime. As explained in the enclosed table, I consider that the offences are justifiable in light of the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

Case history has demonstrated that civil penalty provisions on their own may not be a sufficient deterrent/penalty as services may choose not to pay these penalties and continue to operate. In some cases, civil penalties are not sufficient in their penalty amounts as it is more profitable for services to inappropriately claim and pay the fines. Therefore, they may not have the desired impact in penalising illegal behaviour.

The rationale for the various strict liability offences has been included at Attachment A.

[This attachment is included in full in the Minister's response at the end of this report, and an extract appears below.]

<u>The application of penalties greater than 60 penalty units</u>

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability is generally only considered appropriate where, amongst other things, the offence is punishable by a fine of up to 60 penalty units.

The proposed penalty units for five of the clauses listed are set above this guideline:

Clause	**Penalty Units**
201A, 201C and 202C	80
204B and 204C	70

The failure to advise the Secretary of certain matters that may affect the approval of the provider or the approval of the service may impact families resulting in them:

- no longer having access to fee reduction payments for child care at that service (which can be at short notice)
- being unable to find alternative care arrangements at short notice to ensure they continue to receive fee reduction payments
- or receiving fee reduction payments for which they may not be eligible.

Given the impact on the Commonwealth and intended service recipients, it was determined to be appropriate to increase the penalty units in order to promote compliance from the outset.

Committee response

The committee thanks the Minister for this detailed response and notes the key points made, including the need to address systemic non-compliance in the child care sector. The committee also notes the individual explanations provided for each proposed offence and the justification for the maximum penalties that can be imposed by delegated legislation. **The committee requests that the key information be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.**

continued

While the explanations for the application of strict liability in each instance appear to be consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the ability to impose penalties above 60 penalties units is not. The committee notes the Minister's advice that setting higher penalties in relation to several clauses (clauses 201A, 201C and 202C—80 penalty units and clauses 204B and 204C—70 penalty units) was considered to be appropriate in order to promote compliance. In this regard the Minister noted the impact on the Commonwealth and intended service recipients of a failure to advise the Secretary of certain matters that may affect the approval of a provider or service. However, it remains the case that in order to be consistent with the principles outlined in the *Guide* (see pp 23–24), strict liability offences should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.

The committee therefore draws this matter to the attention of Senators and leaves the question of whether the proposed approach, including providing for strict liability offences with penalties above 60 penalty units, is appropriate to the consideration of the Senate as a whole.

Narcotic Drugs Amendment Bill 2016

Introduced into the House of Representatives on 10 February 2016
Portfolio: Health
This bill received the Royal Assent on 29 February 2016

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter received on 11 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Background

This bill amends the *Narcotic Drugs Act 1967* to:

- give effect to certain of Australia's obligations under the *Single Convention on Narcotic Drugs*, 1961 (the Single Convention);
- establish licensing and permit schemes for the cultivation and production of cannabis and cannabis resin for medicinal and scientific purposes, and for the manufacture of narcotic drugs covered by the Single Convention;
- provide for monitoring, inspection and enforcement powers for authorised inspectors and for the secretary to give directions to licence holders and former licence holders; and
- enable the secretary to authorise a state or territory government agency to undertake cultivation and production of cannabis and manufacture of medicinal cannabis products.

The bill also amends the *Therapeutic Goods Act 1989* to make a consequential amendment.

Privacy

The bill includes provisions that relate to:

- collecting, using, storing and disclosing personal information (including information about a person's reputation and criminal record), and
- allowing collection of personal information about the family of the person (an applicant's/licence holder's relatives are relevant to a determination by the Secretary of whether the person is 'fit and proper').

The statement of compatibility includes (at pp 35–36) a detailed discussion of the ways in which the bill may affect privacy and the justification for the proposed approach. **In light of this information the committee leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

However, section 14N authorises disclosure in a number of listed circumstances and it is not clear whether there is a related offence for unauthorised disclosure. The committee therefore seeks the Minister's advice about this matter.

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

Minister's response - extract

Privacy
Section 14N

It is not an offence under the *Narcotic Drugs Act 1967* itself for a person to disclose information of the kind set out in section 14N. That section makes it clear that where the Secretary of the Department of Health releases information in the circumstances set out in the section, that disclosure is taken to be authorised for the purposes of the *Privacy Act 1988.* The effect is that any release of personal information by the Secretary in such circumstances would not be a breach of Australian Privacy Principle 6.

Unauthorised disclosure of personal information is also covered by the *Privacy Act 1988.* Subsection 13G(1) of the Act provides that a Department that does an act, or engages in a practice, that is a serious interference with the privacy of an individual, or repeatedly does an act or engages in a practice that is an interference with the privacy of one or more individuals, is subject to a civil penalty of 2,000 penalty units. An interference with the privacy of an individual includes an act or practice which breaches an Australian Privacy Principle.

Section 70 of the *Crimes Act 1914* however makes it an offence for any Commonwealth officer to disclose information which it is his or her duty not to disclose to a person to whom he or she is not authorised to disclose that information. The offence attracts a maximum term of 2 years imprisonment if a person is convicted of that offence. This offence is not limited to the unauthorised disclosure of personal information.

Committee response

The committee thanks the Minister for this response and notes that it would have been helpful if the key information had been included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.

However, as this bill has already been passed by the Parliament the committee makes no further comment.

Alert Digest No. 2 of 2016 - extract

Breadth of administrative power
Proposed section 13H

This proposed section allows the Secretary to appoint officers and employees of an agency of a State or Territory that has functions relating to health, agriculture or law enforcement, as well as Australian Public Service employees, officers and employees as authorised inspectors. **Given the extensive monitoring powers that may be exercised, the committee seeks the Minister's advice as to safeguards that will apply to the exercise of these powers and whether consideration has been given to including a legislative requirement for appointed officers to hold appropriate qualifications and experience.**

> *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

Breadth of administrative power
Proposed section 13H

Although not expressly provided for in the statutory provisions, it is intended that APS officers and State and Territory officers with appropriate technical qualifications in auditing and monitoring manufacturing premises and lands used for cultivation of cannabis be appointed by the Secretary as authorised inspectors under Chapter 4 of the *Narcotic*

Drugs Act 1967. These inspectors are the officers responsible for investigating and reporting in relation to the compliance of licence holders with the requirements of the Act. This information would ultimately be used in decision making (e.g. licence revocation or imposition of additional conditions) and in consideration of other sanctions such as prosecution or action for the payment of civil penalties. It would therefore be important for these officers to have the relevant qualifications and experience to minimise any risk that the evidence or information that they collect may not comply with the evidentiary requirements.

It would therefore [be] in the Secretary's interests to ensure that those appointed inspectors have the appropriate qualifications and experience.

Committee response

The committee thanks the Minister for this response and notes the intention that the officers appointed as authorised inspectors will hold appropriate technical and other relevant qualifications and experience. **However, the committee remains concerned that the bill itself did not include a requirement for inspectors to have appropriate qualifications and experience.**

However, as this bill has already been passed by the Parliament the committee makes no further comment.

Alert Digest No. 2 of 2016 - extract

Coercive powers—entry and search powers without consent or a warrant Proposed section 14C

The explanatory memorandum notes (at p. 83) that:

> Authorised inspectors will, under new section 14C, be able to enter licensed premises without consent or a warrant for the purposes of determining whether the Act and any regulations and licence conditions and any applicable directions given under new sections 15, 15A, and 15B are being complied with, and to decide whether to exercise a power under the Act.

Although entry and search powers without consent or a warrant are inconsistent with the general principles in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) it is arguable that the proposed approach falls within an exception for 'exceptional circumstances' (see section 8.6 of the Guide). The Guide notes that in its 2000 *Inquiry into Entry and Search Provisions in Commonwealth*

Legislation this committee stated that legislation should authorise entry without consent or warrant only in 'situations of emergency, serious danger to public health, or where national security is involved.' The Guide goes on to state that:

> Where these powers are provided for, senior executive authorisation should be required and rigorous reporting requirements should be imposed. This helps to ensure a sufficient level of accountability is maintained.

Furthermore, the committee is of the view that such authorisation should only be sought if avenues for obtaining a warrant by remote means have proven absolutely impractical in the particular circumstances.

While the committee accepts that in the current circumstances the general approach could possibly be seen to be consistent with the Guide, **the committee seeks the Minister's advice as to what Executive or other authorisation will be needed before entry without consent or a warrant can take place, what reporting requirements will apply and whether there is a requirement for guidelines for the use of the powers to be made.**

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

Minister's response - extract

Coercive powers - entry and search powers without consent or a warrant
Proposed section l4C

Both cannabis licences (granted under Chapter 2) and manufacturing licences (granted under Chapter 3) will be subject to the conditions set out in sections 10H and 12K of the *Narcotic Drugs Act 1967,* respectively. Section 10H provides that it is a condition of a cannabis licence that if a person is authorised by the licence to obtain or cultivate cannabis plants or to produce cannabis or cannabis resin, or to engage in activities related to such obtaining, cultivation or production, the person must allow the Secretary, or a person authorised by the Secretary, to:

(a) enter land or premises at which the person is present and where the obtaining, cultivation, production or activity is being undertaken, for the purposes of the following:

    (i) inspecting or monitoring the obtaining, cultivation, production or activity;

(ii) checking whether the obtaining, cultivation, production or activity is being carried out as authorised by the licence in accordance with the cannabis permit and whether the licence conditions are being complied with; and

(b) take samples of any things at such land or premises and remove and test samples.

Section 12K provides that it is a condition of a manufacture licence that, if a person is authorised by the licence to manufacture a drug, or to engage in activities related to such manufacture, the person allow the Secretary, or a person authorised by the Secretary, to:

(a) enter the premises at which the person is present and where the manufacture or activity is being undertaken, for the purposes of the following:

(i) inspecting or monitoring the manufacture or activity;

(ii) checking whether the manufacture or activity is being carried out as authorised by the licence in accordance with a manufacture permit and whether the licence conditions are being complied with; and

(b) take samples of any things at such premises and remove and test samples.

