



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

**FIRST REPORT**  
**OF**  
**2016**

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## **Members of the Committee**

### **Current members**

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Joseph Ludwig	ALP, Queensland
Senator Rachel Siewert	AG, Western Australia

### **Secretariat**

Ms Toni Dawes, Secretary  
Mr Glenn Ryall, Principal Research Officer  
Ms Ingrid Zappe, Legislative Research Officer

### **Committee legal adviser**

Associate Professor Leighton McDonald

### **Committee contacts**

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Phone: 02 6277 3050  
Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)



## 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

## FIRST REPORT OF 2016

The committee presents its *First 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:

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Corporations Amendment (Financial Advice Measures) Bill 2015 <i>Previously: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014</i>	5
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Criminal Code Amendment (Private Sexual Material) Bill 2015	16
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## Responsiveness to requests for further information

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

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

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

### Ministerial responsiveness to 31 December 2015

Bill	Portfolio	Correspondence	
		Due	Received
Australian Immunisation Register Bill 2015	Health	01/10/15	29/09/15
Australian Citizenship Amendment (Allegiance to Australia) Bill 2015	Immigration and Border Protection	27/08/15	11/01/16
Australian Crime Commission Amendment (Criminology Research) Bill 2015	Justice	26/11/15	30/11/15
Aviation Transport Security Amendment (Cargo) Bill 2015	Infrastructure and Regional Development	29/10/15	12/11/15
Corporations Amendment (Financial Advice Measures) Bill 2015 <i>Previously: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014</i>	Treasury	17/12/15	04/01/16
Counter-Terrorism Legislation Amendment Bill (No. 1) 2015	Attorney-General	10/12/15	<i>Not yet received</i>
Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015	Justice	17/12/15	02/02/16

Bill	Portfolio	Correspondence	
		Due	Received
Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015	Immigration and Border Protection	29/10/15	30/10/15
Family Law Amendment (Financial Agreements and Other Measures) Bill 2015	Attorney-General	17/12/15	08/12/15
Health Legislation Amendment (eHealth) Bill 2015	Health	29/10/15	02/11/15
<i>Minister's further response</i>		26/11/15	01/12/15
Migration Amendment (Charging for a Migration Outcome) Bill 2015	Immigration and Border Protection	29/10/15	30/10/15
Migration Amendment (Complementary Protection and Other Measures) Bill 2015	Immigration and Border Protection	26/11/15	26/11/15
Migration and Maritime Powers Amendment Bill (No. 1) 2015	Immigration and Border Protection	29/10/15	30/10/15
Omnibus Repeal Day (Spring 2015) Bill 2015	Prime Minister	10/12/15	11/01/16
Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015	Employment	01/10/15	29/10/15

### Members/Senators responsiveness to 31 December 2015

Bill	Member/Senator	Correspondence
		Received
Criminal Code Amendment (Private Sexual Material) Bill 2015	Mr Tim Watts MP	11/12/15

# Corporations Amendment (Financial Advice Measures) Bill 2015

*Previously: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014*

Introduced into the House of Representatives on 19 March 2014

Portfolio: Treasury

## ***Introduction***

The committee dealt with this bill in the amendment section of *Alert Digest No.14 of 2015*. The Assistant Treasurer responded to the committee's comments in a letter received on 4 January 2016. A copy of the letter is attached to this report.

### ***Alert Digest No. 14 of 2015 - extract***

## **Background**

This bill seeks to amend Part 7.7A the *Corporations Act 2001* (in relation to the financial advice industry) to:

- remove the need for clients to renew their ongoing fee arrangement with their financial adviser every two years;
- make the requirement that financial advisers provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- remove paragraph 961B(2)(g) (the 'catch-all' provision) from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- facilitate the provision of scaled advice; and
- provide a targeted exemption for general advice from the ban on conflicted remuneration in certain circumstances.

## **Government amendments—general comment**

The supplementary explanatory memorandum (at p. 3) explains the background to these government amendments as follows:

On 19 March 2014, the Government introduced the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Bill) as part of the Government's Autumn Repeal Day. The purpose of the Bill is to reduce compliance costs imposed on the financial services industry by amending Part 7.7A of the

*Corporations Act 2001*. Part 7.7A is also referred to as Future of Financial Advice (FOFA).

Following refinements to better target a number of FOFA provisions, the Bill passed the House of Representatives on 28 August 2014.

The Government's amendments to FOFA were initially implemented through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation). The Regulation commenced on 1 July 2014. On 19 November 2014, the Senate voted to disallow the Regulation, reversing the law to the original legislation.

