SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

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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

TENTH REPORT OF 2016

The committee presents its *Tenth 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:

Bills	**Page No.**
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Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	This bill amends the *Criminal Code Act 1995* to establish a scheme for the continuing detention of high risk terrorist offenders at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate on 15 September 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Attorney-General responded to the committee's comments in a letter dated 27 November 2016. A copy of the letter is attached to this report.

Attorney-General's general comment - extract

I note that the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry. The PJCIS tabled its report on 4 November 2016. The Government has accepted all 24 of the PJCIS recommendations.

I intend to move Government amendments to the Bill in the Senate in the week commencing 28 November 2016 to implement the PJCIS recommendations. The amendments will also enhance safeguards and improve the efficacy of the continuing detention scheme. To assist the Committee's further consideration of the Bill please find below an overview of the amendments to make important changes to the continuing detention scheme. The amendments will provide that:

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence;
- the scope of the offences to which the scheme applies will be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the *Criminal Code* (publishing recruitment advertisements);
- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force;

- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required);
- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made;
- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender;
- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence;
- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings;
- the criminal history of the offender that the Court must have regard to in making a continuing detention order will be confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill;
- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding;
- when sentencing an offender convicted under any of the provisions of the *Criminal Code* to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered; and
- the continuing detention scheme will be subject to a sunset period of 10 years after the day the Bill receives Royal Assent.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* will be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent; and
- the *Intelligence Services Act 2001* will be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent.

Alert Digest No. 7 of 2016 - extract

Trespass on personal rights and liberties
General comment

This bill provides for the continued detention of terrorist offenders who are serving custodial sentences, after those sentences have been served. Orders for continuing detention of terrorist offenders will, it is proposed, be based on a judicial assessment in civil proceedings that the offender presents an unacceptable risk to the community at the time they are due to be released, having served their sentence. Before making an order the courts must be satisfied to a 'high degree of probability' of the existence of this level of risk and, also, that there are no less restrictive means which would effectively prevent that risk. Although the period for which a continuing detention order may be made is limited to a maximum of 3 years, there is no limit on the number of such orders that may be made.

Proceedings for a continuing detention order (or an interim order) are characterised by the usual procedures and rules for civil proceedings: the standard rules of evidence and procedure apply, the parties have a right to be heard and adduce evidence, reasons for decisions must be given, and decisions may be appealed. However, the application of these indicia of judicial process does not change the fact that the proposed scheme for the continuing detention of terrorist offenders fundamentally inverts basic assumptions of the criminal justice system. 'Offenders' in our system of law may only be punished on the basis of offences which have been proved beyond reasonable doubt. This bill proposes to detain persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

In justifying this significant departure from the presumption of innocence, the explanatory memorandum points to the fact that some states and territories have enacted similar schemes in relation to sex offenders. It is suggested, however, that the principle that persons should not be imprisoned for crimes they may commit should continue to be accepted as a fundamental postulate of our system of law, despite some legislatures having accepted limited exceptions to it. If exceptions to this foundational principle are created and widened, then there is a risk to the integrity of the system of criminal justice. Furthermore, if one exception is used to justify further exceptions—based on predictive assessments about serious risk to the public—then it is unclear, as a matter of legal principle, how the proliferation of exceptions can be limited.

The inversion of fundamental principles proposed by this bill is justified on the basis that the rationale for detention is non-punitive. Rather, it is suggested, the bill has a protective purpose. The explanatory materials state that the detention will be authorised because of an unacceptable risk to the community. It will not be punishing the person for a past offence or a future offence which will likely be committed:

> …the continued detention of a terrorist offender under the scheme does not constitute additional punishment for their prior offending – the continued detention is protective rather than punitive or retributive (statement of compatibility, p. 9)

It may be accepted that in some circumstances, detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence or the principle that persons should not be imprisoned for crimes they may commit. For example, detention on the basis of risks associated with the spread of communicable disease do not threaten these basic assumptions of our criminal law. However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention is triggered by past offending, then it can plausibly be characterised as *retrospectively* imposing additional punishment for that offence. If the continuing detention is not conceptualised as imposing additional punishment, then the fact that it is triggered by past offending on the basis of predicted future offending necessarily compromises the principles identified above.

Unlike detention on the basis of other threats to the public (such as the spread of disease) the basis of detention, on either interpretation, is the person's status as an offender (either a past offender or a likely future offender). It is for this reason that it is suggested that this bill inverts the fundamental principles of our criminal justice system. Although it is suggested in the explanatory material that the purpose of the detention may also be said to be protective, it remains the case that it is imposed based on a combination of past offending and conclusions about the likelihood of future offences being committed.

The committee draws Senators' attention to the significant scrutiny concerns outlined above about the proposed continuing detention order scheme and requests that the Attorney-General provide further justification for the approach which addresses these concerns.

Attorney-General's response - extract

General observations of the Committee

The Committee noted that if the continuing detention order is triggered by past offending, then it can plausibly be characterised as *retrospectively* imposing additional punishment for that offence. The scheme will only be applicable to people who have committed certain offences. In this respect, there is a connection between the operation of the scheme and a conviction which was secured through a criminal justice process. However, the threshold for obtaining a continuing detention order is based on the risk the person presents to the community at the end of their custodial sentence. Preventative detention imposed on this basis does not constitute additional punishment.

The protective purpose of the scheme is reflected in numerous features including the grounds on which a continuing detention order may be made or affirmed; the matters to

which the Court must have regard when making or reviewing a continuing detention order; the requirement to consider less restrictive measures; and the requirement that the period of detention authorised by a continuing detention order be limited to a period that is reasonably necessary to prevent the unacceptable risk. The fact that the effect of a continuing detention order or interim detention order is to commit the terrorist offender to detention in a prison does not render the detention punitive.

The Committee considers that detention may be justified on the basis of protecting the public from unacceptable risks such as the spread of communicable disease, but is concerned about creating a 'proliferation of exceptions' to the principle that persons should not be imprisoned for crimes they may commit. However, this is not a valid reason for not creating new protective regimes that authorise detention in the interests of protective safety, provided those regimes are carefully confined with appropriate justifications and safeguards.

Committee response

The committee thanks the Attorney-General for this response.

The committee welcomes the Attorney-General's advice that a number of Government amendments will be moved to the bill. The committee welcomes the substance of many of these proposed amendments, however, it notes that these amendments go to issues around the process for the making of the order but do not address the committee's fundamental scrutiny concerns about the continual imprisonment of persons whose sentences have been served.

The committee notes the Attorney-General's view that preventative detention imposed on the basis of the risk the person presents to the community, even where there is a connection between the operation of the scheme and the prior conviction 'does not constitute additional punishment'. The committee also notes the Attorney-General's view that the committee's concern about creating a 'proliferation of exceptions' is 'not a valid reason for not creating new protective regimes that authorise detention in the interests of protective safety'.

The committee reiterates its earlier comments that the proposed scheme for the continuing detention of terrorist offenders fundamentally inverts basic assumptions of the criminal justice system. It also reiterates its view that the principle that persons should not be imprisoned for crimes they *may* commit should continue to be accepted as a fundamental postulate of our system of law, despite some legislatures having accepted limited exceptions to it (such as in relation to sex offenders). The committee notes that the Attorney-General's response highlights its concern that if one exception is used to justify further exceptions, it is unclear, as a matter of legal principle, how the proliferation of exceptions can be limited. The Attorney-General's response appears to indicate that it cannot be so limited, as this is not a valid reason for not creating new protective regimes.

continued

The committee remains concerned that where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction of an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. The committee reiterates that even if the continuing detention is not conceptualised as imposing additional punishment (much of which will depend on the actual conditions of detention, which is dealt with in the response below), the fact that the basis for the order is triggered by past offending on the basis of predicted future offending, necessarily compromises basic assumptions of the criminal justice system.

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the continuing detention order scheme to the consideration of the Senate as a whole.

Alert Digest No. 7 of 2016 - extract

Trespass on personal rights and liberties
Item 1, proposed subsections 105A.4(1) and (2)

Proposed subsection 105A.4(1) provides that a terrorist offender that is subject to a continuing detention order must be treated in a way appropriate to their status as a person who is not serving a sentence of imprisonment. However, paragraphs (a) to (c) of that subsection provide for exceptions to that principle. In particular, the principle may be subverted on the basis of 'reasonable requirements necessary to maintain':

- the management, security or good order of the prison;
- the safe custody or welfare of the offender or any prisoners; and
- the safety and protection of the community.

Proposed subsection 105A.4(2) provides that the offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment. This general principle is subject to similar exceptions as in the case of proposed subsection 105A.4(1), along with further exceptions relating to rehabilitation, treatment, work, education, general socialisation or other group activity or where an offender elects to be accommodated or detained with the general prison population.

If the purpose of continuing detention orders is preventative rather than punitive, it is unclear why the general principles articulated in subsections 105A.4(1) and (2) should be subject to all of the broad exceptions provided for in the bill, particularly those potentially based on reasons of efficiency. It is suggested that it is not possible to interpret the overall

scheme as non-punitive unless the detention regime is kept entirely separate and where appropriate modifications to the normal conditions of incarceration for convicted offenders are made. If prison conditions remain the same the punitive/protective distinction appears to be rendered meaningless in its application. These exceptions exacerbate the general scrutiny concerns identified above. It must be emphasised, however, that removing these exceptions would not ameliorate those general concerns.

In addition some of the exceptions in proposed section 105A.4 are very broad. In particular, the ambit of reasonable requirements necessary to maintain the 'management, security and good order' of the prison is unclear.

The committee considers that these provisions allowing for a terrorist offender to ultimately be treated and detained in the same manner and in the same area as persons serving prison sentences appear to undermine the stated non-punitive nature of the scheme. The committee seeks the Attorney-General's advice as to what are the likely conditions of detention for a terrorist offender in a prison under a continuing detention order and what is the justification for having such broad exceptions to the general principle that the person must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment.

Attorney-General's response - extract

Trespass on personal rights and liberties - proposed subsections 105A.4(1) and (2)

The Committee has sought advice about the likely conditions of detention for a terrorist offender in a prison under a continuing detention order and the justification for having exceptions to the general principle that the person must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment.

Subsections 105A.4(1) and (2) have been drafted to make it clear that the default position is for offenders under a continuing detention order to be treated and accommodated differently to those offenders who are serving a sentence of imprisonment. However, the provisions also recognise that there may be limited situations where this is either not reasonable given the risk the offender may present to the community or other offenders, or in the best interest of the offender.

For example, one exception is when the offender elects to be accommodated or detained in an area or unit of the prison with other offenders who are serving sentences of imprisonment. This promotes the rights of the offender by providing them with greater opportunity to participate in decisions relevant to their accommodation. Other exceptions are focused on promoting the offender's wellbeing, such as through participation in group activities, rehabilitation or education programs. In relation to the exceptions relevant to ensuring the security or good order of the prison, or the safety and protection of the

community, there would need to be reasonable grounds to justify the use of these exceptions.

Accordingly, the conditions the offender under the continuing detention order will be subject to will vary, depending upon the particular circumstances of the case. My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme, including the housing of offenders under the regime. In particular, the Working Group will consider developing 'Management Standards' that would provide a minimum standard all correction authorities should meet, ensuring that conditions in correction facilitates are appropriate and proportionate.