Section 14C provides for the carrying out of the monitoring of the activities authorised under a cannabis licence or manufacture licence as a condition of those licences. The licence holder is aware of the existence of this condition when applying for a licence as it is a statutory condition that applies automatically and that monitoring of the activities in relation to those licences would be carried out by an authorised inspector. They would also know that a person who refuses to allow an authorised inspector to enter licensed premises under section 14C would be breaching the conditions set out in section 10H or 12K and that a breach of a condition of a licence may result in the revocation of the licence (refer to section 13B for a manufacture licence, and section 10P for a cannabis licence).

It is necessary and appropriate for the Secretary to monitor and investigate whether the activities in relation to cannabis, cannabis resin or manufacture of medicinal cannabis are in compliance with the requirements under the *Narcotic Drugs Act 1967* and that no possible risks relating to diversion and other activities are being carried out in those premises or lands that are covered by licences granted under that Act.

Subsection 14C(2) provides that an authorised inspector may only enter the premises during the business hours of the premises. Moreover, subject to the powers set out in subsection 13L(2) (in relation to the taking of samples) the powers that can be exercised under section 14C are limited to the general monitoring powers set out in section 18 of the *Regulatory Powers (Standard Provisions) Act 2014.*

Guidelines and procedures for monitoring and investigations under the new Chapter 4 of the Narcotic Drugs Act are being prepared to cover matters such as frequency of monitoring and inspections, whether they will be ‘announced’ or ‘unannounced’, how information and other evidence are to be collected and the authorised persons who will be carrying out these inspections.

Committee response

The committee thanks the Minister for this response and notes that allowing access to land and premises is a pre-existing condition for a licence holder and that 'Guidelines and procedures for monitoring and investigations under the new Chapter 4 of the Narcotic Drugs Act are being prepared'.

The committee notes that it would have been helpful if this key information had been included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.

In addition, given the significance of these powers the committee's view is that the making of guidelines such as those referred to in the Minister's response (as well as public reporting on the use of these powers) should be required by the legislation. However, as this bill has already been passed by the Parliament the committee makes no further comment.

Alert Digest No. 2 of 2016 - extract

Merits review
Proposed sections 15E and 15H

Section 15E lists decisions of the Secretary that it is proposed will be reviewable. In addition, subsection 15E(2) states that the regulations may provide that a decision made under a specified provision of this Act is a reviewable decision. **The committee seeks the Minister's advice as to whether any decisions permitted by the Act will not be reviewable (and have therefore been omitted from the list of reviewable decisions in section 15E) and, if so the justification for this approach.**

Paragraph 15H(2)(b) provides that the Minister or internal reviewer must not take into account any other information (i.e. other than that included in the application) provided by or on behalf of the applicant after the making of the application, other than information provided in response to a notice under section 15K.

In general, when the Administrative Appeals Tribunal (AAT) exercises merits review it is obliged to act on the basis of the most up-to-date information provided to it in the course of the hearing. It is also possible that information excluded by this provision from consideration in internal review may be included in a review by the AAT. Further, it has been suggested in some cases that decision-makers may have implied statutory obligations to act on the basis of the most up-to-date information bearing on relevant matters within

their actual or constructive knowledge (see, for example, *Peko-Wallsend*). **The committee therefore seeks the Minister's advice as to the justification for the approach proposed in section 15H.**

> *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 non-reviewable decisions in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

Merits Review
Proposed sections 15E and 15H

Section l5E lists decisions that are reviewable decisions. An administrative decision made by the Secretary and listed under section 15E would be subject to internal review under section 15G. A decision by the Minister or internal reviewer under section 15H that relate to a reviewable decision would be reviewable by the Administrative Appeal Tribunal. Any administrative decision under the *Narcotic Drugs Act 1967* that is not listed under section 15E would be subject to a judicial review, including under the *Administrative Decisions (Judicial Review) Act 1977.*

In addition, through the operation of sections 15F and 15G, the head of the State or Territory agency can apply for a review of the decision by the Secretary under section 8F to grant a medicinal cannabis licence (paragraph 15E(1)(a)), under section 9E to grant a cannabis research licence (paragraph 15E(1)(f)) or under subsection 10M(1) to vary a cannabis licence (paragraph 15E(1)(k)), to the extent that:

(a) the licence concerned relates to land or premises situated wholly or partially in that State or Territory; and

(b) a notice under subsection 258(1), given by the head of a State or Territory agency for that State or Territory, is in force.

Subsection 15L(2) gives the States and Territories status as a 'person whose interests are affected' for the purposes of subsections 27(2) and 30(1A) of the *Administrative Appeals Tribunal Act 1975.* This gives the States and Territories standing to appeal decisions referred to in paragraphs 15E(1)(a), (f) and (k) where, for instance, a decision to grant or vary a licence could affect the interests of that State or Territory.

The only administrative decisions that are not included in sections 15E and 15H are decisions under section 11H to grant a manufacture licence and under section 12A to grant a manufacture permit. A successful applicant would not generally request a review of the grant of a manufacture licence or a manufacture permit. (They can separately seek a review of any decision to impose a condition on that grant under section 11L.) It is not proposed

that State and Territory agencies have a right of review in relation to decisions to grant a manufacture licence. Unlike cultivation and production of cannabis for medicinal or related research purposes, the States and Territories are able to regulate the manufacture of narcotic drugs within their jurisdictions. Even if licensed under the Narcotic Drugs Act, manufacturing activities could not be undertaken in a State or Territory if the State or Territory did not also authorise those activities. In those circumstances it was not thought necessary to provide for the relevant State or Territory to have the capacity to seek a review of any decision to grant a Commonwealth manufacture licence.

Proposed section 15H

The approach proposed in section 15H limits a person seeking an internal review to a single opportunity to provide information, unless otherwise requested by the Minister under 15K to provide additional information. Under subsection 15J(2) the Minister is deemed to have affirmed the initial reviewable decision if a notice of a decision from the review is not provided to the applicant within 60 days of the application for review.

This provision is justified because it ensures that the Minister's delegate reviewer has time to consider all relevant information when commencing the review and puts the onus on the appellant to provide all relevant information at the time of submitting the application for review. Under section 150, the appellant has up to 90 days to gather this information before submitting the information for review with the application. Late submission of relevant information places an undue burden on the Minister given the 60-day time limit within which to complete the review. Given that the decision which is proposed by the appellant to be overturned is deemed to be affirmed if the decision maker does not make the decision within the 60 days (and there is no capacity to extend this period), section 15H helps ensure a decision based on all available information can be made in a timely way.

These provisions mirror similar provisions that are contained in section 60 of the *Therapeutic Goods Act 1989.*

There is nothing to prevent the decision-maker from requesting information if it appears that relevant and more up-to-date material can be provided. It should be noted that in such an event, the 60 days clock is stopped pending provision of the material.

Committee response

The committee thanks the Minister for this response.

The committee notes that it would have been helpful if the key information about the exclusion of section 11H decisions from review and the limits on the provision of material for a review had been included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.

However, as this bill has already been passed by the Parliament the committee makes no further comment.

Alert Digest No. 2 of 2016 - extract

Delegation of legislative power—incorporation by reference
Subsection 28(2)

The committee's general approach is that scrutiny concerns arise when provisions allow the amendment of legislative provisions by incorporating material from another document as it exists from time-to-time (incorporating material by reference) because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including in standards or industry databases, is not publicly available or is available only if a fee is paid).

New subsection 28(2) creates an exception to the limitation on the incorporation by reference rule in subsection 14(2) of the *Legislation Act 2003* that would not otherwise allow regulations to be made in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time.

The explanatory memorandum notes (at p. 96) that 'this will allow, for instance, the incorporation by reference of standards that are relevant to the cultivation of contaminant-free plants.'

While the committee notes the example provided as to a possible use of this provision, the committee seeks the Minister's advice as to:

- **whether consideration can be given to including a requirement in the bill that instruments incorporated by reference are made freely and readily available to the public; and**
- **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law as a result of new or updated material being incorporated by reference into the law.**

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

Minister's response - extract

Delegation of legislative power - incorporation by reference subsection 28(2)

Subsection 28(2) will allow regulations to make provision for a matter by applying adopting or incorporating any matter contained in another document or instrument as in force at a particular time or as in force from time to time.

Section 26 of the *Legislative Instruments Act 2003* (the LIA) requires that the explanatory statement lodged for registration with a legislative instrument must, if any documents are incorporated in the instrument by reference, contain a description of the documents so incorporated and indicate how they may be obtained.

While it would normally be expected that documents that are incorporated by reference in regulations would be publicly available, that will not always be the case, particularly where they are technical documents and, for instance, might be covered by copyright. Documents that are covered by copyright would require a licence to be negotiated and it would normally be a condition of that licence that disclosure, reproduction or copying would be limited. Examples of these types of these documents are 'international standards (ISO)' applying to particular goods and the device nomenclature system code (also called the Global Medical Device Nomenclature system (GMDN)) applying to medical devices for the purposes of the *Therapeutic Goods Act 1989.* Copies of international standards can be accessed and purchased from the International Organization for Standards. It would therefore be difficult to include a statutory requirement in the legislation that instrument incorporated by reference are made freely and readily available to the public. It would be expected that regulated entities that would need to comply with such standards would ensure they have access to such material as a necessary pre-condition to participating in the

regulated business or industry. As provided for under section 26 of the LIA, the Department of Health can however, provide information how they may be obtained.

Committee response

The committee thanks the Minister for this response.

The committee has a longstanding significant concern about circumstances in which there is not free and ready access to the full content of the law, such as when material incorporated by reference is only available at a cost. While the committee notes the need for any regulated business or industry to have access to such material as a necessary pre-condition to participation in the relevant business or industry, these are not necessarily the only categories of persons with an interest in knowing the detail of the law in full.

The committee remains concerned about this issue, however, as this bill has already been passed by the Parliament on this occasion the committee makes no further comment.

Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016

Introduced into the Senate on 2 March 2016
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No. 4 of 2016*. The Minister responded to the committee's comments in a letter received 14 April 2016. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2016 - extract

Background

This bill amends the *Child Support (Registration and Collection) Act 1988*, the *A New Tax System (Family Assistance)(Administration) Act 1999*, the *Social Security Act 1991* and the *Student Assistance Act 1973* to:

- introduce departure prohibition orders to prevent debtors from leaving the country; and
- remove the current six year limitation on the recovery of social welfare debts that would otherwise be non-recoverable.