Following the disallowance of the Regulation, a number of measures from the Regulation were remade through the *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014*, which commenced in December 2014. Further measures were remade through the *Corporations Amendment (Financial Advice) Regulation 2015*, which commenced on 1 July 2015. The Bill is being amended to remove a number of the proposed amendments to FOFA and to implement minor and technical changes.

In the committee's *Ninth Report of 2014* (at p. 348) the committee commented on the issue of whether the content of the Corporations Amendments (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation) is an appropriate delegation of legislative power or would be more appropriate for Parliamentary enactment. At that time, the committee noted the Acting Assistant Treasurer's response in relation to this issue which stated that 'implementing these changes through the Regulation provides clarity and certainty for the financial advice industry and for investors seeking financial advice while the changes are considered in detail by the Parliament'. In relation to this the committee noted two matters:

- the extent to which the approach promotes clarity and certainty is contingent both on the regulations not being disallowed and on the FOFA amendments being passed in their current form by the Parliament; and
- the committee has strong reservations about using regulations to initially enact changes ultimately intended for primary legislation.

**The committee takes this opportunity to reiterate the above comments and its view that enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.**

## **Government amendments (14), (16) and (18) on sheet GU108— Inappropriate delegation of legislative power (Henry VIII clause)**

These amendments will allow regulations to prescribe circumstances in which, despite another provision of the relevant section, ‘all or part of a benefit is to be treated as conflicted remuneration’. This means that the regulations will be able to override the effect of the primary legislation.

The committee previously sought advice from the Acting Assistant Treasurer in relation to this general matter as outlined in the committee’s *Twelfth Report of 2014* (at pp 573–575). At that time, the Acting Assistant Treasurer stated that:

...there is always the possibility – given the complexity of arrangements in the financial services sector – that unintended consequences may arise. As such, the enhanced regulation-making powers would permit the Government to address any unintended consequences should they arise.

The Government has endeavoured to ensure that there is adequate flexibility in the new amendments to address the concerns of industry and consumers at a time of legislative change. I believe that the Bill achieves the appropriate regulatory balance. Any regulations would be subject to consultation with stakeholders, as well as subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing Parliament with the opportunity to scrutinise the application of new regulations.

The committee again notes these comments, although it reiterates its view that while unintended consequences may arise in complex regulatory environments, it may be doubted whether this risk is, in itself, a sufficient justification for broad delegations of legislative power which enable regulations to override the effect of the primary legislation. **The committee reiterates its concerns about the breadth of the power to override the effect of the primary legislation and draws this issue to the attention of Senators.**

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

Furthermore, the supplementary explanatory memorandum (at p. 12) states that:

The Bill currently makes amendments to introduce regulation-making powers that would clarify the operation of existing exemptions to conflicted remuneration.

Amendments 14, 16 and 18 remove the regulation-making power.

While these amendments do remove certain regulation-making powers, **the committee considers that this description of the amendments has the potential to be misleading because the significant regulation-making powers outlined above (relating to circumstances in which, despite another provision of the relevant section, all or part**

of a benefit is to be treated as conflicted remuneration) are still provided for in the amendments.

The committee therefore seeks the Assistant Treasurer's advice as to whether the supplementary explanatory memorandum can be amended to more clearly outline the effect of the amendments. The committee also seeks the Assistant Treasurer's advice in relation to possible examples of circumstances in which these regulation-making powers may be utilised.

### *Assistant Treasurer's response - extract*

I appreciate the concern the Committee raises in relation to the Bill's supplementary explanatory memorandum. The regulation-making power is intended to provide the Government with the flexibility to deem certain benefits, originally exempted from conflicted remuneration, as conflicted remuneration.

This intention was outlined in the revised explanatory memorandum provided to the Senate in September 2014:

*3.75 Similarly, if a future remuneration structure is developed that, prima facie, is not captured by the ban on conflicted remuneration – but is clearly contrary to the spirit or intent of the ban – regulation-making powers that proscribe such payments provide a way to address this problem (page 40).*

The supplementary explanatory memorandum did not cover this regulation-making power as the parliamentary amendments did not make any further changes to the power, and including detail on the power would fall outside the normal scope of the document.

As the Parliament has previously been provided the information the Committee has requested, I do not propose to revise the supplementary explanatory memorandum.

### *Committee response*

The committee thanks the Assistant Treasurer for this response.