Committee response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the default position is that offenders under a continuing detention order (CDO) will be treated and accommodated differently to those serving a sentence of imprisonment but that there may be 'limited situations' where this is not reasonable or in the best interests of the offender. The committee also notes the Attorney General's advice that there would need to be reasonable grounds to justify the use of the exceptions based on the security or good order of the prison or the safety or protection of the community. The committee also notes the advice that consideration will be given to developing 'Management Standards' that provide a minimum standard that all correction authorities should meet.

Despite the Attorney-General's advice that there are 'limited' situations where it may not be reasonable to treat or accommodate an offender subject to a CDO in a way that is appropriate to their status as a person not serving a term of imprisonment, the committee considers that the provisions, as drafted, allow for a broad exception to this general principle. In particular, the committee considers that paragraph 105A.4(1)(a), which provides an exception in relation to reasonable requirements necessary to maintain the 'management, security or good order of the prison' is overly broad. While the committee agrees that there is a requirement that the exception be a 'reasonable requirement', because the phrase 'management, security or good order of the prison' is so broad and ultimately the view of prison officials, it would be difficult to challenge a decision to this effect. For example, as the provision is drafted, it is conceivable that prison authorities may decide to treat a person subject to a CDO in the same way as those serving sentences of imprisonment, because to do otherwise may cause resentment amongst other prisoners and affect the good order of the prison.

continued

The committee's scrutiny concerns also apply in relation to proposed paragraph 105A.4(2)(b) which provides that an offender must not be accommodated or detained in the same area of the prison as those serving terms of imprisonment unless 'it is necessary for the security or good order of the prison'. In this instance, the committee notes that the requirement is that it is 'necessary' for the security or good order of the prison and not that it is 'reasonably necessary'. This appears to impose a subjective approach to where the person is to be accommodated, based on what prison authorities consider necessary for the good order of the prison.

It is also not clear, based on the Attorney-General's response, as to what are the likely conditions of detention for a terrorist offender in a prison under a CDO. The committee welcomes the development of 'Management Standards' that would provide a minimum standard all correction authorities should meet. However, the committee notes that such standards are not required by the legislation and they would not be subject to parliamentary scrutiny. Furthermore, without these standards being included in the primary legislation it is not possible to evaluate the extent to which they may address the scrutiny concerns identified by the committee.

The committee therefore seeks the Attorney-General's further advice as to:

- whether it is possible to include these standards in the primary legislation; and

- if this approach is rejected, whether the bill could be amended to require the making of such standards by a legislative instrument, which would be subject to parliamentary scrutiny and the disallowance process.

The committee requests that the key information provided by the Attorney-General 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 (see section 15AB of the *Acts Interpretation Act 1901*).

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the exceptions to treating an offender subject to a CDO differently to those serving terms of imprisonment to the consideration of the Senate as a whole.

Alert Digest No. 7 of 2016 - extract

Trespass on personal rights and liberties—procedural fairness
Item 1, proposed subsection 105A.5(4)

Proposed subsection 105A.5(4) requires that an applicant for a continuing detention order must give a copy of the application to the offender within two business days of making the application. The provision, in this way, facilitates a fair hearing. However,

subsection 105.5(5) provides that the applicant is not required to give the offender, when the applicant gives them a copy of the application pursuant to subsection 105.5(4), any information included in the application if the Attorney-General is likely to, under a number of identified bases, seek to have information or material suppressed or protected from release to the general public.

The committee seeks the Attorney-General's advice as to the extent to which an offender will receive such information or material (which is part of the case made against them) prior to the ultimate hearing for the continuing detention order.

Attorney-General's response - extract

Trespass on personal rights and liberties - proposed subsection 105A.5(4) - procedural fairness

The Committee has sought advice as to the extent to which an offender will receive information or material prior to the ultimate hearing for the continuing detention order.

Subsection 105A.5(4) requires the offender to be given a copy of the continuing detention order application within two days of the application being made. This ensures the offender understands the allegations that have been made against them at a very early stage. Subsection 105A.5(5) does not require the Attorney-General to include in the copy of the application that goes to the offender any material over which the Attorney-General may seek protective orders preventing or limiting the disclosure of the information. For example, the Attorney-General may wish to seek suppression orders to ensure the information in the application can be protected from release to the broader public. The provision will enable the Attorney-General to give a redacted copy of the application to the offender until the Court has dealt with the suppression order application.

Subsection 105A.5(4) will not prevent the material that the Attorney-General seeks to rely on in the application from ultimately being disclosed to the offender. I propose to move Government amendments in the Senate to make this very clear. The amendments will specifically provide that a complete copy of the application must be given to the offender within a reasonable period before the preliminary hearing.

In addition, the Government amendments will also include a requirement that the application must contain any material in the possession of the Attorney-General and a statement of facts that the Attorney-General is aware of, that would reasonably be regarded as supporting a finding that an order should not be made.

Committee response

The committee thanks the Attorney-General for this response.

In particular, the committee welcomes the Attorney-General's advice that he proposes to move Government amendments to make it clear that 'a complete copy of the application must be given to the offender within a reasonable period before the preliminary hearing'.

In light of the Attorney-General's advice that Government amendments will be moved to provide that a complete copy of the application must be given to the offender within a reasonable period before the preliminary hearing, the committee makes no further comment on this matter.

Alert Digest No. 7 of 2016 - extract

Rights and liberties unduly dependent upon insufficiently defined administrative powers
Proposed section 105A.8

Proposed section 105A.8 sets out mandatory relevant considerations which the court must consider in determining whether to make a continuing detention order. The explanatory material merely repeats the listed considerations without explaining their relevance given the purpose of the legislation and the legal tests to be applied. For example, it is not clear from the explanatory material accompanying the bill why the general criminal history of an offender is relevant given the purposes of the legislation. Nor is it clear how 'any other information as to risk of the offender committing a serious Part 5.3 offence' is to be understood.

The committee requests a detailed justification from the Attorney-General for the basis for the relevance of these matters and more specificity about the type of information and factors which should legitimately form part of the decision-making process.

Attorney-General's response - extract

Rights and liberties unduly dependent upon insufficiently defined administrative powers - Proposed section 105A.8

The Committee has sought a detailed justification for the basis for the relevance of the matters set out in section 105A.8 and more specificity about the type of information and factors which should legitimately form part of the decision-making process.

Section 105A.8 provides a list of matters the Court must consider when determining whether to make a continuing detention order. These matters have been largely modelled on similar requirements in State and Territory post-sentence detention schemes. It is a matter for the Court as to the weight it places on each of these matters when considering whether to make a continuing detention order.

Proposed section 105A.8 assists the Court by outlining matters which are directly relevant to an assessment of the offender's risk to the community. For example, in determining whether to make an order, the Court is required to consider the safety and protection of the community, any expert reports relevant to the offender's risk, and any treatment or rehabilitation programs in which the offender has participated and the level of the offender's participation in those programs. These matters are relevant to the offender's risk to the community.

The Committee asked, in particular, about the requirement under paragraph 105A.8(g) for the Court to have regard to the offender's general criminal history. I propose to move Government amendments in the Senate that will appropriately confine this requirement so that the Court will only have to have regard to the offender's prior convictions for any offences that fall within the categories listed in paragraph 105A.3(1)(a).

The Committee also asked how paragraph 105A.8(i) should be understood. Paragraph 105A.8(i) requires the Court to consider any other information as to the risk of the offender committing a serious Part 5.3 offence. This enables the Court to consider matters that are not captured by the other paragraphs in the section, but are relevant to the risk of the offender committing a serious Part 5.3 offence. For example, this could include admissible evidence from police or other agencies, that will assist the Court in considering the risk of the offender committing a serious Part 5.3 offence. Section 105A.8 is designed to provide the Court with an appropriate degree of flexibility. Importantly, the rules of evidence and procedure for civil matters apply when the Court has regard to the matters in section 105A.8 (see section 105A.13).

Committee response

The committee thanks the Attorney-General for this response.

In particular, the committee welcomes the Attorney-General's advice that he proposes to move Government amendments to confine the court's consideration of the offender's criminal history to prior conviction for relevant terrorist offences (and not their criminal history more broadly).

continued

The committee requests that the key information provided by the Attorney-General 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 (see section 15AB of the *Acts Interpretation Act 1901*).

In light of the information provided, the committee leaves the appropriateness of the relevant mandatory considerations the court must have regard to in making a continuing detention order to the consideration of the Senate as a whole.

Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016

Purpose	This bill seeks to amend various Acts relating to law enforcement to: • support the establishment of the NSW Law Enforcement Conduct Commission and its Inspector; • align the Independent Broad-based Anti-corruption Commission of Victoria's investigative powers with those available to other state anti-corruption bodies; and • amend the definition of 'lawfully acquired' in the *Proceeds of Crime Act 2002* in response to issues raised in a recent court decision
Portfolio	Justice
Introduced	House of Representatives on 19 October 2016
Status	Passed both Houses on 24 November 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter dated 22 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and liberties—retrospective application
Schedule 3, item 2

This item provides that the amendments made in item 1 to section 336A of the *Proceeds of Crime Act 2002* (the POC Act) apply in relation to property or wealth acquired *before*, on or after the commencement of this Schedule.

The effect of the amendment to section 336A is to provide that property or wealth is not to be considered as 'lawfully acquired' where it has been subject to a security or liability that has been wholly or partially discharged using property that is not 'lawfully acquired' (explanatory memorandum, p. 3). The amendment has been prompted by a decision of the Supreme Court of Western Australia in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5 which held that the court could not consider the source of funds used to satisfy a mortgage over a residential property in determining whether this property was 'lawfully acquired', despite the possibility that unlawfully acquired funds had been

used to make mortgage repayments. The Court was therefore bound to exclude the residential property from forfeiture.

The explanatory memorandum (at pp 3–4) states that the decision in *Huang* was 'contrary to the intended meaning and the objects of the POC Act' and that the amendments are intended to clarify that, where illegitimate funds are used to discharge a legitimately obtained security (such as a mortgage), property or wealth obtained using this security does not constitute 'lawfully acquired' property under section 336A.

Although the justification provided is sufficient to justify amending the law with prospective application, the fact that a court has interpreted a law contrary to the executive government's understanding of the original provisions 'intended meaning' is not a sufficient justification to apply the law retrospectively. A central purpose of the rule of law is to enable people to guide their decision-making and actions by reference to the law that applies at the time of those decisions and actions. In general, this principle applies to all persons regardless of their motivation in taking the action (unless acting on a particular motivation itself contravenes a legal obligation).

The statement of compatibility (at p. 9) notes that the international human rights law prohibition on the retrospective operation of criminal laws is not applicable as orders under the POC Act are civil in character. The explanatory memorandum (at pp 33-34) states that the retrospective application of the amendment is necessary:

> …to ensure that relevant orders are not frustrated by requiring law enforcement agencies to obtain evidence of, and prove, the precise point in time at which certain property or wealth was acquired. Such a requirement would be unnecessarily onerous and would be contrary to the objects of the Act.'

The committee considers the way in which the retrospective application of a law can impact on personal rights and liberties in the context of civil as well as criminal proceedings. Although the committee accepts that the retrospective application of laws is justifiable in limited instances, it expects to see the case for that conclusion fully articulated. Relying on the fact that it would be onerous for law enforcement agencies to have to prove elements of the case against a person is not generally sufficient to justify the retrospective application of laws. It is also unclear how requiring proof of when property or wealth was acquired would be contrary to the objects of the POC Act. Noting this, the committee seeks the Minister's more detailed justification for applying this amendment to property or wealth acquired before the commencement of the Schedule.