Freedom of movement
Merits review
Schedule 1, item 2, proposed section 102A

Section 102B makes it an offence to depart from Australia if a departure order in respect of the person is in force and the person has not been granted a departure authorisation certificate. Proposed section 102A empowers the Secretary to make a departure prohibition order if a person owes a debt to the Commonwealth under Part 4, there are no satisfactory arrangements for its recovery in place and the Secretary believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does not travel to a foreign country without paying the debt or there being satisfactory arrangements in place for it to be paid.

Proposed section 102H provides for circumstances where the Secretary must issue a departure authorisation certificate. Subsection 102H(3) provides that a departure authorisation certificate must be issued if the person has given security under section 102J for the person's return to Australia or if the Secretary is satisfied that the certificate should

be issued on humanitarian grounds or that refusing to issue the certificate will be detrimental to Australia's interests.

Although the statement of compatibility (at p. 3) states that a person's rights to freedom of movement are 'enshrined in the capacity of the person to travel under a departure authorisation certificate on humanitarian grounds' it should be noted that the question of whether such grounds are established may be contestable and establishing these questions depends on the Secretary's 'satisfaction'. On the other hand, section 102R provides that an application for review of a decision of the Secretary under section 102H may be made to the Administrative Appeals Tribunal.

Although section 102N provides that an appeal from a decision to make a departure prohibition order may be made to the Federal Court of Australia or Federal Circuit Court of Australia, this is expressly made subject to Chapter III of the Constitution (and would, in any event, necessarily be read as subject to the Constitution). The result is that the appeal would be limited to questions about the legality of the decision rather than enabling the court to question the merits of the original decision. This means that the court would not be in a position to substitute its judgment for the Secretary's even if it thought the decision was not the correct or preferable decision on the established facts.

Especially given the significant impact on the right to freedom of movement constituted by the offence in section 102B (the operation of which depends on decisions made under sections 102A and 102H) and the potential breadth of operation of the provision it is unclear why merits review of the decision to make a departure prohibition order should not be available. **The committee therefore seeks the Minister's advice as to whether consideration has been given to providing for merits review of decisions made pursuant to section 102A.**

> *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 non-reviewable decisions in breach of principle 1(a)(iii) of the committee's terms of reference.*

Minister's response - extract

The Committee notes that appeals regarding the Secretary's power to make a departure prohibition order to the Federal Court of Australia or the Federal Circuit Court of Australia would be limited to questions about the legality of the decision, rather than enabling the court to question the merits of the original decision.

The Committee specifically questions why merits review of the decision to make a departure prohibition order should not be available.

Powers of review by the Administrative Appeals Tribunal (AAT) and the Federal Court were considered when drafting the Bill. The departure prohibition order provisions of the Bill were modelled upon similar arrangements applying in child support and taxation legislation. This was done in order to align administrative practices and to treat social welfare debtors in the same manner as those with child support and taxation debts.

The Secretary's power to make a departure prohibition order is onerous and discretionary. The conditions required to be satisfied for the Secretary to come to the position to make a departure prohibition order are prescribed at proposed subsection 102A(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* in the Bill. The Secretary must take into consideration matters specified at subsection 102A(2), which are prescriptive at paragraphs (a), (b) and (c). Paragraph 102A(2)(d) provides that the Secretary also must have regard to 'such other matters as the Secretary considers appropriate'.

These provisions are mirrored in proposed amendments to the *Paid Parental Leave Act 2010*, *Social Security Act 1991* and *Student Assistance Act 1973.*

The Committee should note that the use of the Secretary's power to make a departure prohibition order is a 'last resort' position following lengthy, unsuccessful efforts to engage with the debtor to enter into satisfactory arrangements for repayment of the debt. My Department will ensure that the Guide to Social Security Law, which will be used to assist the Secretary's decision-making process to determine whether to make a departure prohibition order, reflects this intent.

Under the current provisions of the Bill, a person against whom a departure prohibition order has been made can seek merits review of a refusal by the Secretary to issue a Departure Authorisation Certificate (certificate) to allow a temporary absence from Australia, or of a refusal to revoke or vary a departure prohibition order.

The Administrative Appeals Tribunal (AAT), standing in the shoes of the Secretary, can affirm the Secretary's decision to refuse to issue a certificate, or can set the decision aside. The AAT can also affirm the Secretary's decision that the departure prohibition order not be revoked or varied, or can set aside that decision. A request for review, by a person against whom a departure prohibition order has been made, of the decision to refuse to revoke or vary the order will be quicker and simpler at the AAT than an appeal to the Federal Court.

In my view, the Federal Court of Australia or the Federal Circuit Court of Australia is best placed to conduct judicial reviews of the Secretary's discretionary legislative power to ensure that the decision was properly made at that point in time and met the required legislative threshold.

I base this position on jurisprudence developed by the Federal Court in the context of taxation departure prohibition orders which indicates that a court has greater capacity under similar review provisions to inquire into the reasonableness of the grounds for the order, and thus into factual matters, than a court undertaking a purely judicial review.

Since 2001, departure prohibition orders have been available to restrict the movement of child support debtors from departing Australia where they have unpaid child support debts. In that time, of the several thousand decisions to make a departure prohibition order, only 17 matters have been appealed to the Federal Court of Australia or the Federal Circuit Court of Australia (or equivalent). This would suggest that the overwhelming majority of debtors subject to departure prohibition orders are accepting of the circumstances, with few seeking judicial review. Further, the provisions that allow temporary travel under certificates, ensures sufficient means for people to travel when required.

I anticipate that the existing review regime, provided in the Bill, will continue to provide satisfactory review mechanisms for persons subject to departure prohibition orders.

Committee response

The committee thanks the Minister for this detailed response.

The committee notes that the proposed departure prohibition regime is modelled upon similar arrangements applying in child support and taxation legislation. The committee also welcomes the Minister's undertaking that the *Guide to Social Security Law* will specify that the use of the Secretary's power to make a departure prohibition order will be a position of 'last resort' following 'lengthy, unsuccessful efforts to engage with the debtor to enter into satisfactory arrangements for repayment of the debt'.

However, the committee remains concerned about the absence of merits review of a decision to make a departure prohibition order under proposed section 102A. In the committee's view, a Chapter III court will necessarily have more limited capacity (as it can only exercise judicial power) to inquire into the reasonableness of the order and factual matters (which are questions which directly concern the merits of an order) than would the AAT.

The committee requests that the key information provided in the Minister's response be included in the explanatory memorandum (particularly the information in relation to the guidance proposed to be included in the Guide to Social Security Law), noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*.

The committee draws its concerns to the attention of Senators and leaves the question of whether the proposed approach to the provision of merits review is appropriate to the consideration of the Senate as a whole.

Trespass on personal rights and liberties—privilege against self-incrimination
Schedule 1, item 2, proposed section 102T

In the context of authorising an officer of Customs or the Australian Federal Police to enforce a departure prohibition order the officer may require a person seeking to depart Australia to answer questions or produce documents relevant to the order. A person is not excused from responding on the basis that the information might tend to incriminate them, which abrogates the usual privilege against self-incrimination.

While the bill provides use and derivative use immunities (see subsection 102T(2)) the explanatory memorandum (see p. 10) does not provide a comprehensive justification for abrogating the privilege. **The committee therefore seeks the Minister's further advice as to the rationale for seeking to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

> *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.*

Trespass on personal rights and liberties—reversal of the evidential burden of proof
Schedule 1, item 7, subsection 200S(4)
Schedule 1, item 14, subsection 43Y(4)

The effect of these items is that the defendant bears an evidential burden in relation to the matters specified.

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence beyond reasonable doubt. The accused is not required to prove anything ('innocent until proven guilty'). However, provisions in some legislation (such as these) reverse this onus and require the person charged with an offence to prove, or disprove, a matter to establish their innocence. This can include placing an evidential burden on the defendant in relation to an available defence or 'exception'.

The committee looks to the explanatory memorandum for a detailed justification for provisions that reverse the onus of proof. The committee is particularly interested in whether:

- the matter is peculiarly within the knowledge of the defendant, or
- it would be significantly more difficult or costly for the prosecution to disprove the matter than for the defendant to establish it.

Explanatory material should directly address these matters and others outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. **As**

the explanatory memorandum does not appear to include any discussion of these provisions, the committee seeks the Minister's advice as to the rationale for the proposed approach, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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.

Committee response

The Minister's response does not appear to address the matters the committee raised above in relation to the privilege against self-incrimination and the reversal of the evidential burden of proof. **The committee therefore restates its request to the Minister for the information requested about these two matters.**

Transport Security Amendment (Serious or Organised Crime) Bill 2016

Introduced into the House of Representatives on 11 February 2016
Portfolio: Infrastructure and Regional Development

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter dated 17 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Background

This bill amends the *Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003* to:

- seek to prevent the use of aviation and maritime transport or offshore facilities in connection with serious or organised crime;
- establish a regulatory framework to implement harmonised eligibility criteria for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes;
- clarify and align the legislative basis for undertaking security checking of ASIC and MSIC applicants and holders;
- provide for regulations to prescribe penalties for offences; and
- insert an additional severability provision to provide guidance to a court as to Parliament's intention.

Delegation of legislative power
Schedule 1, item 4, proposed subsection 38AB(3)
Schedule 1, item 12, proposed subsection 113F(2)

Subsection 38AB(1) provides that the regulations may, for the purposes of preventing the use of aviation in connection with serious or organised crime, prescribe requirements in relation to areas and zones established under Part 3 of the Act. Subsection 38AB(3) provides that the regulations made under this section may prescribe penalties for offences against those regulations. The subsection provides that for an offence committed by an operator the maximum penalty is 200 penalty units; for an industry participant, 100 penalty units; and for an accredited air cargo agent or any other person, 50 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement*

Powers suggests that penalties that exceed 50 penalty units should not normally be imposed by regulations.