The bill (as introduced into the Senate) sought to introduce new regulation-making powers under sections 963B, 963C and 963D of the *Corporations Act 2001*. The regulation-making powers would have allowed the regulations to prescribe:

- circumstances in which all or part of a benefit is not considered to be conflicted remuneration;

*continued*

- the extent to which, or a method for working out the extent to which, a benefit is not considered conflicted remuneration; and
- circumstances in which all or part of a benefit is to be treated as conflicted remuneration. (revised explanatory memorandum, p. 40)

Government amendments (14), (16) and (18) on sheet GU108 removed the first two limbs of the proposed new regulation-making powers outlined above (i.e. the regulation-making powers that would allow the regulations to ‘clarify the operation of existing exemptions to conflicted remuneration’ (supplementary explanatory memorandum, p. 12)).

However, the amendments do not remove the regulation-making power that would allow the regulations to prescribe the circumstances in which, despite another provision of the relevant section, all or part of a benefit is to be treated as conflicted remuneration. The committee notes the Assistant Treasurer’s advice that there was an explanation of this third limb in the revised explanatory memorandum and that the ‘supplementary explanatory memorandum did not cover this regulation-making power as the parliamentary amendments did not make any further changes to the power, and including detail on the power would fall outside the normal scope of the document’.

However, given the complexity of proposed regulation-making powers and the amendments proposed to them, **the committee reiterates its concern that the brief description in the supplementary explanatory memorandum (under the heading ‘Conflicted remuneration: removal of expanded regulation making power’) has the potential to cause confusion and could usefully be expanded to more clearly outline the effect of the amendments to assist parliamentarians and others in scrutinising the proposed amendments.**

**The committee also draws Senators’ attention to the committee’s general comments outlined above in relation to the issue of regulations (delegated legislation) overriding the effect of the primary legislation.**

**The committee draws this issue to the attention of the Regulations and Ordinances Committee for information.**

# Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Introduced into the House of Representatives on 26 November 2015

Portfolio: Justice

## *Introduction*

The committee dealt with this bill in the amendment section of *Alert Digest No. 14 of 2015*. The Minister responded to the committee's comments in a letter dated 2 February 2016. A copy of the letter is attached to this report.

### *Alert Digest No. 14 of 2015 - extract*

## **Background**

This bill amends the *Proceeds of Crime Act 2002* (POC Act), *Criminal Code Act 1995* (*Criminal Code*), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), and the *AusCheck Act 2007* (AusCheck Act).

Schedule 1 amends the POC Act to clarify the operation of the non-conviction based confiscation regime provided under that Act.

Schedule 2 amends the *Criminal Code* to create two new offences of false dealing with accounting documents.

Schedule 3 amends the *Criminal Code* to clarify the definitions of the terms 'drug analogue' and 'manufacture' and ensure that they capture all relevant substances and processes.

Schedule 4 amends the AML/CTF Act to clarify and address operational constraints identified by law enforcement agencies including:

- listing the Independent Commissioner Against Corruption of South Australia as a 'designated agency' under the Act;
- amending the definition of 'foreign law enforcement agency' in the Act to specifically include Interpol and Europol, and provide a new regulation-making power to enable additional international bodies to be prescribed in future; and
- clarifying the circumstances in which entrusted investigating officials may disclose information obtained under section 49 of the Act.



Schedule 5 amends the AusCheck Act to enable AusCheck to directly share AusCheck scheme personal information with State and Territory authorities and with a broader range of Commonwealth authorities.

### **Delegation of legislative power Schedule 4, item 2**

This item repeals the existing definition of ‘foreign law enforcement agency’ in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and inserts a new definition that includes Europol and Interpol. The explanatory memorandum contains a detailed general justification for this aspect of the bill, which emphasises the importance of enabling information to be shared with international law enforcement organisations as they often play an important role in the facilitation of transnational investigations.

However, the new definition also provides for a regulation-making power to prescribe additional international bodies, including (but not limited to) those with multijurisdictional law enforcement coordination and cooperation functions. The explanatory memorandum notes that regulations prescribing these bodies will be disallowable and, as such, the prescription of any additional bodies will remain subject to a level of Parliamentary scrutiny (see p. 45).