Minister's response - extract

Exposing vulnerabilities within the Act

Item 1 must apply retrospectively to ensure the continued effective operation of the POC Act. If item 1 is only applied prospectively, this would severely undermine the effectiveness of the Act, allowing criminal entities to launder proceeds of crime through

seemingly legitimate legal structures while undermining law enforcement's ability to effectively restrain and seize proceeds of crime.

If the amendments in item 1 are not applied retrospectively, the Supreme Court of Western Australia's decision in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5 *(Huang)* will continue to apply to property or wealth acquired before the commencement of the Bill.

The Court in *Huang,* in considering monthly mortgage repayments used to purchase a residential property, provided (from 149) that:

> How he (the second respondent) met the monthly repayments does not as a matter of law, bear upon the earlier temporal question concerning whether or not the Girrawheen land was lawfully acquired in 2005. Nor does it bear upon whether his interest as a registered proprietor in fee simple can be said to be the proceeds of unlawful activity

The implications of the decision are significant. In determining whether property is 'lawfully acquired', a court will focus solely on how property was initially purchased, even where illicit funds have been used to pay off a loan in relation to that property. The Court's decision currently allows individuals to launder proceeds of crime through mortgage repayments as, even if the Australian Federal Police proves that proceeds of crime were used to make these payments, this fact would remain irrelevant in determining whether the property was 'lawfully acquired'.

The scope of the decision is concerning as the Court ultimately confined its analysis to payments made to directly acquire property (i.e. the deposit on the property) and disregarded payments made to retain the interest in the property (i.e. mortgage repayments). This may suggest that payments made to retain interest in property, such as lease repayments, are also not to be considered in determining whether a proprietary interest is 'lawfully acquired'.

Under the POC Act, a person can rely on the fact that property or wealth is 'lawfully acquired' to resist preliminary unexplained wealth orders (section 179B) and unexplained wealth restraining orders (section 20A), and to assist them in excluding property from forfeiture (s 94) and transferring forfeited property to themselves (s 102).

If the *Huang* decision continues to apply to property or wealth acquired prior to the commencement of the Bill, this vulnerability will be exploited by criminal entities, which could launder large sums of money through multiple mortgage repayments and related legal instruments. This behaviour is relatively common within criminal organisations, which regularly take steps to disguise their unlawful income through structured transfers, hiding it behind seemingly legitimate enterprises and intermingling it with legitimately derived income.

Further, a failure to make these provisions retrospective, would create an effective avoidance mechanism for established criminals and their networks. For example, a criminal could continuously remortgage an existing property and repay that mortgage with the proceeds of criminal activity, without the value held in this property ever being treated as being unlawfully acquired.

This would be contrary to the objects of the POC Act under section 5, as it would actively contribute to the profitability of criminal enterprises and prevent authorities from depriving persons of the proceeds of offences.

Practical difficulties in enforcement

If item 1 is only applied prospectively, this would significantly undermine law enforcement's ability to effectively restrain and seize proceeds of crime by requiring authorities to prove the date that wealth or property was lawfully acquired.

A court may only be bound to make preliminary unexplained wealth orders (section 179B) and unexplained wealth restraining orders (section 20A), for example, if satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was 'lawfully acquired'. If item 1 only applies prospectively, a proceeds of crime authority would need to prove the date that the wealth was acquired to avoid the application of *Huang*. This will be practically impossible in cases where a person has accumulated significant wealth over decades and has no apparent source of legitimate income, especially in relation to property that is portable and not subject to registration requirements.

If the amendments apply prospectively and a proceeds of crime authority cannot establish the date that wealth was acquired, a court may rely on *Huang* in holding that evidence which proves that a liability or security on this wealth was discharged using unlawfully obtained funds is irrelevant in determining whether this wealth was 'lawfully acquired'. This may allow persons to dispose of unexplained wealth before an order can be made or potentially prevent an unexplained wealth order being made at all.

It is important that item 1 applies retrospectively to ensure the continued effective operation of the POC Act. The decision in *Huang* has created a loophole in the operation of the law and, if item 1 is only applied prospectively, this could be exploited until the commencement of the Schedule, with effects well into the future.

I also note that previous amendments to unexplained wealth orders and restraining orders have been applied retrospectively to property or wealth acquired before the amendments commenced (see item 34 of the *Crimes Legislation Amendment (Unexplained Wealth and other Measures Bill) 2015).*

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to the practical issues that may arise if the amendments in item 1 to section 336A of the *Proceeds of Crime Act 2002* are not applied retrospectively.

The committee notes that it would have been useful had this information been included in the explanatory memorandum.

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

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	This bill seeks to amend the *Migration Act 1958* (the Migration Act) to: • establish a visa revalidation framework within the Migration Act; • clarify the circumstances in which a visa can cease to be in effect under the Migration Act; and • enable the use of contactless technology to clear travellers through the immigration clearance authority (SmartGates)
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 19 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter dated 24 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Inappropriately defined administrative powers—definition of 'adverse information'
Item 4, proposed subsection 96A

The bill provides that the Minister may require a person who holds a certain type of visa to complete a revalidation check. Proposed subsection 96A sets out the definition of a 'revalidation check' as meaning a check as to whether there is any adverse information relating to a person who holds a visa. What constitutes 'adverse information' is not defined in the legislation. The explanatory memorandum explains this as follows (p. 11):

> Adverse information is not defined in the Migration Act, and accordingly it is to be given its ordinary general meaning when considering whether the information relating to the person is adverse. Whether the information is adverse will also depend on the circumstances of each particular case and depend on the visa held by the person as a revalidation check will generally be directed to determining whether the person continues to meet the criteria for the visa that has been granted.

The check is to see if there is any adverse information *relating* to the person who holds the visa. This is because the adverse information does not need to be directly about the person, it is enough if it *relates* to the person. While still capturing adverse information that is directly about the person, it is intended that the definition will be broader and capture any adverse information if it relates to the person.

Examples of adverse information relating to the holder of the proposed new longer validity Visitor visa may include, but is not limited to, information that the person:

- has been convicted of an offence since the grant of the visa or since the last revalidation check;
- may present a health concern to the Australian community;
- has spent a period of time in Australia that may be considered de facto residency;
- no longer genuinely intends to stay in Australia for a temporary tourism or business visitor purpose; or
- may present a security risk to the Australian community.

Based on the explanation in the explanatory memorandum it appears that the definition of 'adverse information' is intended to be very broad. However, it is not clear why information *relating* to the person would be included in a revalidation check and what this means, over and above information directly about the person. It is also not clear why it is necessary to link the revalidation check to such a broad category of information given that the legislation sets out in detail the criteria for the grant of the initial visa. It is not clear to the committee why the revalidation check is not linked to whether the person still meets the requirements set out for the initial grant of the visa.

The committee seeks the Minister's advice as to why the revalidation check is linked to whether there is any 'adverse information' about the visa holder and not to whether the person still meets the requirements for the initial grant of the visa. It also seeks the Minister's advice as to why the legislation does not contain a definition of 'adverse information' which would give visa holders more certainty as to the type of information that may be taken into account when a revalidation check is undertaken.

Minister's response - extract

The committee seeks the Minister's advice as to why the revalidation check is linked to whether there is any 'adverse information' about the visa holder and not to whether the person still meets the requirements for the initial grant of the visa.

A revalidation check will generally assess whether a visa holder continues to meet the criteria for the visa that has been granted. But, this check is not intended to be a full reassessment of the visa holder's ability to meet the original requirements for grant of the visa. A revalidation check is intended to reduce red tape for frequent travellers by

removing the requirement for the visa holder to complete multiple visa applications over a 10-year period, answering the same questions and providing the same level of supporting documentation, as the original visa application. In completing the check, in the absence of any adverse information, or where there is adverse information, but it is reasonable to disregard that information, the visa would be revalidated. There is no disadvantage to the visa holder of this approach.

The current criteria for grant of a visitor visa, including public interest criteria, may change over time in response to changing domestic and global circumstances. Requiring the visa holder to continue to meet these criteria may result in unintended anachronistic revalidation decisions. Adopting the proposed approach provides flexibility for the Minister to consider but, where reasonable, disregard this information.

Additionally, this approach provides for consideration of the visa holder's ongoing compliance with the conditions of their visa, as well as consideration of information relevant to any new grounds for visa cancellation that are introduced in the future under the *Migration Act 1958.*

It also seeks the Minister's advice as to why the legislation does not contain a definition of 'adverse information' which would give visa holders more certainty as to the type of information that may be taken into account when a revalidation check is undertaken.

The scope of possible adverse information is necessarily broad to allow for flexibility in addressing future changes in both domestic and global circumstances. But flexibility has also been provided for the Minister to disregard adverse information when reasonable. In these cases, the visa holder would satisfy the revalidation check.

Where the delegate considers that it is not reasonable to disregard that information, the information would be referred to a visa cancellation delegate to consider if grounds for cancellation exist. This may result in a decision to cancel the visa, or a decision that the person subsequently passes the revalidation check.

It is not clear why information relating to the person would be included in a revalidation check and what this means, over and above information directly about the person.

Adverse information 'relating to' the visa holder is used to ensure that all relevant adverse information may be taken into account. This includes information that may not be directly about the person, but relevant to the revalidation check.

For example, this could include circumstances relevant to the assessment of the genuine temporary entrant criteria, including consideration of both the personal circumstances of the applicant in their home country and general conditions in the home country that might encourage them to remain in Australia. These conditions include:

- economic disruption, including shortages, famine, or high levels of unemployment, or natural disasters in the applicant's home country; or

- civil disruption, including war, lawlessness or political upheaval in the applicant's home country.

Relevant information 'relating to' the visa holder may also include the need to address emerging public health and safety risks identified in the visa holder's country of citizenship or long term residence.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that the revalidation check will 'generally' assess whether a visa holder continues to meet the criteria for the visa, but it is not intended to be a full reassessment. The committee notes the Minister's advice that the current criteria for the grant of the visa 'may change over time' and requiring the visa holder to continue to meet these criteria may result in 'unintended anachronistic revalidation decisions', and that the approach of assessing 'adverse information' provides flexibility for the Minister. The committee also notes the Minister's advice that this allows for consideration of information relevant to any new grounds for visa cancelation that are introduced in the future into the *Migration Act 1958*. However, it is unclear to the committee why the bill could not reference the relevant provisions of the migration legislation, so that if the substance of those provisions change over time, this would automatically be reflected in the revalidation process.

The committee also notes the Minister's advice that the phrase 'adverse information relating to' the visa holder is intended to be broad so as to allow for flexibility, and to facilitate assessment of 'general conditions in the home country [of the visa holder] that may encourage them to remain in Australia'.

The committee notes this explanation, however the committee considers that the current drafting of the provision, with reference to 'adverse information relating to' the visa holder, is overly vague and it therefore provides little certainty to visa holders whose visas could be cancelled on grounds unrelated to whether they meet the criteria for the grant of the visa. It also provides limited scope for parliamentary scrutiny of the exercise of this power as there is nothing on the face of the bill to clarify to the Parliament what is meant by 'adverse information'.