The explanatory memorandum, however, states that these offence provisions 'follow a clear legislative precedent already established in the Aviation Act'. Further, it is noted that the 'maximum penalties are consistent with existing penalties for these classes of offenders for corresponding offences in relation to access to secure aviation areas and zones' and that the penalties take into account 'the appropriate level of deterrence for the different classes of offenders' (at p. 6). Finally, it is noted that it is intended that the regulations prescribing penalties under the new subsection 38AB(3) will be consistent with existing penalties for equivalent offences already established in the Aviation Transport Security Regulations 2005' (at p. 6).

The same issue arises in relation to item 12, proposed subsection 113F(2), which is discussed at p. 10 of the explanatory memorandum.

In light of the explanation provided, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.

In the circumstances, the committee makes no further comment on this issue

Minister's response - extract

Proposed subsection 38AB(3) of the Bill, which amends the *Aviation Transport Security Act 2004* (Aviation Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for airport and aircraft operators, and 100 penalty units for aviation industry participants other than airport or aircraft operators or accredited air cargo agents. Similarly, proposed subsection 113F(2), which amends the *Maritime Transport and Offshore Facilities Security Act 2003* (Maritime Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for operators of ports, ships, port facilities and offshore facilities, with 100 penalty units for other maritime industry participants.

The Guide recommends that penalties exceeding 50 penalty units should not normally be imposed by regulations.

The primary object of the Bill is to introduce an additional purpose in the Aviation and Maritime Acts to prevent the use of security-relevant areas and zones at aviation and maritime facilities in connection with serious or organised crime. Currently, the Aviation and Maritime Acts are focused on securing such areas and zones solely for the purpose of preventing unlawful interference with aviation and maritime transport.

As explained in the explanatory memorandum to the Bill, any new penalties to be prescribed in the Aviation Transport Security Regulations 2005 (Aviation Regulations) and Maritime Transport and Offshore Facilities Security Regulations 2003 (Maritime Regulations) for the purpose of the new serious or organised crime provisions, will be consistent with existing penalties prescribed for similar offences within the Aviation and Maritime Regulations. This will ensure uniform implementation and enforcement of similar offences, which reflects the Guide's requirements that any penalties imposed should be consiste1nt with penalties for existing offences of a similar kind, or of a similar seriousness.

I also note that the penalties specified in the Bill, and in the existing Aviation and Maritime Acts, take into the account body corporate multiplier rule identified in the Guide. This rule provides that penalties can be set five times higher for body corporates than for natural persons, which also applies to offences in subordinate legislation. The maximum penalty imposed in the Bill for natural persons (identified as "any other persons" in the Bill) is 50 penalty units, which is consistent with the requirements under the Guide. However, in accordance with the Guide, higher maximum penalties are prescribed for industry roles undertaken by corporate entities. Aviation industry participants' and 'maritime industry participants' are corporate entities such as port operators or airlines.

Finally, by prescribing maximum penalties, the Bill provides for discretion to be applied in making regulations imposing any such penalties. The provisions of the Bill itself do not establish any offences or impose any penalties.

Committee response

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

Senator Helen Polley
Chair

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC16-000579

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

Dear Senator Polley

I refer to the letters of 25 February 2016, sent to my senior adviser by Ms Toni Dawes, Secretary to the Senate's Standing Committee for the Scrutiny of Bills (the Committee). Those letters drew my attention to the Committee's *Alert Digest No. 2 of 2016* (the Digest) requests for information in relation to the Appropriation Bill (No. 3) 2015-2016 and Appropriation Bill (No. 4) 2015-2016.

Appropriation Bill (No. 3) 2015-2016

Your Committee sought my advice on the initial expenditure of the 'Cities and the Built Environment Taskforce' and its classification as ordinary annual services within Appropriation Bill (No. 3) 2015-2016. I note that the Committee considers this may be a 'new policy not previously authorised by special legislation'.

The appropriation for the Cities and the Built Environment Taskforce measure has been provided for in Bill No. 3 as it falls under the existing Outcome 1 of the Department of the Environment. The Department of the Environment's portfolio additional estimates statement makes clear that the expenditure is under Outcome 1, which is as follows:

> Outcome 1: *Conserve, protect and sustainably manage Australia's biodiversity, ecosystems, environment and heritage through research, information management, supporting natural resource management, establishing and managing Commonwealth protected areas, and reducing and regulating the use of pollutants and hazardous substances*

As indicated in my previous correspondence to you, this Government prepares Appropriation Bills in a manner consistent with the previous practices of this Government and its predecessors. In particular, that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. The Cities and the Built Environment Taskforce involves departmental expenditure that falls within an existing outcome. Accordingly this measure was included in Appropriation Bill (No. 3) 2015-2016.

Appropriation Bill (No. 4) 2015-2016

As you are aware, additional information was included in the explanatory memorandum to Appropriation Bill (No. 4) 2015-2016 to reference external sources and publicly available information on the proposed appropriations.

While the concept of a stand-alone location of explanatory information on appropriations including purposes and specific statutory provisions that authorise programs has some appeal, it would be well outside the scope of an explanatory memorandum. The explanatory memoranda to the Bills address technical aspects of the operative clauses of the Bills, rather than specific details of appropriation amounts for proposed Government expenditure. Any further expansive background in the explanatory memoranda to the appropriation Bills would add considerably to production times for Budget documentation, which would be impractical where some decisions can be settled late in the process and final production work ties down available staff in rigorous processes for reconciling financial data and quality assuring documentation for typesetting and preparation of the legislation.

The suite of Budget documentation has been carefully developed over the years and is continually evolving. The detail of proposed Government expenditure, and the detail for the Budget generally, appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The portfolio statements provide the Senate with additional information and facilitate understanding of the proposed appropriations as a 'relevant document' under the *Acts Interpretation Act 1901* for the associated Appropriation Bills.

In practice the interest of the Committee has been in a select number of spending activities, where for example the Committee wants assurance that specific expenditure is appropriately supported by constitutional and legislative power. Such targeted inquiries are capable of being addressed as necessary, as they have been reasonable in number and posed through an orderly Committee process with manageable timeframes for response.

The Senate Estimates committees also have a well designed process specifically for such forensic examination of detail. The principal purpose of the three Estimates sessions held each year is to afford the opportunity for Senators to ask relevant entities about amounts in appropriation bills, or related measures in portfolio statements, or other published Budget documentation. Further details on enabling legislation and purposes of spending activities can also be ascertained through Estimates' Questions on Notice, which allow an extended timeframe for providing additional information on an activity beyond the hearings.

The 2015-16 Portfolio Additional Estimates Statements provides information on appropriations for 'Payments to the States, ACT, NT and local government' and related programs. This information is available in the tables in the Entity Resources Statements, Additional Estimates and Variations, and Outcome and Performance sections of the document. For the Appropriation Bill (No. 4) 2015-2016:

- $3.4 million under Outcome 3 of the Department of Agriculture and Water Resources relates to movement of funds for the National Urban Water and Desalination Plan to align with construction schedules;
- $302.6 million under Outcome 1 of the Department of Infrastructure and Regional Development for the Infrastructure Investment Program is the net impact of the *Mid-Year Economic and Fiscal Outlook 2015-16* (MYEFO) measure *Infrastructure Investment Programme – new investments,* movement of funds for Roads to Recovery to align with construction schedules, and estimate adjustments for the Investment element to align with construction schedules;
- $23.0 million under Outcome 3 of the Department of Infrastructure and Regional Development is a total of movement of funds for the Latrobe Valley economic diversification program to align with construction schedules and reclassification of appropriations for the Drought Communities Program to reflect grants to local Government.

The program information can be used in conjunction with the tables in Payments to the States sub-sections of Annex A to Attachment D in Part 3 of MYEFO to obtain the most recent detailed estimates of Commonwealth payments to the States, Territories and local governments from 2015-16 to 2018-19. These tables are available at http://www.budget.gov.au/. The specific statutory or other provisions which detail any terms and conditions for these particular payments can be found in various publicly available sources, such as the relevant entity websites, www.comlaw.gov.au and www.federalfinancialrelations.gov.au.

Thank you for bringing the Committee's comments to my attention.

Mathias Cormann
Minister for Finance

15 March 2016

The Hon Christian Porter MP
Minister for Social Services

MC16-002695

21 MAR 2016

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

Dear ~~Senator Polley~~ Helen

I am writing in response to a letter received on 29 February 2016 from Ms Toni Dawes, Committee Secretary for the Senate Scrutiny of Bills Committee, regarding concerns about amendments made by the Business Services Wage Assessment Tool (BSWAT) Payment Scheme Amendment Bill 2016 (the Bill) which changes the requirement to obtain legal advice under the scheme. I appreciate the time you have taken to bring this matter to my attention.

As you are aware, the Bill gives effect to the settlement agreement between the Commonwealth and the Applicant in a representative proceeding in the Federal Court of Australia. Among other matters, the settlement agreement provides that the requirement for participants to obtain legal advice before receiving a payment under the scheme should be optional rather than mandatory.

The amendment provides greater choice and control to participants. Currently, a participant cannot accept an offer under the scheme if they have not received legal advice from an eligible adviser. The amendment provides participants the option to choose whether they want to access legal advice funded by the Commonwealth before accepting an offer under the scheme.

The Bill strikes a balance between the needs of class members, who comprise the large majority of people eligible to participate in the scheme, and the needs of eligible participants who have opted out of the representative proceeding. By continuing to fund legal advice for those who choose to obtain it, the Bill removes an undue and unnecessary burden from class members who do not want to obtain further legal advice, protects the rights of non-class members and allows the Government to make payments more quickly to some participants of the scheme.

Class members of the representative proceedings have had the opportunity to receive legal advice from Maurice Blackburn Lawyers, the Applicant's legal representative, during the course of the representative proceedings. Any further legal advice they would receive under the scheme may be unnecessary and may discourage class members from applying for the scheme.

Thank you for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Clare O'Neil MP
Federal Member for Hotham

13 April 2016

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
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Dear Senator Polley,

Alert Digest No. 4 of 2016 – Ethical Cosmetics Bill 2016

Thank you for your letter concerning comments made about the Ethical Cosmetics Bill 2016 (the Bill) in the Committee's Alert Digest No. 4 of 2016.

In considering the Bill the Committee made note of the role of the Director and their role in establishing the rules which determine the dominant purpose of testing a substance. Specifically, the Committee questioned:

> *"why it is appropriate that the content of an offence be determined by reference to a legislative instrument rather than being included in the primary legislation."*

In drafting this Bill, consideration was given to the technical nature of the matters being legislated and ensuring the proposed amendments were consistent with the Industrial Chemical Notification Scheme Act (the Act), which this Bill amends.

The Act covers an extensive array of chemical substances. In determining the dominant purpose of testing consideration has to be given to the composition of the substance being tested, the substance's intended use and the context in which the tests have occurred. These are extremely technical in nature and change from substance to substance. Allowing the Director to establish how this is determined provides flexibility to the administering body (the National Industrial Chemicals Notification and Assessment Scheme) and allows for variations in industry practice.

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Further, the Act delegates the responsibility of determining approved tests (s23 (12)). Given that the Director is establishing the tests which must be undertaken, the Director is best placed to determine the parameters to establish the dominant purpose of those tests.

The Bill establishes the broad intention of the offence whilst allowing the Director to determine the technical and quantifiable aspects. Parliamentary scrutiny can still occur regarding the nature of the offence. Given the variety of tests and substances covered by the Act it was deemed inappropriate to establish the measures by which the offence is determined within the primary legislation.

I hope this information will assist the Committee in its considerations.

Clare O'Neil MP
Federal Member for Hotham

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MS16-000145

Senator Helen Polley
Chair
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Dear Senator ~~Polley~~ Helen,

Thank you for the comments made by your Committee concerning the Family Assistance Legislation Amendment (*Jobs for Families* Child Care Package) Bill 2015 (the Bill) published in Alert Digest No. 1 of 2016. An explanation of the issues raised is provided below.

Review rights – notice of a deemed refusal – Schedule 1, item 1, subsections 85CE(4) and 85CH(5)

The Committee asked for the rationale for the proposed approach where subsection 27A(1) of the *Administrative Appeals Tribunal 1975* (the AAT Act) will not apply to a deemed refusal under subsections 85CE(4) and 85CH(5) of the *A New Tax System (Family Assistance) Act 1999* (FA Act).

Subsections 85CE(3) (child at risk) and 85CH(4) (temporary financial hardship) of the Bill require the Secretary to either make a determination, or to refuse an application, within 28 days of receipt of that application, and, where the Secretary does so, s/he would be required to give notice of the decision in accordance with subsection 27A(1) of the AAT Act. In the current FA Act there are no timeframes for which the Secretary is required to make a determination in relation to 'at risk' or 'temporary financial hardship' applications. As such, timeframes for response to these applications could drag out and the applicants would have no clear timeframe for when a decision will be made. The rationale for the inclusion of a 28 day timeframe is to ensure a timely response from the Department where there are children and families in these vulnerable circumstances. The Department of Education and Training is committed to making every attempt to deal with applications in a timely manner and expects to do so within the 28 days.

The deemed refusal provisions in subsections 85CE(4) and 85CH(5) were included for the purposes of providing certainty to applicants (that is, the child care service in relation to children at risk and families in relation to temporary financial hardship) in the rare event that their application is not determined in a timely manner. Significant work is, however, underway to reduce the chance of rare and unfortunate situations when an application is lost in the mail, or an application is not processed due to administrative oversight. In such circumstances, where the Secretary has neither made a determination nor refused the application, the application is taken to be refused under subsections 85CE(4) and 85CH(5) so that there is a clear outcome for an applicant.

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In situations where a deemed refusal has occurred, the applicant will have full access to review rights (both merits review through internal review and subsequently through the Administrative Appeals Tribunal, and judicial review). For example, the applicant may contact the Department to ask about the progress of their application, and the Secretary would be able to initiate an own motion review of the refusal decision. Alternatively, the person may make a formal application for an internal review of the refusal decision. In addition, there is also nothing to prevent an applicant whose application is deemed to be refused from making a new application.

Subsection 27A(1) of the AAT Act provides that a person who makes a reviewable decision must take reasonable steps to give to an affected person a written notice of the decision and of their review rights. It would not be appropriate to require the Secretary to give a decision notice advising of review rights in relation to deemed refusals under subsections 85CE(4) and 85CH(5), because deemed refusals only come into effect in circumstances where the Secretary, (or his or her delegate), has failed to personally make a decision: in other words, no actual decision was made by an officer. Accordingly, proposed subsections 85CE(4) and 85CH(5) simply reflect that it would be inappropriate to oblige the Secretary to notify of the act of not making an active decision. As such, the exemption from the notification requirement merely reflects the practical reality that any deemed refusals are likely to occur without the Secretary's actual and active knowledge.

Delegation of legislative power – Schedule 1, item 202, proposed section 199G

The Committee asked for the rationale for the proposed sections of the Bill which provide broad powers of modification of the principal legislation.

The Secretary may approve a provider for the purposes of the family assistance law under section 194B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the FAA Act). Under subsection 194B(5) an approval can take effect on a date prior to the date of the approval decision, but no earlier than the date of the application. This means that there may be cases where an applicant is taken to have been approved in the time prior to notification of the approval decision. This in turn may mean that providers are retrospectively required to meet obligations by timeframes that have already passed and they could possibly be in a position where they are in breach of those requirements (such as the requirement to submit attendance reports under new section 204B). Similarly, it is possible that suspensions of services could be revoked with retrospective effect, again retrospectively requiring providers to meet obligations in the past.

In view of this, proposed section 199G gives Ministerial power to make rules which modify the FAA Act, so that it operates without anomalous or unfair consequences for providers where their approval takes effect during a past period. Such modifications would be beneficial for providers as they would ensure providers are not unfairly exposed to obligations in the past that they are unable to meet. One such possible modification, for example, would be to extend the time in which attendance reports under section 204B are required to be provided where providers are taken to have been approved in a past period.

Although it may be possible to include limiting words to ensure the provisions are only used beneficially, amendments of this nature could be equivocal and possibly confusing due to difficulties in defining what a 'benefit' is in the context of lifting obligations relating to backdated approvals. I note that any rules made in accordance with section 199G will be subject to further parliamentary scrutiny through the disallowance process for legislative instruments, which means that Parliament will be able to disallow any rules that are considered non-beneficial or otherwise unfair.

Delegation of legislative power – Schedule 4, item 12 (transitional rules)

I intend that this power will be used in a beneficial way to ensure a smooth transition into the new system, including to ensure that: provider approvals happen seamlessly and without unintended or unfair consequences for child care services with existing approval under family assistance law; payment arrangements for individuals transitioning to the new Child Care Subsidy can operate without unexpected complications; and the public purse is appropriately protected by ensuring that outstanding debt or compliance matters on transition can still be dealt with under the new system. I consider that the power to make transitional rules needs to be worded as broadly as possible to ensure that any unforeseen and unintended consequences of repealing and amending legislation can be remedied promptly and flexibly by legislative instrument.

I consider this broad power is justified and proportionate given it can only operate for a limited period of two years, and any rules made would be subject to further parliamentary scrutiny through the process of disallowance of legislative instruments. Any rules that attempt to broadly modify the Act other than to assist transition would be beyond power and ineffective.

Trespass on personal rights and liberties – strict liability – Schedule 1, Item 202, new part 8A, various provisions

The Committee has asked for a detailed justification of each instance of the application of strict liability, with reference to the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (developed by the Attorney-General's Department to assist officers in Australian Government departments to frame criminal offences that are intended to become part of Commonwealth law).

Strict liability provisions exist in the current FAA Act in relation to a range of contraventions by operators of child care services. These have been expanded upon in the Bill for the purposes of addressing systemic non-compliance in the child care sector. In addition, new penalties have been included to address compliance issues that have emerged in relation to the administration of the child care payment system under existing legislation.

The Australian National Audit Office 2014–15 Financial Statements audit report estimates that $692.9 million was inappropriately claimed by child care service providers in 2014–15. As such, the increased compliance measures in the Bill (including strict liability) are aimed at deterring inappropriate practices and penalising those providers that continue to disregard their legal obligations under the FA and FAA Act.

The integrity of the subsidy system relies on child care services engaging in a range of important administrative and business practices to ensure that the financial benefit of child care subsidy payments are passed onto families, including by appropriate record keeping, invoicing practices and reporting attendance and enrolment of children. A new child care information technology system will support services to be able to meet their obligations under the Bill while reducing regulatory burden.

Besides the criminal offences created under the Bill, the compliance regime outlined by the Bill also provides for the possibility of pursuing non-compliance through 'sanction' processes (including by cancelling or suspending provider or service approval) as well as through an infringement notice and civil penalty regime. The imposition of strict liability offences in relation to the contravention of obligations offers the ability for criminal prosecution only where a contravention is considered to be sufficiently serious to pursue in this manner. Strict liability offences are only proposed in relation to contraventions that would have a significant impact on the payment integrity of the new child care regime. As explained in the enclosed table, I consider that the offences are justifiable in light of the principles set out in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Case history has demonstrated that civil penalty provisions on their own may not be a sufficient deterrent/penalty as services may choose not to pay these penalties and continue to operate. In some cases, civil penalties are not sufficient in their penalty amounts as it is more profitable for services to inappropriately claim and pay the fines. Therefore, they may not have the desired impact in penalising illegal behaviour.

The rationale for the various strict liability offences has been included at Attachment A.

I trust the information provided is helpful to the Committee.