The committee requests that the key information provided by the Minister 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 (see section 15AB of the *Acts Interpretation Act 1901*).

continued

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of allowing any visa to be subject to a revalidation check that considers any 'adverse information relating to' the visa holder (which is undefined) to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Delegation of legislative power—use of delegated legislation for important matters
Item 4, proposed subsection 96B(1)

Proposed subsection 96B(1) provides that the Minister may, from time to time, require a person who holds a visa 'of a prescribed kind (however described)' to complete a revalidation check for the visa. The explanatory memorandum explains that these amendments were introduced in response to the *White Paper on Developing Northern Australia* and it is intended to trial a new longer validity Visitor visa (initially available to Chinese nationals) (at p. 5). The discussion in the explanatory memorandum is limited to this new type of visa, as stating that the revalidation checks for visas introduced by the bill will only apply to this new Visitor visa.

However, the bill does not limit the application of the revalidation checks to the Visitor visa. The power in the bill is to require persons to complete a revalidation check in relation to any visa 'of a prescribed kind'. This gives a broad power which could result in the revalidation check being applied to any category of visa (including spouse or family visas or protection visas). The explanatory memorandum does not explain why it is necessary to include such a broad power in the bill.

The committee seeks the Minister's advice as to why the power to subject a person to a revalidation check for their visa is expressed to relate to a visa of a prescribed kind, without any limits set as to the type of visa which could be prescribed.

Minister's response - extract

Currently, only the new Frequent Traveler stream of the Subclass 600 (Visitor) visa will be prescribed for the purposes of requiring a revalidation check. This is to support the trial of a new longer validity visitor visa that will initially only be available to Chinese nationals.

The power to prescribe which visa can be subject to the revalidation check process has not been limited for several reasons.

Flexibility had been provided as other longer validity visa products may be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Including a limit on the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.

There would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. If the Parliament considered it was inappropriate for a visa which had been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that it is currently intended that only one type of visa will be prescribed under these powers, and that the power to prescribe visas has not been limited to allow for flexibility, to reduce red tape and to manage risks 'associated with newly developed or reformed visa products'. The committee notes the Minister's advice that 'other longer validity visa products may be implemented in the future'. The committee also notes the Minister's comments that any instrument prescribing the relevant visa would be subject to parliamentary scrutiny through the disallowance process.

However, the committee notes that while the disallowance process allows for some level of parliamentary scrutiny, the committee considers it preferable that the primary legislation set appropriate limits on the delegation of legislative power. The committee notes that the bill would allow for any type of visa to be prescribed as being subject to the revalidation check. Yet the Minister's reply (and the explanatory materials) suggest that the revalidation check is likely to be applied only to longer validity visa products.

It is not clear to the committee why the legislation could not set limits on the type of visas to be prescribed (i.e. to apply to visas over a specified validity date) or to exempt certain categories of visas. As currently drafted, it appears to the committee that the power to prescribe any type of visa as one subject to a revalidation check is inappropriately broad in scope.

The committee requests that the key information provided by the Minister 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 (see section 15AB of the *Acts Interpretation Act 1901*).

continued

The committee draws the delegation of legislative power in proposed subsection 96B(1) of this bill to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of enabling the prescription of any type of visa as subject to the revalidation check to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Delegation of legislative power—disallowance
Item 4, proposed subsection 96E(1)

Proposed subsection 96E(1) provides that the Minister may, by legislative instrument, determine that a specified class of persons holding a visa of a prescribed kind (however described) must complete a revalidation check for the visa. The only condition for the exercise of this power is that the 'Minister thinks it is in the public interest' to make the determination.

The determination is not subject to disallowance (due to exemptions set out in the *Legislation (Exemptions and Other Matters) Regulation 2015*). This approach is justified in the explanatory memorandum (at p. 23) on the basis that subsection 96E(3) provides for adequate Parliamentary supervision of the power. Subsection 96E(3) requires the Minister to cause to be laid before each House of Parliament a statement that a determination has been made and the reasons for the determination, specifically the reasons why the making of the determination is in the public interest.

The explanatory memorandum suggests that this subsection provides for 'public and political accountability to the Parliament regarding the exercise of the power in new subsection 96E(1)' and that the 'tabling provisions will still ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism'. The explanatory memorandum also states that it is expected that the power will only be used in rare circumstances (p. 22).

Although it is may be accepted that in exercising this power the Minister may consider a broad range of factors relevant to the public interest and that there is a level of accountability to the Parliament through the reporting requirements, it is not clear why it is not feasible to provide for the Parliament to disallow the exercise of legislative power.

The committee seeks the Minister's advice as to why a legislative instrument setting out a specified class of persons who are to complete revalidation checks should not be subject to disallowance.

Minister's response - extract

The Ministerial power in new subsection 96E(1) would provide a mechanism to manage specific, serious, or time-critical risks in relation to an identified cohort of visa holders, where the Minister determines it is in the public interest to exercise this power.

It is intended that this power be exercised in circumstances necessitating an immediate response, for example situations where there has been an assessment of increased risk to the Australian community resulting from a significant health or national security incident.

It would not be appropriate for this legislative instrument to be subject to disallowance, as the time-critical nature of the implementation of the Minister's determination is key to its effectiveness.

Affected visa holders would be notified under section 96F of both the determination and how to complete and pass the revalidation check. If they completed and passed the revalidation check, their visa would come back into effect. If they completed, but did not pass the revalidation check, further information may be requested and they may subsequently pass the revalidation check. It is also possible that in some cases their visa may be referred to a cancellation delegate for consideration. This may result in a notice of intention to consider cancellation being issued, or a further decision made that it is reasonable to disregard the information and that the visa holder passes the revalidation check.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that the power to determine that a specified class of persons holding a visa of a prescribed kind must complete a revalidation check, is necessary to manage 'specific, serious, or time-critical risks in relation to an identified cohort of visa holders'. The committee also notes the Minister's advice that it would not be appropriate for the legislative instrument to be subject to disallowance 'as the time-critical nature of the implementation of the Minister's determination is key to its effectiveness'.

continued

The committee notes that while the Minister states that it is intended that the provision is only used where the Minister identifies a risk to the Australian community, the bill is not limited in this way; rather it allows the Minister to make such a determination purely on the basis of what the Minister considers to be in the 'public interest'. While the committee accepts that there may be instances where the implementation of the Minister's determination is time-critical, a legislative instrument generally commences immediately upon being made and enabling it to be subject to disallowance would not affect the initial response by the Minister.

The committee requests that the key information provided by the Minister 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 (see section 15AB of the *Acts Interpretation Act 1901*).

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of enabling the Minister to specify, in a non-disallowable instrument, a class of persons to be subject to a revalidation check to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Merits review
Item 4

It is not clear which of the decisions made under the proposed new subdivision BA of Division 3 of Part 2 of the Migration Act will be reviewable decisions. The explanatory material is silent on this point.

The committee seeks the Minister's advice as to which, if any, of the decisions in the proposed new Subdivision are not reviewable.

Minister's response - extract

Decisions under the proposed new subdivision BA of Division 3 of Part 2 of the Migration Act would not be merits reviewable decisions.

If a visa holder does not pass a revalidation check, this would not automatically result in cancellation of the visa. In this case, the visa would cease to be in effect; a person whose visa has ceased to be in effect may subsequently pass a revalidation check during the visa period (as discussed at paragraph 13 of the Explanatory Memorandum). A decision that the

person does not pass a revalidation check for the visa is a decision that can be reconsidered by the Minister or delegate. During this period, an individual may subsequently pass the revalidation check and this would result in the visa coming back into effect.

Where a person does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists. If the delegate decided not to cancel the visa, this would result in the person passing the revalidation check for the visa. If the delegate decided to cancel the visa, this decision may be subject to merits review.

Accordingly, the time and costs associated with seeking merits review of a decision that a person does not pass a revalidation check would be inefficient and potentially unnecessary. It is likely that the person would either subsequently pass the revalidation check (following provision of further information) or be notified of an intention to consider cancellation of their visa before the merits review process produced an outcome.

Committee response

The committee thanks the Minister for this response.

The committee notes in particular the Minister's advice that while the new provisions will not be merits reviewable decisions, any decision to cancel a visa may be subject to merits review and it is likely that 'the person would either pass the revalidation check (following provision of further information) or be notified of an intention to consider cancellation of their visa before the merits review process produced an outcome'.

The committee requests that the key information provided by the Minister 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 (see section 15AB of the *Acts Interpretation Act 1901*).

In light of the information provided by the Minister, the committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the exclusion of merits review of the revalidation check process to the consideration of the Senate as a whole.

Narcotic Drugs Legislation Amendment Bill 2016

Purpose	This bill amends the *Narcotic Drugs Act 1967* (the ND Act) to provide protection of sensitive law enforcement information used in licencing decisions under the ND Act
Sponsors	Health
Introduced	House of Representatives on 14 September 2016
Status	Received the Royal Assent on 23 November 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter received on 27 October 2016. The committee sought further information and the Minister responded in a letter dated 22 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2016 - extract

Delegation of legislative power and parliamentary scrutiny
Schedule 2, item 28, proposed subsection 26B(2)

Proposed new subsection 26B(2) provides that in making legislative standards for the purposes of the Act, the standards may incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The effect of this provision is to deprive parliamentary oversight of legislative standards as they may be amended by virtue of changes made to any incorporated instrument or other writing.

At a general level, the committee has scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents 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 is not publicly available or is available only if a fee is paid).

The explanatory memorandum provides no reason for the need for this provision, nor does it indicate whether any such standards will be publicly and freely available.

The committee therefore seeks the Minister's advice as to:

- why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternatives to incorporating material by reference and why such alternatives are not appropriate in this instance); and
- if the approach is still considered necessary:
  - o how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and
  - o whether a requirement specifying that any material incorporated by reference must be freely and readily available can be included in the bill.

Minister's initial response - extract

The Committee sought the Minister's advice as to why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternative to incorporating material by reference and why such alternatives are not appropriate in this instance) and if the approach is still considered necessary:

- how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and
- whether a requirement specifying that any material incorporated by reference must be freely available and readily available can be included in the Bill**.**

Recent amendments to the ND Act implement the national licensing scheme allowing the lawful cultivation in Australia of cannabis plants for medicinal and scientific purposes. This would enable a sustainable, high quality and safe supply of locally grown and manufactured medicinal cannabis products to Australian patients.

Subsection 26B(1) of the ND Act authorises the Minister for Health to issue standards for the purposes of the Act. The standards issued under subsection 26B(1) are legislative instruments. Decisions under that Act, such as the granting, suspension or revocation of a licence (medicinal cannabis licence, cannabis research licence and manufacture licence) would take into account whether applicable standards issued by the Minister under subsection 26B(l) have been met, or will be met as the case requires. These decisions are not legislative in nature.

A reliable source of high quality and safe cannabis plants, cannabis and cannabis resins for the manufacture of medicinal cannabis products for supply to patients in Australia is crucial for the success of the Australian medicinal cannabis framework. As the ultimate products are to be used for pharmaceutical and medical research, the overall process involving cultivation, production and manufacture of drugs derived from cannabis plants must be carried out to produce a product of acceptable pharmaceutical quality and safety standards like any medicine.

Suitable collection, cultivation, harvesting, drying, fragmentation and storage conditions are essential to the quality of the dried cannabis products. They must be free from impurities, such as soil, dust, dirt, and other contaminants (such as fungal, insect, bacterial contamination and other animal contamination). The dried cannabis products must also comply with requirements for pesticide residues, heavy metals content, aflatoxin content and microbial contamination. Most of these standards and requirements are set out in Pharmacopoeial Monographs such as the European Pharmacopeia and British Pharmacopeia. These Pharmacopoeias are amended from time to time.