Simon Birmingham

Encl.
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Attachment A

Use of 'Strict Liability' Provisions in the Family Assistance Legislation Amendment (*Jobs for Families* Child Care Package) Bill 2015

Clause	Heading	Rationale for use of 'strict liability' provisions
200A	Enrolment Notices	It is important for the Secretary to be given notice of the enrolment of a child in relation to whom an individual may become entitled to Child Care Subsidy (CCS), including information about any irregularities in the approval of a provider. This information is required to make correct weekly determinations of CCS to the individual in relation to the enrolled child. Failure to notify of an enrolment of a child, regardless of intent, leads to an individual not being able to be paid for CCS in relation to the child. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to notify of an enrolment is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to report on an enrolment) • there are legitimate grounds for penalising persons irrespective of fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
200D	Updates in relation to enrolled children	It is also important for the Secretary to be given notice of any changes or variations to enrolment arrangements. This may include, for example, when a child ceases to be enrolled at the child care service. Failure to notify of changes to enrolment arrangements or failure to notify of changes in a timely manner, regardless of mental intent, will lead to incorrect payment of CCS. The Secretary relies on the service provider submitting this information in a timely manner, to ensure the correct payment of CCS to families. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and*

Clause	Heading	Rationale for use of 'strict liability' provisions
		Enforcement Powers developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to notify of variations to an enrolment is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to ensure the integrity of the child care payment regime (it is difficult to find evidence to establish that a provider intended to not to give updates in relation to an enrolled child) • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to report on an enrolment) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur during training and information provided following approval of a provider.
201A	Requirement to pass on fee reduction amount to individual entitled to be paid CCS or Additional CCS (ACCS)	An individual's entitlement to CCS by fee reduction is paid by the Secretary to the child care provider, and the provider is required to pass on the amount by reducing the fees charged to the individual. Failure to pass on the fee reduction amount, regardless of intent, would mean that the individual would not benefit from their entitlement to CCS or ACCS and would still be charged full fees by the provider. Where a provider is not able to pass on the fee reduction, they are required to remit the amount to the Secretary. The Secretary would then seek to pay the remitted amount directly to the individual. If a provider fails to remit the fee reduction amount, the Secretary could only identify this through notification by the individual or another party. Regardless of intent, this means the individual would lose out on receiving their CCS entitlement. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to pass on or remit the fee reduction amount is justifiable because: • the offence is not punishable by imprisonment • although the offence is punishable by a fine exceeding 60 penalty units for an individual (80 penalty units), it is considered that a serious strict liability offence dealing with providers' failure to

Clause	Heading	Rationale for use of 'strict liability' provisions
		remit fees is necessary to ensure that providers do not inappropriately retain monetary amounts that are unable to be passed onto entitled individuals • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
201C	Charging no more than usual hourly session fee	The hourly rate of ACCS in most cases is equal to 100 per cent of the hourly session fee up to 120 per cent of an hourly fee cap (there is a lower subsidy rate for some groups). This means that the Secretary would be paying a provider 100 per cent of the fee charged by the provider (up to the hourly fee cap) and the eligible individual would not be charged for the session of care unless the provider charges more than 120 per cent of the hourly fee cap. In order to protect Commonwealth outlays, it is important to ensure that providers do not inflate their fees with respect to individuals who are eligible for ACCS, compared to other individuals who are eligible for CCS, in order to maximise payment from the Commonwealth. Failure to comply with this provision, regardless of intent, would lead to greater Commonwealth outlays than intended under the law. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for charging more than the usual hourly fee is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine of 80 penalty units for an individual, which is an increase from the current penalty of 60 penalty units under section 219BB of the FAA Act. Non-compliance with current section 219BB of the FAA Act is causing significant Commonwealth outlays, as some services have set up business models to justify charging only high fees. A penalty unit of 80 is considered to be a greater deterrent • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely

Clause	Heading	Rationale for use of 'strict liability' provisions
		difficult to prove that a provider intended not to charge more than the usual hourly session fee) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
201D	Requirement to give individuals statements of entitlements	The calculation of entitlements to CCS relies on information provided by the provider about hours of attendance and fees charged. One of the ways in which the integrity of the subsidy system is protected is by ensuring transparency of information for families and that families receive timely entitlement statements, including information such as the hours used and the fees charged, so that they have the opportunity to verify that the amount of entitlement is correct. Persistent failure to give families a timely statement outlining their entitlement, regardless of intent, will compromise the financial integrity of the child care subsidy regime. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to give individuals statements of entitlement is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to give an individual a statement of entitlement) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
201E	Statements following changes of entitlement	Section 201E is intended to ensure transparency of information for families and to ensure that individuals are informed of any review of CCS entitlement and to give them the earliest opportunity to raise any issues with the provider or the Secretary. Again, like for section 201D above,

Clause	Heading	Rationale for use of 'strict liability' provisions
		persistent failure to give families a timely statement following changes to their entitlement, regardless of intent, will compromise the financial integrity of the child care subsidy regime. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to give individuals statements following changes of entitlement is justifiable because: • the offence is not punishable by imprisonment; • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to give an individual a statement of entitlement) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
202A	Requirement to make records	The Commonwealth relies on providers to make relevant records, so they can notify the Secretary of such information from time to time, or when requested. Failure to make accurate and complete records of matters affecting eligibility and compliance with conditions of continued approval, irrespective of the mental or fault elements, would compromise the financial integrity of the child care payment regime. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to make records is justifiable because: • the offence is not punishable by imprisonment; • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime

Clause	Heading	Rationale for use of 'strict liability' provisions
		• the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to make a record) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
202B	Requirement to keep records	The Commonwealth relies on providers to keep relevant records, so that they can notify the Secretary of such information from time to time, or when requested. Failure to make accurate and complete records of matters affecting eligibility and compliance with conditions of continued approval, irrespective of the mental or fault elements, would compromise the financial integrity of the child care payment regime. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in *the A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to keep records is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to keep a record) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
202C	Requirement to keep records in relation to certificates of risk of serious abuse or neglect	Where a provider certifies that a child is at risk of serious abuse or neglect, it is the provider's obligation to make and keep a record of evidence to support their view. Further the provider must make and keep a record of the notice given to the state or territory authority that the child is at risk of serious abuse or neglect. This record keeping requirement allows the Commonwealth to undertake compliance checks

Clause	Heading	Rationale for use of 'strict liability' provisions
		to ensure only eligible individuals are receiving the higher payment of ACCS (at risk). The new child care information technology system will support providers to meet the requirements of this provision. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to make and keep records in relation to certificates of risk of serious abuse and neglect is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine of 80 penalty units for an individual. Under the current law in relation to the 'special' rate of Child Care Benefit, there are significant non-compliance issues in relation to certificates of risk of serious abuse and neglect being made with no record of supporting evidence, as well as a range of sharp practices. This has resulted in significant Commonwealth outlays outside of the law's intent as the Government is paying the full cost of care where there is potentially no 'at risk' situation. A penalty unit of 80 is considered to provide greater deterrent • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to keep a record) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
202D	Requirement to keep Secretary informed about location of records after suspension or cancellation	The financial integrity of the child care payment system would be compromised if the Commonwealth did not continue to hold providers accountable for the safe storage of records of the provider and service after the suspension or cancellation of approval. Even though the provider is not approved, such records may become important to work out, for example, an amount of overpayment for a past period which needs to be raised as a debt and recovered. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing*

Clause	Heading	Rationale for use of 'strict liability' provisions
		Commonwealth Offences, Infringement Notices and Enforcement Powers developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to keep the Secretary informed about location of records after suspension or cancellation is justifiable because: • the offence is not punishable by imprisonment; • the offence is punishable by a fine not exceeding 60 penalty units for an individual • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to keep the Secretary informed about the location of records) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
204B	Requirement to report for enrolled children	The calculation of entitlements to CCS relies on information provided by the provider about fees charged and hours of attendance of each enrolled child. Failure to provide weekly reports, regardless of intent, results in individuals missing out on their CCS entitlements. Failure to provide accurate reports, regardless of intent, results in incorrect payment to individuals (and a debt raised against individuals for overpayments). Failure to provide timely reports, regardless of intent, results in delays in making payments of CCS to individuals. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to weekly reports for enrolled children is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine of 70 penalty units for an individual. Under the current law in relation to Child Care Benefit, there are significant non-compliance issues in relation to late reports or inaccurate reports being submitted. This has resulted in significant Commonwealth outlay outside of the law's intent, especially in relation to the administrative burden placed on the Government in correcting these issues. A penalty unit of 70 is considered to provide greater deterrent

Clause	Heading	Rationale for use of 'strict liability' provisions
		• strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
204C	Dealing with inaccurate records	Given that the regulatory system is dependent upon the accuracy of information submitted by providers, it is paramount that providers promptly vary or substitute inaccurate reports at the direction of the Secretary within the required timeframe. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to deal with inaccurate records is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine of 70 penalty units for an individual. Under the current law in relation to Child Care Benefit, there are significant non-compliance issues in relation to late reports or inaccurate reports being submitted. This has resulted in significant Commonwealth outlay outside of the law's intent. A penalty unit of 70 is considered to provide greater deterrent • strict liability is necessary to protect Commonwealth outlays and ensure the integrity of the child care payment regime • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended to submit and inaccurate record) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.
204F	Requirement to notify Secretary of	Approved providers are required to notify the Secretary of a range of matters provided for under the Bill, contravention of

Clause	Heading	Rationale for use of 'strict liability' provisions
	certain matters	which is a strict liability offence. Section 204F allows the Minister to make rules to prescribe additional matters about which providers must give notice to the Secretary that are necessary for the administration of the CCS and ACCS payment system, for example, information relevant to decisions in relation to the continued approval of the provider/service. Experience has shown that as the child care sector changes over time, the kinds of matters which the Secretary may require a provider to notify about may change. Therefore, this provides capacity for the Minister to prescribe notification requirements in addition to those contained in the Bill. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to provide information prescribed under the rules is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to notify the Secretary of certain matters) • the making of rules under this provision would be subject to further parliamentary scrutiny through the disallowance process for legislative instruments.
204K	Notice to State/Territory body of child at risk of serious abuse or neglect	This provision creates an obligation for a provider to notify the relevant State/Territory body when the provider gives a certificate of risk of serious abuse or neglect, or makes an application for a determination of risk of serious abuse or neglect. The purpose of this provision is to ensure that state or territory government agencies responsible for the welfare of children are informed and able to respond to the welfare risks that such children may be facing, as appropriate. In relation to this clause the following dot points address the principles that should apply to the framing and administration of strict liability offences outlined in the *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Attorney-General's Department. Specifically, imposing a strict liability offence for failure to give notice to State/Territory body of child at risk of serious abuse or neglect is justifiable because: • the offence is not punishable by imprisonment • the offence is punishable by a fine not exceeding 60 penalty units for an individual

Clause	Heading	Rationale for use of 'strict liability' provisions
		• strict liability is necessary to ensure child protection agencies are promptly notified of children at risk of serious abuse and neglect, and to ensure the integrity of the child care payment regime • notification to State/Territory child protection agencies is essential to ensure that those agencies can step in to provide further support if necessary • the punishment of this offence not involving fault is likely to significantly enhance the effectiveness of the enforcement regime (this is because it is extremely difficult to prove that a provider intended not to provide notice to a State/Territory body) • there are legitimate grounds for penalising persons lacking fault because providers will be put on notice, to be on guard against the possibility of any contravention. This would occur through information and support provided following approval of a provider.