In addition to pharmaceutical quality and safety standards in relation to medicinal cannabis products derived from cannabis plants, standards relating to security of the premises, packaging and transport may also be relevant to ensure that any storage, or movement or cannabis plants, cannabis, cannabis resins, drugs and narcotic preparations are protected from unauthorised access and to minimise diversion risks for illicit purposes.

The allowance for the Ministerial standards to refer to other documents or instruments is therefore appropriate where the standard seeks to apply specifications or restrictions for a given activity or product in relation to cannabis that are applicable to similar activities or products overseas. It will be appropriate to the emerging industry to comply with these international standards as the end products are for therapeutic use and that any inferior or poor quality products should be not be supplied to patients. Allowing the use of such references and standards as they change from time to time ensures that Australia's regulatory framework in the cultivation, production and the manufacture of medicinal cannabis products from cannabis plants remain in step or is comparable with other pharmaceutical products internationally. This will also provide export opportunities for the industry in the future if the medicinal cannabis products manufactured in Australia are of high quality and comply with overseas regulatory standards.

International standards and Pharmacopeias are not freely available. Any access or copying requires copyright licensing from the owners of these instruments, including for the use by Commonwealth Departments and agencies.

While the provision appears to be very wide in its application, the number and extent of documents that will be included in the issuing of standards will be limited and be mostly in relation to Pharmacopoeial monographs and Australian and international standards. In addition, before a standard is finalised and as part of the requirement for consultation under the *Legislation Act 2003*, the proposal will undergo consultation with the industry and other relevant stakeholders to ensure that the industry is informed and provided time to adhere to the relevant standards proposed to be issued. Any changes to the referenced material will be communicated to industry to ensure that they become aware and are able to get ready to comply with any amendments to the incorporated instrument.

As the standards to be issued by the Minister under subsection 26B(1) is a legislative instrument, the instrument is required to be tabled in Parliament after registration, and undergo Parliamentary scrutiny.

Committee's initial response

The committee thanks the Minister for this detailed response.

The committee notes the Minister's advice that the 'cultivation, production and manufacture of drugs derived from cannabis plants must be carried out to produce a product of acceptable pharmaceutical quality and safety standards like any medicine' and that 'most of these standards and requirements are set out in Pharmacopoeial Monographs such as the European Pharmacopeia and British Pharmacopeia' which are amended from time to time. The committee also notes the Minister's advice that 'international standards and Pharmacopeias are not freely available' and that 'any access or copying requires copyright licensing from the owners of these instruments, including for the use by Commonwealth Departments and agencies'.

While the committee understands the need to ensure that medicinal cannabis products conform with pharmaceutical quality and safety standards, the committee takes this opportunity to reiterate its scrutiny concerns in relation to provisions such as proposed subsection 26B(2) which allow the incorporation of legislative provisions by reference to other documents. In particular, the committee will be concerned where incorporated information is not publicly available or is available only if a fee is paid as persons interested in or affected by the law may have inadequate access to its terms.

A fundamental principle of the rule of the law is that every person subject to the law should be able to freely and readily access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available. The committee draws this report to the attention of Senators as the matters raised are relevant to all Australian jurisdictions.

The committee also takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should:

- clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at the commencement of the legislative instrument. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*); and

- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

continued

The committee requests that the key information provided by the Minister 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 (see section 15AB of the *Acts Interpretation Act 1901*).

Noting the above comments, the committee also requests the Minister's further advice as to whether material incorporated by reference under proposed subsection 26B(2) can be made available to persons interested in or affected by the law.

Minister's further response - extract

The Senate passed the Narcotic Drugs Legislation Amendment Bill 2016 on 10 November 2016. As the Bill has already been passed by both Houses, I will no longer be able to amend the Explanatory Memorandum to incorporate the additional information requested by the Committee. I assure the Committee that key information, including those identified by the Committee in *Alert Digest No. 7 of 2016,* will be included in any future memorandum relating to this legislation.

Use of international standards promotes the global alignment in quality and safety requirements for medicinal cannabis products. The Office of Drug Control will endeavour to make the incorporated documents in these standards publicly available, unless restrictions are imposed by the owners of the incorporated documents with regard to publication of those documents. In regulation, reference to international standards is approp1iate and necessary to ensure consistency. For example, access to Pharmacopoeial monographs on which our Medicines Regulation framework depends is based on subscription or purchase, with limits in relation to the number of copies that can be made and the number of persons able to access and use these documents.

Compliance with global standards will make Australia's medicinal cannabis industry internationally competitive.

Committee's further response

The committee thanks the Minister for this further response.

The committee welcomes the Minister's advice that the Office of Drug Control will endeavour to make the relevant international standards incorporated into the law publicly available, unless restrictions are imposed by the owners of the incorporated documents.

continued

The committee also notes the Minister's advice that access to some of these international standards is indeed restricted. For example, access to Pharmacopoeial monographs (on which the Australian medicines regulation framework depends) is based on subscription or purchase, with limits in relation to the number of copies that can be made and the number of persons able to access and use the documents.

As previously noted, the committee understands the need to conform with international pharmaceutical quality and safety standards in the new regulatory scheme for medicinal cannabis. However, the committee again takes this opportunity to reiterate that it will have scrutiny concerns where external materials (such as Pharmacopoeial monographs) are incorporated into the law, particularly where such materials are not freely and readily available and therefore persons interested in or affected by the law may have inadequate access to its terms.

The committee draws the comments that it has made in relation to the incorporation of external material into the law (and the expectations of the Senate Standing Committee on Regulations and Ordinances in this regard) to the attention of Senators and departmental officials (see pp 661 above).

The committee draws the delegation of legislative power in subsection 26B(2) of this bill to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment in relation to this particular provision.

The committee notes that it has commented on the general issue of incorporation of external material into the law on several occasions in recent reports and will continue to take an active interest in this important issue in the future.

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	This bill seeks to amend the *Privacy Act 1988* to introduce prohibitions on the re-identification of de-identified information and disclosure of re-identified information
Portfolio	Attorney-General
Introduced	Senate on 12 October 2016

The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Attorney-General responded to the committee's comments in a letter dated 23 November 2016. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and freedoms—reversal of evidential burden of proof
Schedule 1, item 5, proposed subsections 16D(2)–(5), 16E(3)–(6)

These provisions provide for various defences to offences for re-identifying de-identified personal information and the disclosure of re-identified information. The defences require an accused entity to demonstrate that their behaviour is consistent with relevant defences, namely that:

- The entity is an agency and either the act was done in connection with performing the agency's functions or activities or the agency was required or authorised to do the act under Australian law or court order;
- The entity was a contracted service provider for a Commonwealth contract to provide services for a responsible agency and the act was done for the purposes of meeting (directly or indirectly) an obligation under the contract;
- The entity has entered into an agreement with the responsible agency to perform functions or activities on behalf of the agency, and the act was done in accordance with the agreement; or
- The entity is an exempt entity for the purposes of a determination in force under section 16G and the act was done for a purpose specified in the determination and in compliance with any conditions specified in the determination.

The statement of compatibility contains a detailed explanation for placing an evidential burden on defendants in relation to the matters in the various defences (p. 8):

> However, for each of the three defences it is expected that each limb of the defence will not be unreasonably difficult for an entity to prove. That is, it is expected that it will not be unreasonably difficult for an entity to demonstrate that it is a contracted service provider for a Commonwealth contract to a responsible agency, has entered into an agreement to perform functions or activities on behalf of a responsible agency, or is an exempt entity for the purpose of a determination in force under section 16G. It follows that, given a Commonwealth contract, agreement to perform functions or activities on behalf of an agency or a determination under section 16G would all be expected to be focused on achieving specific outcomes, it should not be unreasonably difficult for an entity to prove that the act falling under the defence was done for purposes of achieving those outcomes. This also reflects the seriousness of the conduct that is otherwise prohibited under section 16D, 16E or 16F, where the above defences do not apply.
>
> Given the nature of these defences, it is expected that prosecutions will not proceed where it is clear to authorities that the entity will be able to rely on an applicable defence during the proceedings.
>
> For these reasons the reverse burden offences contained in the Bill are a reasonable and appropriate response to the behaviours the penalties are intended to discourage.

In general, the committee has accepted that a reversal of the burden of proof is justified only where it can be argued that the defence might be said to be peculiarly within the knowledge of the defendant and/or where a particular matter would be extremely difficult or expensive for the prosecution to prove whereas it could be readily and cheaply provided by the accused. In approaching this question it appears that the statement of compatibility has applied a less exacting standard, namely, to ask whether it would be unreasonably difficult for an accused to prove a particular matter.

Therefore, the committee seeks a further justification from the Attorney-General as to the appropriateness of reversing the burden of proof and asks that the Attorney General's advice specifically addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50-52).

Attorney-General's response - extract

Reversal of evidential burden of proof

As the Committee has noted, the Bill provides for various exceptions to the offences for re-identifying de-identified personal information (subsections 16D(2) to (5)) and disclosing re-identified information (subsections 16E(3) to (6)). An accused entity bears the evidential burden for each of these exceptions, which reverses the criminal law principle that the prosecution must prove every element of the offence.

This reversal is justified on the basis that an accused entity is in the best position to discharge the burden of proof for these exceptions. This is because knowledge of, for example, an agency's functions or activities, the terms of a contract for services or the existence of an agreement to perform specific functions will generally be peculiarly within the knowledge of the defendant. This is particularly the case where a contract or agreement between an entity and Commonwealth agency is not publicly available. It would therefore be significantly more difficult and costly for the prosecution to prove that the exception did not apply, as it would require the prosecution to first enquire and establish whether such a contract or agreement exists and, if so, then establish that the conduct was not consistent with that contract or agreement. By contrast, this information would be readily and cheaply available from the accused entity: I therefore consider this reversal of evidential burden of proof to be consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

Committee response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the relevant matters will be peculiarly within the knowledge of the defendant, particularly where a contract or agreement between an entity and Commonwealth agency is not publicly available. The advice states that in such cases it would be 'significantly more difficult and costly for the prosecution to prove that the exception did not apply, as it would require the prosecution to first enquire and establish whether such a contract or agreement exists', but that such information would be readily and cheaply available from the accused entity.

The committee notes that the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the *Guide*) states that the fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself a sound justification for placing a burden of proof on a defendant (p. 50).

In this case, it is not apparent to the committee that it would be particularly onerous for the prosecution to prove the existence of an agreement or contract with the Commonwealth, given there does not seem to be any impediment on the Commonwealth supplying evidence of that agreement or contract to the prosecution. It is also not apparent, on the information provided to the committee, that such matters would be *peculiarly* within the knowledge of the defendant. **As such, it appears that the reversals of the evidential burden of proof in proposed subsections 16D(2)–(5) and 16E(3)–(6) may not be framed in accordance with the relevant principles set out in the *Guide*.**

The committee requests that the key information provided by the Attorney-General 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 (see section 15AB of the *Acts Interpretation Act 1901*).

continued

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the reversal of the evidential burden of proof to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Rights and liberties unduly dependent on insufficiently defined administrative powers—breadth of discretion to exempt
Schedule 1, item 5, proposed section 16G

Proposed section 16G provides a power for the Minister to determine that an entity or an entity included in a class of entities is exempt for the purposes of the criminal and civil penalty provisions relating to the re-identification of personal information and its use. The explanatory memorandum (at p. 26) indicates that the purpose of the power:

> …is to provide a mechanism by which entities engaging in valuable research in areas such a testing the effectiveness of de-identification techniques, cryptology or information security…can be granted an exemption from sections 16D, 16E or 16F so that this legitimate research may continue'.

The power to make an exemption is to be exercised on the basis of a single criterion, namely, whether the Minister is satisfied it is in the public interest to exercise the power. The need for such a broad power of exemption may indicate that the offence and civil penalty provisions have been drawn too broadly. In general, the committee considers that it is appropriate that Parliament define the boundaries of criminal wrong-doing rather than leaving these boundaries to be depend (even in part) on executive decision-making.

The committee seeks further justification from the Attorney-General as to the breadth of this discretionary power and whether consideration has been given to whether it is possible to more narrowly define the offence and civil penalty provisions so that research which is in the public interest is less likely to fall within them.

Attorney-General's response - extract

Breadth of discretion to exempt—proposed section 16G

It is my view that the offence and civil penalty provisions in sections 16D, 16E and 16F of the Bill are appropriate and narrowly defined as currently drafted.

The offence for re-identification in section 16D only applies to intentional re-identification of personal information. That is, the entity must have done an act with the specific intention of re-identifying the dataset. Unintentional re-identification that occurs as a by-product of other public interest research using a government dataset, for example through data matching, would not constitute an offence under section 16D. While the offence for disclosure in section 16E applies to information which is intentionally or unintentionally re-identified, the offence itself is confined to the intentional disclosure of re-identified information only.

Merely disclosing that a de-identified dataset published by Government could be re-identified, or speculating about the possibility of re-identification, would therefore not constitute an offence under section 16E. Similarly, inadvertent disclosure of re-identified information where the entity is not aware that the information is re-identified would also not constitute an offence. Further, it is difficult to envisage circumstances where the prohibition against disclosure of re-identified information in section 16E and the obligation to notify the responsible agency of any re-identification under section 16F would interfere with the ability to conduct research which is in the public interest such that an exemption would be required.

I note that the provisions in the Bill do not apply to universities or any other authorities established under State and Territory legislation. This is because the Privacy Act generally does not apply to State and Territory authorities (see subsection 6C(1) of the Privacy Act, which states that an organisation for the purposes of the Privacy Act does not include a State or Territory authority): Under subsection 16CA(2) of the Bill this exemption also applies to acts done in the course of employment or service by individuals employed by, or engaged to provide services to, those exempt universities.

As the Committee has noted, section 16G of the Bill provides the Minister with a general power to determine that a particular entity or class of entities is exempt from one or more of · sections 16D, 16E or 16F for particular purposes if an exemption is in the public interest. This is intended to provide an appropriate balance between protecting the privacy of individuals and allowing for legitimate research to continue. Specific research purposes involving cryptology, information security and data analysis are identified in paragraphs 16G(2)(a) to (c), and paragraph 16G(2)(d) provides a general ground for any other purpose the Minister considers appropriate. It is my expectation that the predominant reason for an exemption determination under section 16G will be in relation to the specific research purposes involving cryptology, information security and data analysis which is in the public interest. However, the ability to grant exemptions for 'any other purpose' ensures there is appropriate flexibility in the event that other legitimate reasons to grant exemptions arise in the future which are not currently contemplated.

In view of the narrow scope of the proposed offences noted above, I do not expect there will be a large number of entities who will need exemptions for research in the public interest which requires the intentional re-identification of de-identified personal information published by a government agency. I am therefore satisfied that the current breadth of the exemption in section 16G is appropriate.

Committee response

The committee thanks the Attorney-General for this response.

The committee notes in particular the Attorney-General's advice that the general power for the Minister to exempt an entity from the offence and civil penalty provisions 'is intended to provide an appropriate balance between protecting the privacy of individuals and allowing for legitimate research to continue'. The committee also notes the Attorney-General's advice that it is difficult to envisage circumstances where the relevant provisions would interfere with the ability to conduct research which is in the public interest, such that an exemption would be required. Further, the committee notes the Attorney-General's advice that the ability to grant exemptions for 'any other purpose' ensures there is appropriate flexibility. However, the Attorney-General's advice does not address the committee's comments that the need for the exemption power indicates that the offence provisions may have been drawn too broadly or that the exemption is to be exercised on the basis of a single criterion, namely that the Minister is satisfied it is in the public interest to exercise the power.

The committee reiterates its previous comments that, in general, the committee considers that it is appropriate that Parliament define the boundaries of criminal wrong-doing rather than leaving these boundaries to depend (in part) on executive decision-making.

The committee requests that the key information provided by the Attorney-General 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 (see section 15AB of the *Acts Interpretation Act 1901*).

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the broad ministerial discretion to exempt entities to the consideration of the Senate as a whole.

Alert Digest No. 8 of 2016 - extract

Trespass on personal rights and freedoms—retrospective application Schedule 1, item 5

The proposed new offences relating to the re-identification of de-identified information operate from 29 September 2016 (see proposed paragraphs 16D(1)(c), 16E(1)(c), and 16F(1)(c)). This makes the offences retrospective. The statement of compatibility contains the following justification for this approach (p. 9):

> Retrospective offences challenge a key element of the rule of law — that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly.
>
> The Bill provides that new offences relating to the re-identification of de-identified information operate from 29 September 2016. The Government does not propose to make these offences lightly.
>
> The retrospective application of the offences is reasonable and necessary. The Government has made it abundantly clear that it is pursuing this course of action. The Attorney-General's media release ('Amendment to the Privacy Act to further protect de-identified data', 28 September 2016) states unequivocally that the offences will take effect from the date of announcement. Re-identification of de-identified information and associated conduct undertaken before the announcement is not prohibited by the Bill.
>
> This action is necessary because releases of private information can have significant consequences for individuals beyond their privacy and reputation, which cannot be easily remedied. This warrants swift and decisive action by the Government to prohibit such conduct. Further, the retrospective commencement of the offences creates a strong disincentive for entities to engage in such conduct while the Parliament considers the Bill.
>
> The retrospective application of the offences is proportionate as it is for a short time period, and steps have been taken to ensure it is no more retrospective than required. The Government has introduced this Bill in the Parliament at the earliest available opportunity.
>
> These measures in the Bill are consistent with the prohibition on retrospective criminal laws.

The explanatory materials recognise that the retrospective application of a criminal offence 'challenges a key element of the rule of law'. The key justification provided for imposing these offences retrospectively is that the government announced by media release that legislation would be introduced to provide for these offences and that the offences would take effect from the date of that announcement.

In most instances the introduction of new offences is justified on the basis of the public interest in prohibiting certain behaviour. While the committee acknowledges the importance of protecting privacy and reputation this is not, in itself, sufficient to override this general principle. For these reasons, the rationale provided for the retrospective application of these offences appears to be overly broad.

The committee has consistently commented on provisions that back-date commencement to the date of announcement, i.e. 'legislation by press release'. The committee's scrutiny concerns in this regard are particularly acute in relation to provisions which create new offences. As a result, the committee considers that the conclusion expressed in the statement of compatibility that the measures in the bill are consistent with the prohibition on retrospective criminal laws has not been adequately explained. The committee therefore

seeks further advice from the Attorney-General as to the appropriateness of making these offences retrospective in light of the committee's comments.

Attorney-General's response - extract

Retrospective application

The Committee has also raised questions about the retrospective application of the offences in the Bill. These are legitimate queries, as retrospective offences challenge a key element of the rule of law—that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. However, in the circumstances the Government considers that these narrowly prescribed offences should have a limited retrospective effect.

The recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset brought to the Government's attention the existence of a gap in privacy legislation regarding the re-identification of de-identified data. Once aware of this gap, the Government acted immediately to strengthen protections for personal information against re-identification by introducing these offences. The offences will only take effect in relation to conduct occurring on or after 29 September 2016, which is the day after I announced the proposed amendments to the Privacy Act. This retrospective application was made very clear in my statement of 28 September 2016. As a result of my statement, entities were clearly given notice that this particular conduct will be made subject to offences from that time.

The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult—in many cases impossible—to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after I announced the Government's intention to introduce this Bill provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill. The Government has also taken swift action to introduce the Bill in the Parliament at the earliest available opportunity to ensure the retrospective application is for a short time period only.

Committee response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the retrospective application of the bill is intended to provide a strong disincentive to entities who 'may have been tempted to attempt re-identification of any published datasets while the Parliament considers the bill'. The committee also notes the Attorney-General's advice that the retrospective application was made clear in the Attorney-General's media statement announcing the proposed amendments.

The committee reiterates its long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release') challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). While the committee acknowledges the importance of protecting privacy and reputation this is not, in itself, sufficient to override this general principle. The importance of laws operating only prospectively is particularly acute in relation to the criminal law, where conduct should only be criminalised from the date the law making the conduct criminal commences. This supports long-recognised criminal law principles that there can be no crime or punishment without law.

The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the retrospective application of the criminal offence and civil penalty provisions to the consideration of the Senate as a whole.

Senator Helen Polley
Chair

ATTORNEY-GENERAL

CANBERRA

27 NOV 2016

MC16-003586

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

Thank you for the letter of 13 October 2016 from the Senate Standing Committee for the Scrutiny of Bills Committee (the Committee) concerning the Committee's Alert Digest No. 7 of 2016, which seeks further advice on the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill). I thank the Committee for its consideration of the Bill and provide the enclosed additional information.

I note that the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry. The PJCIS tabled its report on 4 November 2016. The Government has accepted all 24 of the PJCIS recommendations.

I intend to move Government amendments to the Bill in the Senate in the week commencing 28 November 2016 to implement the PJCIS recommendations. The amendments will also enhance safeguards and improve the efficacy of the continuing detention scheme. To assist the Committee's further consideration of the Bill please find below an overview of the amendments to make important changes to the continuing detention scheme. The amendments will provide that:

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence
- the scope of the offences to which the scheme applies will be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the *Criminal Code* (publishing recruitment advertisements)
- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force

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- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)

- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made

- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence

- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings

- the criminal history of the offender that the Court must have regard to in making a continuing detention order will be confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill

- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding

- when sentencing an offender convicted under any of the provisions of the *Criminal Code* to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered, and

- the continuing detention scheme will be subject to a sunset period of 10 years after the day the Bill receives Royal Assent.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* will be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and

- the *Intelligence Services Act 2001* will be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent.

Once again, I thank the Committee for its consideration of the Bill and trust this advice is of assistance.

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 7 of 2016.

Response to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 7 of 2016 concerning the *Criminal Code Amendment (High Risk Terrorist Offender) Bill 2016*

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has requested further advice on the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill).

General observations of the Committee

The Committee noted that if the continuing detention order is triggered by past offending, then it can plausibly be characterized as *retrospectively* imposing additional punishment for that offence. The scheme will only be applicable to people who have committed certain offences. In this respect, there is a connection between the operation of the scheme and a conviction which was secured through a criminal justice process. However, the threshold for obtaining a continuing detention order is based on the risk the person presents to the community at the end of their custodial sentence. Preventative detention imposed on this basis does not constitute additional punishment.

The protective purpose of the scheme is reflected in numerous features including the grounds on which a continuing detention order may be made or affirmed; the matters to which the Court must have regard when making or reviewing a continuing detention order; the requirement to consider less restrictive measures; and the requirement that the period of detention authorised by a continuing detention order be limited to a period that is reasonably necessary to prevent the unacceptable risk. The fact that the effect of a continuing detention order or interim detention order is to commit the terrorist offender to detention in a prison does not render the detention punitive.