The application of penalties greater than 60 penalty units

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability is generally only considered appropriate where, amongst other things, the offence is punishable by a fine of up to 60 penalty units.

The proposed penalty units for five of the clauses listed are set above this guideline:

Clause	Penalty Units
201A, 201C and 202C	80
204B and 204C	70

The failure to advise the Secretary of certain matters that may affect the approval of the provider or the approval of the service, may impact families resulting in them:

- no longer having access to fee reduction payments for child care at that service (which can be at short notice)
- being unable to find alternative care arrangements at short notice to ensure they continue to receive fee reduction payments
- or receiving fee reduction payments for which they may not be eligible.

Given the impact on the Commonwealth and intended service recipients, it was determined to be appropriate to increase the penalty units in order to promote compliance from the outset.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

MC16-005115

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

Narcotic Drugs Amendment Bill 2016

Dear Senator Polley Helen

Thank you for your correspondence of 25 February 2016 addressed to my Senior Adviser requesting information from me about issues identified in relation to the Narcotic Drugs Amendment Bill. As you have mentioned, the Bill has been passed by both Houses and it has recently received Royal Assent. You also mentioned that in light of the passage of the legislation, the Scrutiny of Bills Committee is interested in whether the matters it has raised can be given consideration for future amendments to relevant legislation.

The response to specific comments by the Committee in relation to the relevant provisions to the Bill is attached.

Thank you for bringing this matter to my attention.

The Hon Sussan Ley MP

Encl

11 MAR 2016

Response to the Scrutiny of Bills Committee Report on the Narcotic Drugs Amendment Bill 2016

Alert Digest No 2 of 2016

Privacy
Section 14N

The Committee sought the Minister's advice on whether, noting that section 14N of the Act authorises disclosure of information in a number of listed circumstances, there is a related offence for unauthorised disclosure of information.

Response
It is not an offence under the *Narcotic Drugs Act 1967* itself for a person to disclose information of the kind set out in section 14N. That section makes it clear that where the Secretary of the Department of Health releases information in the circumstances set out in the section, that disclosure is taken to be authorised for the purposes of the *Privacy Act 1988*. The effect is that any release of personal information by the Secretary in such circumstances would not be a breach of Australian Privacy Principle 6.

Unauthorised disclosure of personal information is also covered by the *Privacy Act 1988*. Subsection 13G(1) of the Act provides that a Department that does an act, or engages in a practice, that is a serious interference with the privacy of an individual, or repeatedly does an act or engages in a practice that is an interference with the privacy of one or more individuals, is subject to a civil penalty of 2,000 penalty units. An interference with the privacy of an individual includes an act or practice which breaches an Australian Privacy Principle.

Section 70 of the *Crimes Act 1914* however makes it an offence for any Commonwealth officer to disclose information which it is his or her duty not to disclose to a person to whom he or she is not authorised to disclose that information. The offence attracts a maximum term of 2 years imprisonment if a person is convicted of that offence. This offence is not limited to the unauthorised disclosure of personal information.

Breadth of administrative power
Proposed section 13H

The Committee sought the Minister's advice about safeguards that will apply to the exercise of monitoring powers and whether consideration has been given to including a legislative requirement for authorised inspectors to have appropriate qualifications and experience.

Response
Although not expressly provided for in the statutory provisions, it is intended that APS officers and State and Territory officers with appropriate technical qualifications in auditing and monitoring manufacturing premises and lands used for cultivation of cannabis be appointed by the Secretary as authorised inspectors under Chapter 4 of the *Narcotic Drugs Act 1967*. These inspectors are the officers responsible for investigating and reporting in relation to the compliance of licence holders with the requirements of the Act. This information would ultimately be used in decision making (e.g. licence revocation or imposition of additional conditions) and in consideration of other sanctions such as prosecution or action for the payment of civil penalties. It would therefore be important for these officers to have the relevant qualifications and experience to minimise any risk that the evidence or information that they collect may not comply with the evidentiary requirements.

It would therefore in the Secretary's interests to ensure that those appointed inspectors have the appropriate qualifications and experience.

Coercive powers - entry and search powers without consent or a warrant
Proposed section 14C

The Committee sought the Minister's advice as to what Executive or other authorisation will be needed before entry without consent or a warrant can take place, what reporting requirements will apply and whether there is a requirement for guidelines for the use of the powers to be made.

Response
Both cannabis licences (granted under Chapter 2) and manufacturing licences (granted under Chapter 3) will be subject to the conditions set out in sections 10H and 12K of the *Narcotic Drugs Act 1967*, respectively. Section 10H provides that it is a condition of a cannabis licence that if a person is authorised by the licence to obtain or cultivate cannabis plants or to produce cannabis or cannabis resin, or to engage in activities related to such obtaining, cultivation or production, the person must allow the Secretary, or a person authorised by the Secretary, to:

(a) enter land or premises at which the person is present and where the obtaining, cultivation, production or activity is being undertaken, for the purposes of the following:
    (i) inspecting or monitoring the obtaining, cultivation, production or activity;
    (ii) checking whether the obtaining, cultivation, production or activity is being carried out as authorised by the licence in accordance with the cannabis permit and whether the licence conditions are being complied with; and
(b) take samples of any things at such land or premises and remove and test samples.

Section 12K provides that it is a condition of a manufacture licence that, if a person is authorised by the licence to manufacture a drug, or to engage in activities related to such manufacture, the person allow the Secretary, or a person authorised by the Secretary, to:

(a) enter the premises at which the person is present and where the manufacture or activity is being undertaken, for the purposes of the following:
    (i) inspecting or monitoring the manufacture or activity;
    (ii) checking whether the manufacture or activity is being carried out as authorised by the licence in accordance with a manufacture permit and whether the licence conditions are being complied with; and
(b) take samples of any things at such premises and remove and test samples.

Section 14C provides for the carrying out of the monitoring of the activities authorised under a cannabis licence or manufacture licence as a condition of those licences. The licence holder is aware of the existence of this condition when applying for a licence as it is a statutory condition that applies automatically and that monitoring of the activities in relation to those licences would be carried out by an authorised inspector. They would also know that a person who refuses to allow an authorised inspector to enter licensed premises under section 14C would be breaching the conditions set out in section 10H or 12K and that a breach of a condition of a licence may result in the revocation of the licence (refer to section 13B for a manufacture licence, and section 10P for a cannabis licence).

It is necessary and appropriate for the Secretary to monitor and investigate whether the

activities in relation to cannabis, cannabis resin or manufacture of medicinal cannabis are in compliance with the requirements under the *Narcotic Drugs Act 1967* and that no possible risks relating to diversion and other activities are being carried out in those premises or lands that are covered by licences granted under that Act.

Subsection 14C(2) provides that an authorised inspector may only enter the premises during the business hours of the premises. Moreover, subject to the powers set out in subsection 13L(2) (in relation to the taking of samples) the powers that can be exercised under section 14C are limited to the general monitoring powers set out in section 18 of the *Regulatory Powers (Standard Provisions) Act 2014.*

Guidelines and procedures for monitoring and investigations under the new Chapter 4 of the Narcotic Drugs Act are being prepared to cover matters such as frequency of monitoring and inspections, whether they will be 'announced' or 'unannounced', how information and other evidence are to be collected and the authorised persons who will be carrying out these inspections.

Merits Review
Proposed sections 15E and 15H

The Committee sought the Minister's advice as to whether any decisions permitted by the Act will not be reviewable (and have therefore been omitted from the list of reviewable decisions in section 15E) and if so, the justification for this approach.

Response
Section 15E lists decisions that are reviewable decisions. An administrative decision made by the Secretary and listed under section 15E would be subject to internal review under section 15G. A decision by the Minister or internal reviewer under section 15H that relate to a reviewable decision would be reviewable by the Administrative Appeal Tribunal. Any administrative decision under the *Narcotic Drugs Act 1967* that is not listed under section 15E would be subject to a judicial review, including under the *Administrative Decisions (Judicial Review) Act 1977.*

In addition, through the operation of sections 15F and 15G, the head of the State or Territory agency can apply for a review of the decision by the Secretary under section 8F to grant a medicinal cannabis licence (paragraph 15E(1)(a)), under section 9E to grant a cannabis research licence (paragraph 15E(1)(f)) or under subsection 10M(1) to vary a cannabis licence (paragraph 15E(1)(k)), to the extent that:

(a) the licence concerned relates to land or premises situated wholly or partially in that State or Territory; and
(b) a notice under subsection 25B(1), given by the head of a State or Territory agency for that State or Territory, is in force.

Subsection 15L(2) gives the States and Territories status as a 'person whose interests are affected' for the purposes of subsections 27(2) and 30(1A) of the *Administrative Appeals Tribunal Act 1975.* This gives the States and Territories standing to appeal decisions referred to in paragraphs 15E(1)(a), (f) and (k) where, for instance, a decision to grant or vary a licence could affect the interests of that State or Territory.