The Committee considers that detention may be justified on the basis of protecting the public from unacceptable risks such as the spread of communicable disease, but is concerned about creating a 'proliferation of exceptions' to the principle that persons should not be imprisoned for crimes they may commit. However, this is not a valid reason for not creating new protective regimes that authorise detention in the interests of protective safety, provided those regimes are carefully confined with appropriate justifications and safeguards.

Trespass on personal rights and liberties – proposed subsections 105A.4(1) and (2)

The Committee has sought advice about the likely conditions of detention for a terrorist offender in a prison under a continuing detention order and the justification for having exceptions to the general principle that the person must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment.

Subsections 105A.4(1) and (2) have been drafted to make it clear that the default position is for offenders under a continuing detention order to be treated and accommodated differently to those offenders who are serving a sentence of imprisonment. However, the provisions also recognise that there may be limited situations where this is either not reasonable given the risk the offender may present to the community or other offenders, or in the best interest of the offender.

For example, one exception is when the offender elects to be accommodated or detained in an

area or unit of the prison with other offenders who are serving sentences of imprisonment. This promotes the rights of the offender by providing them with greater opportunity to participate in decisions relevant to their accommodation. Other exceptions are focused on promoting the offender's wellbeing, such as through participation in group activities, rehabilitation or education programs. In relation to the exceptions relevant to ensuring the security or good order of the prison, or the safety and protection of the community, there would need to be reasonable grounds to justify the use of these exceptions.

Accordingly, the conditions the offender under the continuing detention order will be subject to will vary, depending upon the particular circumstances of the case. My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme, including the housing of offenders under the regime. In particular, the Working Group will consider developing "Management Standards" that would provide a minimum standard all correction authorities should meet, ensuring that conditions in correction facilitates are appropriate and proportionate.

Trespass on personal rights and liberties – proposed subsection 105A.5(4)- procedural fairness

The Committee has sought advice as to the extent to which an offender will receive information or material prior to the ultimate hearing for the continuing detention order.

Subsection 105A.5(4) requires the offender to be given a copy of the continuing detention order application within two days of the application being made. This ensures the offender understands the allegations that have been made against them at a very early stage. Subsection 105A.5(5) does not require the Attorney-General to include in the copy of the application that goes to the offender any material over which the Attorney-General may seek protective orders preventing or limiting the disclosure of the information. For example, the Attorney-General may wish to seek suppression orders to ensure the information in the application can be protected from release to the broader public. The provision will enable the Attorney-General to give a redacted copy of the application to the offender until the Court has dealt with the suppression order application.

Subsection 105A.5(4) will not prevent the material that the Attorney-General seeks to rely on in the application from ultimately being disclosed to the offender. I propose to move Government amendments in the Senate to make this very clear. The amendments will specifically provide that a complete copy of the application must be given to the offender within a reasonable period before the preliminary hearing.

In addition, the Government amendments will also include a requirement that the application must contain any material in the possession of the Attorney-General and a statement of facts that the Attorney-General is aware of, that would reasonably be regarded as supporting a finding that an order should not be made.

Rights and liberties unduly dependent upon insufficiently defined administrative powers - Proposed section 105A.8

The Committee has sought a detailed justification for the basis for the relevance of the matters set out in section 105A.8 and more specificity about the type of information and

factors which should legitimately form part of the decision-making process.

Section 105A.8 provides a list of matters the Court must consider when determining whether to make a continuing detention order. These matters have been largely modelled on similar requirements in State and Territory post-sentence detention schemes. It is a matter for the Court as to the weight it places on each of these matters when considering whether to make a continuing detention order.

Proposed section 105A.8 assists the Court by outlining matters which are directly relevant to an assessment of the offender's risk to the community. For example, in determining whether to make an order, the Court is required to consider the safety and protection of the community, any expert reports relevant to the offender's risk, and any treatment or rehabilitation programs in which the offender has participated and the level of the offender's participation in those programs. These matters are relevant to the offender's risk to the community.

The Committee asked, in particular, about the requirement under paragraph 105A.8(g) for the Court to have regard to the offender's general criminal history. I propose to move Government amendments in the Senate that will appropriately confine this requirement so that the Court will only have to have regard to the offender's prior convictions for any offences that fall within the categories listed in paragraph 105A.3(1)(a).

The Committee also asked how paragraph 105A.8(i) should be understood. Paragraph 105A.8(i) requires the Court to consider any other information as to the risk of the offender committing a serious Part 5.3 offence. This enables the Court to consider matters that are not captured by the other paragraphs in the section, but are relevant to the risk of the offender committing a serious Part 5.3 offence. For example, this could include admissible evidence from police or other agencies, that will assist the Court in considering the risk of the offender committing a serious Part 5.3 offence. Section 105A.8 is designed to provide the Court with an appropriate degree of flexibility. Importantly, the rules of evidence and procedure for civil matters apply when the Court has regard to the matters in section 105A.8 (see section 105A.13).

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

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22 NOV 2016

Dear Senator Polley

I refer to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 8 of 2016 (the report), in which the Committee commented on the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016.

The report raises concerns with item 2 of Schedule 3, which provides that the amendments made in item 1 to section 336A of the Commonwealth *Proceeds of Crime Act 2002* (the POC Act) apply in relation to property or wealth acquired *before*, on or after the commencement of Schedule 3. The Committee has sought a more detailed justification for item 2, noting that the difficulty of proving when property or wealth was acquired may not be sufficient to justify the retrospective application of item 1.

Exposing vulnerabilities within the Act

Item 1 must apply retrospectively to ensure the continued effective operation of the POC Act. If item 1 is only applied prospectively, this would severely undermine the effectiveness of the Act, allowing criminal entities to launder proceeds of crime through seemingly legitimate legal structures while undermining law enforcement's ability to effectively restrain and seize proceeds of crime.

If the amendments in item 1 are not applied retrospectively, the Supreme Court of Western Australia's decision in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5 (*Huang*) will continue to apply to property or wealth acquired before the commencement of the Bill.

The Court in *Huang*, in considering monthly mortgage repayments used to purchase a residential property, provided (from 149) that:

> *How he (the second respondent) met the monthly repayments does not as a matter of law, bear upon the earlier temporal question concerning whether or not the Girrawheen land was lawfully acquired in 2005. Nor does it bear upon whether his interest as a registered proprietor in fee simple can be said to be the proceeds of unlawful activity*

The implications of the decision are significant. In determining whether property is 'lawfully acquired', a court will focus solely on how property was initially purchased, even where illicit funds have been used to pay off a loan in relation to that property. The Court's decision

currently allows individuals to launder proceeds of crime through mortgage repayments as, even if the Australian Federal Police proves that proceeds of crime were used to make these payments, this fact would remain irrelevant in determining whether the property was 'lawfully acquired'.

The scope of the decision is concerning as the Court ultimately confined its analysis to payments made to directly acquire property (i.e. the deposit on the property) and disregarded payments made to retain the interest in the property (i.e. mortgage repayments). This may suggest that payments made to retain interest in property, such as lease repayments, are also not to be considered in determining whether a proprietary interest is 'lawfully acquired'.

Under the POC Act, a person can rely on the fact that property or wealth is 'lawfully acquired' to resist preliminary unexplained wealth orders (section 179B) and unexplained wealth restraining orders (section 20A), and to assist them in excluding property from forfeiture (s 94) and transferring forfeited property to themselves (s102).

If the *Huang* decision continues to apply to property or wealth acquired prior to the commencement of the Bill, this vulnerability will be exploited by criminal entities, which could launder large sums of money through multiple mortgage repayments and related legal instruments. This behavior is relatively common within criminal organisations, which regularly take steps to disguise their unlawful income through structured transfers, hiding it behind seemingly legitimate enterprises and intermingling it with legitimately derived income.

Further, a failure to make these provisions retrospective, would create an effective avoidance mechanism for established criminals and their networks. For example, a criminal could continuously remortgage an existing property and repay that mortgage with the proceeds of criminal activity, without the value held in this property ever being treated as being unlawfully acquired.

This would be contrary to the objects of the POC Act under section 5, as it would actively contribute to the profitability of criminal enterprises and prevent authorities from depriving persons of the proceeds of offences.

Practical difficulties in enforcement

If item 1 is only applied prospectively, this would significantly undermine law enforcement's ability to effectively restrain and seize proceeds of crime by requiring authorities to prove the date that wealth or property was lawfully acquired.

A court may only be bound to make preliminary unexplained wealth orders (section 179B) and unexplained wealth restraining orders (section 20A), for example, if satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was 'lawfully acquired'. If item 1 only applies prospectively, a proceeds of crime authority would need to prove the date that the wealth was acquired to avoid the application of *Huang*. This will be practically impossible in cases where a person has accumulated significant wealth over decades and has no apparent source of legitimate income, especially in relation to property that is portable and not subject to registration requirements.

If the amendments apply prospectively and a proceeds of crime authority cannot establish the date that wealth was acquired, a court may rely on *Huang* in holding that evidence which proves that a liability or security on this wealth was discharged using unlawfully obtained funds is irrelevant in determining whether this wealth was 'lawfully acquired'. This may

allow persons to dispose of unexplained wealth before an order can be made or potentially prevent an unexplained wealth order being made at all.

It is important that item 1 applies retrospectively to ensure the continued effective operation of the POC Act. The decision in *Huang* has created a loophole in the operation of the law and, if item 1 is only applied prospectively, this could be exploited until the commencement of the Schedule, with effects well into the future.

I also note that previous amendments to unexplained wealth orders and restraining orders have been applied retrospectively to property or wealth acquired before the amendments commenced (see item 34 of the *Crimes Legislation Amendment (Unexplained Wealth and other Measures Bill) 2015*).

Thank you again for your questions on this matter.

Michael Keenan

THE HON PETER DUTTON MP
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Ref No: MS16-004335

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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Dear Senator Polley

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Thank you for your letter dated 10 November 2016 in relation to comments made in the Committee's *Alert Digest No. 8 of 2016* concerning the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016. I would like to provide the following advice to the Committee as a result of the comments in the Alert Digest, at Attachment A.

<u>Attachment A</u>

Response to the Standing Committee for the Scrutiny of Bills about the *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016* Definition of 'adverse information'

The committee seeks the Minister's advice as to why the revalidation check is linked to whether there is any 'adverse information' about the visa holder and not to whether the person still meets the requirements for the initial grant of the visa.

A revalidation check will generally assess whether a visa holder continues to meet the criteria for the visa that has been granted. But, this check is not intended to be a full reassessment of the visa holder's ability to meet the original requirements for grant of the visa. A revalidation check is intended to reduce red tape for frequent travellers by removing the requirement for the visa holder to complete multiple visa applications over a 10-year period, answering the same questions and providing the same level of supporting documentation, as the original visa application. In completing the check, in the absence of any adverse information, or where there is adverse information, but it is reasonable to disregard that information, the visa would be revalidated. There is no disadvantage to the visa holder of this approach.

The current criteria for grant of a visitor visa, including public interest criteria, may change over time in response to changing domestic and global circumstances. Requiring the visa holder to continue to meet these criteria may result in unintended anachronistic revalidation decisions. Adopting the proposed approach provides flexibility for the Minister to consider but, where reasonable, disregard this information.

Additionally, this approach provides for consideration of the visa holder's ongoing compliance with the conditions of their visa, as well as consideration of information relevant to any new grounds for visa cancellation that are introduced in the future under the *Migration Act 1958*.