The only administrative decisions that are not included in sections 15E and 15H are decisions under section 11H to grant a manufacture licence and under section 12A to grant a manufacture permit. A successful applicant would not generally request a review of the grant

of a manufacture licence or a manufacture permit. (They can separately seek a review of any decision to impose a condition on that grant under section 11L.) It is not proposed that State and Territory agencies have a right of review in relation to decisions to grant a manufacture licence. Unlike cultivation and production of cannabis for medicinal or related research purposes, the States and Territories are able to regulate the manufacture of narcotic drugs within their jurisdictions. Even if licensed under the Narcotic Drugs Act, manufacturing activities could not be undertaken in a State or Territory if the State or Territory did not also authorise those activities. In those circumstances it was not thought necessary to provide for the relevant State or Territory to have the capacity to seek a review of any decision to grant a Commonwealth manufacture licence.

Proposed section 15H

The Committee sought the Minister's advice as to the justification for the approach proposed in section 15H, which limits the applicant for internal review to one opportunity to submit information, unless otherwise requested by the Minister.

Response

The approach proposed in section 15H limits a person seeking an internal review to a single opportunity to provide information, unless otherwise requested by the Minister under 15K to provide additional information. Under subsection 15J(2) the Minister is deemed to have affirmed the initial reviewable decision if a notice of a decision from the review is not provided to the applicant within 60 days of the application for review.

This provision is justified because it ensures that the Minister's delegate reviewer has time to consider all relevant information when commencing the review and puts the onus on the appellant to provide all relevant information at the time of submitting the application for review. Under section 15G, the appellant has up to 90 days to gather this information before submitting the information for review with the application. Late submission of relevant information places an undue burden on the Minister given the 60-day time limit within which to complete the review. Given that the decision which is proposed by the appellant to be overturned is deemed to be affirmed if the decision maker does not make the decision within the 60 days (and there is no capacity to extend this period), section 15H helps ensure a decision based on all available information can be made in a timely way.

These provisions mirror similar provisions that are contained in section 60 of the *Therapeutic Goods Act 1989.*

There is nothing to prevent the decision-maker from requesting information if it appears that relevant and more up-to-date material can be provided. It should be noted that in such an event, the 60 days clock is stopped pending provision of the material.

Delegation of legislative power- incorporation by reference subsection 28(2)

The Committee sought the Minister's advice with regard to the following:

- whether consideration can be given to including a requirement that instruments incorporated by reference are made freely and readily available to the public; and
- how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law as a result of new or updated material being incorporated by reference into law.

Response

Subsection 28(2) will allow regulations to make provision for a matter by applying adopting or incorporating any matter contained in another document or instrument as in force at a particular time or as in force from time to time.

Section 26 of the *Legislative Instruments Act 2003* (the LIA) requires that the explanatory statement lodged for registration with a legislative instrument must, if any documents are incorporated in the instrument by reference, contain a description of the documents so incorporated and indicate how they may be obtained.

While it would normally be expected that documents that are incorporated by reference in regulations would be publicly available, that will not always be the case, particularly where they are technical documents and, for instance, might be covered by copyright. Documents that are covered by copyright would require a licence to be negotiated and it would normally be a condition of that licence that disclosure, reproduction or copying would be limited. Examples of these types of these documents are 'international standards (ISO)' applying to particular goods and the device nomenclature system code (also called the Global Medical Device Nomenclature system (GMDN)) applying to medical devices for the purposes of the *Therapeutic Goods Act 1989*. Copies of international standards can be accessed and purchased from the International Organization for Standards. It would therefore be difficult to include a statutory requirement in the legislation that instrument incorporated by reference are made freely and readily available to the public. It would be expected that regulated entities that would need to comply with such standards would ensure they have access to such material as a necessary pre-condition to participating in the regulated business or industry. As provided for under section 26 of the LIA, the Department of Health can however, provide information how they may be obtained.

The Hon Christian Porter MP
Minister for Social Services

MC16-003036

14 APR 2016

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

Dear Senator Polley

I am writing in response to a letter of 18 March 2016 from Ms Toni Dawes, Committee Secretary, Senate Scrutiny of Bills Committee (the Committee), regarding the Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (the Bill).

The Senate Standing Committee for the Scrutiny of Bills Alert Digest No.4 of 2016 acknowledges that the Bill amends legislation to introduce departure prohibition orders to prevent social welfare debtors from leaving the country. The Committee notes that appeals regarding the Secretary's power to make a departure prohibition order to the Federal Court of Australia or the Federal Circuit Court of Australia would be limited to questions about the legality of the decision, rather than enabling the court to question the merits of the original decision.

The Committee specifically questions why merits review of the decision to make a departure prohibition order should not be available.

Powers of review by the Administrative Appeals Tribunal (AAT) and the Federal Court were considered when drafting the Bill. The departure prohibition order provisions of the Bill were modelled upon similar arrangements applying in child support and taxation legislation. This was done in order to align administrative practices and to treat social welfare debtors in the same manner as those with child support and taxation debts.

The Secretary's power to make a departure prohibition order is onerous and discretionary. The conditions required to be satisfied for the Secretary to come to the position to make a departure prohibition order are prescribed at proposed subsection 102A(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* in the Bill. The Secretary must take into consideration matters specified at subsection 102A(2), which are prescriptive at paragraphs (a), (b) and (c). Paragraph 102A(2)(d) provides that the Secretary also must have regard to 'such other matters as the Secretary considers appropriate'.

These provisions are mirrored in proposed amendments to the *Paid Parental Leave Act 2010*, *Social Security Act 1991* and *Student Assistance Act 1973*.

The Committee should note that the use of the Secretary's power to make a departure prohibition order is a 'last resort' position following lengthy, unsuccessful efforts to engage with the debtor to enter into satisfactory arrangements for repayment of the debt. My Department will ensure that the Guide to Social Security Law, which will be used to assist the Secretary's decision-making process to determine whether to make a departure prohibition order, reflects this intent.

Under the current provisions of the Bill, a person against whom a departure prohibition order has been made can seek merits review of a refusal by the Secretary to issue a Departure Authorisation Certificate (certificate) to allow a temporary absence from Australia, or of a refusal to revoke or vary a departure prohibition order.

The Administrative Appeals Tribunal (AAT), standing in the shoes of the Secretary, can affirm the Secretary's decision to refuse to issue a certificate, or can set the decision aside. The AAT can also affirm the Secretary's decision that the departure prohibition order not be revoked or varied, or can set aside that decision. A request for review, by a person against whom a departure prohibition order has been made, of the decision to refuse to revoke or vary the order will be quicker and simpler at the AAT than an appeal to the Federal Court.

In my view, the Federal Court of Australia or the Federal Circuit Court of Australia is best placed to conduct judicial reviews of the Secretary's discretionary legislative power to ensure that the decision was properly made at that point in time and met the required legislative threshold.

I base this position on jurisprudence developed by the Federal Court in the context of taxation departure prohibition orders which indicates that a court has greater capacity under similar review provisions to inquire into the reasonableness of the grounds for the order, and thus into factual matters, than a court undertaking a purely judicial review.

Since 2001, departure prohibition orders have been available to restrict the movement of child support debtors from departing Australia where they have unpaid child support debts. In that time, of the several thousand decisions to make a departure prohibition order, only 17 matters have been appealed to the Federal Court of Australia or the Federal Circuit Court of Australia (or equivalent). This would suggest that the overwhelming majority of debtors subject to departure prohibition orders are accepting of the circumstances, with few seeking judicial review. Further, the provisions that allow temporary travel under certificates, ensures sufficient means for people to travel when required.

I anticipate that the existing review regime, provided in the Bill, will continue to provide satisfactory review mechanisms for persons subject to departure prohibition orders.

Thank you again for bringing the Committee's concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001429

17 MAR 2016

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
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Helen

Dear Senator Polley

I refer to the Senate Standing Committee for the Scrutiny of Bills' (the Committee's) letter of 25 February 2016 regarding its consideration of the Transport Security Amendment (Serious or Organised Crime) Bill 2016 (the Bill).

The Committee, in the *Alert Digest No. 2 of 2016*, noted that the Bill provides for regulations to make penalties at levels exceeding those recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide).

Proposed subsection 38AB(3) of the Bill, which amends the *Aviation Transport Security Act 2004* (Aviation Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for airport and aircraft operators, and 100 penalty units for aviation industry participants other than airport or aircraft operators or accredited air cargo agents. Similarly, proposed subsection 113F(2), which amends the *Maritime Transport and Offshore Facilities Security Act 2003* (Maritime Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for operators of ports, ships, port facilities and offshore facilities, with 100 penalty units for other maritime industry participants.

The Guide recommends that penalties exceeding 50 penalty units should not normally be imposed by regulations.

The primary object of the Bill is to introduce an additional purpose in the Aviation and Maritime Acts to prevent the use of security-relevant areas and zones at aviation and maritime facilities in connection with serious or organised crime. Currently, the Aviation and Maritime Acts are focused on securing such areas and zones solely for the purpose of preventing unlawful interference with aviation and maritime transport.

As explained in the explanatory memorandum to the Bill, any new penalties to be prescribed in the Aviation Transport Security Regulations 2005 (Aviation Regulations) and Maritime Transport and Offshore Facilities Security Regulations 2003 (Maritime Regulations) for the purpose of the new serious or organised crime provisions, will be consistent with existing penalties prescribed for similar offences within the Aviation and Maritime Regulations. This will ensure uniform implementation and enforcement of similar offences, which reflects the Guide's requirements that any penalties imposed should be consistent with penalties for existing offences of a similar kind, or of a similar seriousness.

I also note that the penalties specified in the Bill, and in the existing Aviation and Maritime Acts, take into the account body corporate multiplier rule identified in the Guide. This rule provides that penalties can be set five times higher for body corporates than for natural persons, which also applies to offences in subordinate legislation. The maximum penalty imposed in the Bill for natural persons (identified as "any other persons" in the Bill) is 50 penalty units, which is consistent with the requirements under the Guide. However, in accordance with the Guide, higher maximum penalties are prescribed for industry roles undertaken by corporate entities. 'Aviation industry participants' and 'maritime industry participants' are corporate entities such as port operators or airlines.

Finally, by prescribing maximum penalties, the Bill provides for discretion to be applied in making regulations imposing any such penalties. The provisions of the Bill itself do not establish any offences or impose any penalties.

I trust this information will be of assistance to the Committee.

DARREN CHESTER