It also seeks the Minister's advice as to why the legislation does not contain a definition of 'adverse information' which would give visa holders more certainty as to the type of information that may be taken into account when a revalidation check is undertaken.

The scope of possible adverse information is necessarily broad to allow for flexibility in addressing future changes in both domestic and global circumstances. But flexibility has also been provided for the Minister to disregard adverse information when reasonable. In these cases, the visa holder would satisfy the revalidation check.

Where the delegate considers that it is not reasonable to disregard that information, the information would be referred to a visa cancellation delegate to consider if grounds for cancellation exist. This may result in a decision to cancel the visa, or a decision that the person subsequently passes the revalidation check.

It is not clear why information relating to the person would be included in a revalidation check and what this means, over and above information directly about the person.

Adverse information 'relating to' the visa holder is used to ensure that all relevant adverse information may be taken into account. This includes information that may not be directly about the person, but relevant to the revalidation check.

For example, this could include circumstances relevant to the assessment of the genuine temporary entrant criteria, including consideration of both the personal circumstances of the applicant in their home country and general conditions in the home country that might encourage them to remain in Australia. These conditions include:

- economic disruption, including shortages, famine, or high levels of unemployment, or natural disasters in the applicant's home country; or
- civil disruption, including war, lawlessness or political upheaval in the applicant's home country.

Relevant information 'relating to' the visa holder may also include the need to address emerging public health and safety risks identified in the visa holder's country of citizenship or long term residence.

Use of delegated legislation for important matters

The committee seeks the Minister's advice as to why the power to subject a person to a revalidation check for their visa is expressed to relate to a visa of a prescribed kind, without any limits set as to the type of visa which could be prescribed.

Currently, only the new Frequent Traveler stream of the Subclass 600 (Visitor) visa will be prescribed for the purposes of requiring a revalidation check. This is to support the trial of a new longer validity visitor visa that will initially only be available to Chinese nationals.

The power to prescribe which visa can be subject to the revalidation check process has not been limited for several reasons.

Flexibility had been provided as other longer validity visa products may be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Including a limit on the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.

There would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. If the Parliament considered it was inappropriate for a visa which had been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation.

Disallowance

The committee seeks the Minister's advice as to why a legislative instrument setting out a specified class of persons who are to complete revalidation checks should not be subject to disallowance.

The Ministerial power in new subsection 96E(1) would provide a mechanism to manage specific, serious, or time-critical risks in relation to an identified cohort of visa holders, where the Minister determines it is in the public interest to exercise this power.

It is intended that this power be exercised in circumstances necessitating an immediate response, for example situations where there has been an assessment of increased risk to the Australian community resulting from a significant health or national security incident.

It would not be appropriate for this legislative instrument to be subject to disallowance, as the time-critical nature of the implementation of the Minister's determination is key to its effectiveness.

Affected visa holders would be notified under section 96F of both the determination and how to complete and pass the revalidation check. If they completed and passed the revalidation check, their visa would come back into effect. If they completed, but did not pass the revalidation check, further information may be requested and they may subsequently pass the revalidation check. It is also possible that in some cases their visa may be referred to a cancellation delegate for consideration. This may result in a notice of intention to consider cancellation being issued, or a further decision made that it is reasonable to disregard the information and that the visa holder passes the revalidation check.

Merits review

The committee seeks the Minister's advice as to which, if any, of the decisions in the proposed new Subdivision are not reviewable.

Decisions under the proposed new subdivision BA of Division 3 of Part 2 of the Migration Act would not be merits reviewable decisions.

If a visa holder does not pass a revalidation check, this would not automatically result in cancellation of the visa. In this case, the visa would cease to be in effect; a person whose visa has ceased to be in effect may subsequently pass a revalidation check during the visa period (as discussed at paragraph 13 of the Explanatory Memorandum). A decision that the person does not pass a revalidation check for the visa is a decision that can be reconsidered by the Minister or delegate. During this period, an individual may subsequently pass the revalidation check and this would result in the visa coming back into effect.

Where a person does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists. If the delegate decided not to cancel the visa, this would result in the person passing the revalidation check for the visa. If the delegate decided to cancel the visa, this decision may be subject to merits review.

Accordingly, the time and costs associated with seeking merits review of a decision that a person does not pass a revalidation check would be inefficient and potentially unnecessary. It is likely that the person would either subsequently pass the revalidation check (following provision of further information) or be notified of an intention to consider cancellation of their visa before the merits review process produced an outcome.

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

Ref No: MC16 032446

22 NOV 2016

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Dear ~~Senator~~ Helen

Narcotic Drugs Legislation Amendment Bill 2016

I refer to the Standing Committee for the Scrutiny of Bills letter of 10 November 2016, regarding the Narcotic Drugs Legislation Amendment Bill 2016. The Committee requested that certain key information be included in the explanatory memorandum. The Committee also requested further advice as to whether the material incorporated by reference under proposed subsection 26B(2) of the Narcotic Drugs Legislation Amendment Bill 2016 can be made available to persons interested in, or affected by, the law.

The Senate passed the Narcotic Drugs Legislation Amendment Bill 2016 on 10 November 2016. As the Bill has already been passed by both Houses, I will no longer be able to amend the Explanatory Memorandum to incorporate the additional information requested by the Committee. I assure the Committee that key information, including those identified by the Committee in *Alert Digest No. 7 of 2016*, will be included in any future memorandum relating to this legislation.

Use of international standards promotes the global alignment in quality and safety requirements for medicinal cannabis products. The Office of Drug Control will endeavour to make the incorporated documents in these standards publicly available, unless restrictions are imposed by the owners of the incorporated documents with regard to publication of those documents. In regulation, reference to international standards is appropriate and necessary to ensure consistency. For example, access to Pharmacopoeial monographs on which our Medicines Regulation framework depends is based on subscription or purchase, with limits in relation to the number of copies that can be made and the number of persons able to access and use these documents.

Compliance with global standards will make Australia's medicinal cannabis industry internationally competitive.

The Hon Sussan Ley MP

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ATTORNEY-GENERAL

CANBERRA

MS16-018032

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Dear Chair

I am writing in response to the letter from the Acting Committee Secretary of the Senate Scrutiny of Bills Committee, Ms Anita Coles, dated 10 November 2016. The letter refers to the Committee's *Alert Digest No. 8 of 2016* and seeks my advice on a number of identified issues related to the Privacy Amendment (Re-identification Offence) Bill 2016.

The Bill amends the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth agencies and disclosure of re-identified information. The provisions apply to conduct occurring on or after 29 September 2016. The Bill is intended to strengthen existing privacy protections and act as a deterrent against attempts to re-identify de-identified personal information in government datasets.

In response to the issues raised in the Committee's *Alert Digest No. 8 of 2016*, my advice is set out below.

Reversal of evidential burden of proof

As the Committee has noted, the Bill provides for various exceptions to the offences for re-identifying de-identified personal information (subsections 16D(2) to (5)) and disclosing re-identified information (subsections 16E(3) to (6)). An accused entity bears the evidential burden for each of these exceptions, which reverses the criminal law principle that the prosecution must prove every element of the offence.

This reversal is justified on the basis that an accused entity is in the best position to discharge the burden of proof for these exceptions. This is because knowledge of, for example, an agency's functions or activities, the terms of a contract for services or the existence of an agreement to perform specific functions will generally be peculiarly within the knowledge of the defendant. This is particularly the case where a contract or agreement between an entity and Commonwealth agency is not publicly available. It would therefore be significantly more difficult and costly for the prosecution to prove that the exception did not apply, as it would

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require the prosecution to first enquire and establish whether such a contract or agreement exists and, if so, then establish that the conduct was not consistent with that contract or agreement. By contrast, this information would be readily and cheaply available from the accused entity. I therefore consider this reversal of evidential burden of proof to be consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Breadth of discretion to exempt—proposed section 16G

It is my view that the offence and civil penalty provisions in sections 16D, 16E and 16F of the Bill are appropriate and narrowly defined as currently drafted.

The offence for re-identification in section 16D only applies to intentional re-identification of personal information. That is, the entity must have done an act with the specific intention of re-identifying the dataset. Unintentional re-identification that occurs as a by-product of other public interest research using a government dataset, for example through data matching, would not constitute an offence under section 16D. While the offence for disclosure in section 16E applies to information which is intentionally or unintentionally re-identified, the offence itself is confined to the intentional disclosure of re-identified information only.

Merely disclosing that a de-identified dataset published by Government could be re-identified, or speculating about the possibility of re-identification, would therefore not constitute an offence under section 16E. Similarly, inadvertent disclosure of re-identified information where the entity is not aware that the information is re-identified would also not constitute an offence. Further, it is difficult to envisage circumstances where the prohibition against disclosure of re-identified information in section 16E and the obligation to notify the responsible agency of any re-identification under section 16F would interfere with the ability to conduct research which is in the public interest such that an exemption would be required.

I note that the provisions in the Bill do not apply to universities or any other authorities established under State and Territory legislation. This is because the Privacy Act generally does not apply to State and Territory authorities (see subsection 6C(1) of the Privacy Act, which states that an organisation for the purposes of the Privacy Act does not include a State or Territory authority). Under subsection 16CA(2) of the Bill this exemption also applies to acts done in the course of employment or service by individuals employed by, or engaged to provide services to, those exempt universities.

As the Committee has noted, section 16G of the Bill provides the Minister with a general power to determine that a particular entity or class of entities is exempt from one or more of sections 16D, 16E or 16F for particular purposes if an exemption is in the public interest. This is intended to provide an appropriate balance between protecting the privacy of individuals and allowing for legitimate research to continue. Specific research purposes involving cryptology, information security and data analysis are identified in paragraphs 16G(2)(a) to (c), and paragraph 16G(2)(d) provides a general ground for any other purpose the Minister considers appropriate. It is my expectation that the predominant reason for an exemption determination under section 16G will be in relation to the specific research purposes involving cryptology, information security and data analysis which is in the public interest. However, the ability to grant exemptions for 'any other purpose' ensures there is appropriate flexibility in the event that other legitimate reasons to grant exemptions arise in the future which are not currently contemplated.

In view of the narrow scope of the proposed offences noted above, I do not expect there will be a large number of entities who will need exemptions for research in the public interest which requires the intentional re-identification of de-identified personal information

published by a government agency. I am therefore satisfied that the current breadth of the exemption in section 16G is appropriate.

Retrospective application

The Committee has also raised questions about the retrospective application of the offences in the Bill. These are legitimate queries, as retrospective offences challenge a key element of the rule of law—that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. However, in the circumstances the Government considers that these narrowly prescribed offences should have a limited retrospective effect.

The recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset brought to the Government's attention the existence of a gap in privacy legislation regarding the re-identification of de-identified data. Once aware of this gap, the Government acted immediately to strengthen protections for personal information against re-identification by introducing these offences. The offences will only take effect in relation to conduct occurring on or after 29 September 2016, which is the day after I announced the proposed amendments to the Privacy Act. This retrospective application was made very clear in my statement of 28 September 2016. As a result of my statement, entities were clearly given notice that this particular conduct will be made subject to offences from that time.

The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult—in many cases impossible—to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after I announced the Government's intention to introduce this Bill provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill. The Government has also taken swift action to introduce the Bill in the Parliament at the earliest available opportunity to ensure the retrospective application is for a short time period only.

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