Nevertheless, the implications for individual privacy of sharing AUSTRAC information are significant, and the committee expects that important matters will usually be included in primary legislation unless a comprehensive and compelling justification is provided. **The committee therefore requests the Minister’s more detailed justification for seeking to prescribe additional international bodies by regulation rather than including any such amendment in future primary legislation.**

*The committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.*

### ***Minister’s response - extract***

The ability to prescribe additional international bodies through regulation is both reasonable and necessary in order to ensure that any newly-constituted international bodies, in particular those with multi-jurisdictional law enforcement coordination and cooperation functions similar in nature to INTERPOL and Europol, are able to be listed in future as expeditiously as possible. The strategic and tactical value of financial intelligence in the detection and disruption of transnational crime diminishes significantly over time. By enabling the timely addition of future international bodies to the existing definition of ‘foreign law enforcement agencies’, this measure will ensure that the value of AUSTRAC financial intelligence information is preserved and able to be appropriately leveraged by

the necessary agencies and networks. This will both assist in fulfilling our international obligations to combat money laundering and the financing of terrorism, and beneficially affect Australia's relations with foreign countries and international organisations.

### ***Committee Response***

The committee notes the Minister's advice that 'the ability to prescribe international bodies through regulation is both reasonable and necessary' because the 'strategic and tactical value of financial intelligence in the detection and disruption of transnational crime diminishes significantly over time' and therefore a mechanism to enable 'the timely addition of future international bodies to the existing definition of 'foreign law enforcement agencies'' is necessary.

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

**As noted above, the implications for individual privacy of sharing AUSTRAC information are significant. However, given the justification provided above and the fact that the regulations prescribing additional international bodies for the purposes of sharing AUSTRAC information will be disallowable, the committee draws the matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as whole.**

### ***Alert Digest No. 14 of 2015 - extract***

#### **Trespass on personal rights and liberties—privacy Schedule 5, item 3**

This amendment will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. In each case the disclosure must be for the performance of functions relating to law enforcement or national security.

The statement of compatibility and explanatory memorandum justify this measure in part on the basis that appropriate safeguards will remain in place to protect disclosure of AusCheck personal information under the AusCheck legislation (see pp 6–7 and 15–16).

One of the safeguards discussed relates to AusCheck's 'robust administrative procedures and practices' for ensuring that its information is managed in an open and transparent way. Further, it is emphasised AusCheck has developed *Guidelines for Accessing Information on the AusCheck Database* under regulation 15 of the AusCheck regulations which 'establish a compulsory framework for providing access to AusCheck information'. Although these practices and the Guidelines do constitute practical safeguards, it is a matter of concern that the existence of safeguards such as these is not required by law. **As such, the committee seeks the Minister's advice as to whether consideration has been given to enshrining practices and policy in law to provide assurance that the safeguards are robust and permanent. Alternatively, the committee seeks the Minister's advice as to whether consideration has been given to establishing at least a general legislative requirement that safeguards, such as those currently used, are required to be in place.**

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

### ***Minister's response - extract***

The amendments in Schedule 5, Item 3 will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. The broadening of disclosure is however limited to that which is necessary for the purpose of the performance of functions relating to law enforcement or national security.

The use and disclosure of AusCheck scheme personal information is protected by law. AusCheck scheme personal information is subject to the privacy protections in the *Privacy Act 1988*, including the Australian Privacy Principles (APPs). Section 15 of the *AusCheck Act 2007* also prescribes criminal penalties for the unlawful disclosure of AusCheck scheme personal information by any person, which carries a maximum penalty of two years imprisonment.

Pursuant to regulation 15(2) of the *AusCheck Regulations 2007*, all AusCheck staff members are required to comply with the *Guidelines for Accessing Information on the AusCheck Database*. The Guidelines provide a compulsory decision-making framework for AusCheck staff members to determine whether disclosure of AusCheck scheme personal information is appropriate and for prescribed purposes only. This framework has been established in the form of guidelines, as these are administrative procedures that require updating on a frequent basis due to, for example, changes in ICT systems.

Failure of an AusCheck staff member to comply with the Guidelines may constitute a criminal offence under section 15 of the *AusCheck Act 2007*. The Attorney-General's Department considers that this is a significant legislative incentive to comply with the Guidelines, and ensures that the safeguards on information held by AusCheck are robust and permanent. Information provided by AusCheck to other agencies will also be protected by these agencies' own privacy or secrecy obligations.

AusCheck is required under the Guidelines to publicly report disclosures of personal information from the AusCheck database to recognised Commonwealth authorities and accredited agencies, in the Attorney-General's Department Annual Report. This includes the names of the authorities or agencies to which information was provided and the purposes, frequency and method of provision of access to personal information.

AusCheck's privacy notice and Guidelines will be updated to clarify the agencies and purposes for which an individual's personal information may be provided. The privacy notice is provided to all individuals who are background checked through AusCheck and is published on the AusCheck website.

### ***Committee Response***

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

The committee notes the Minister's advice, including:

- in relation to the legal protections connected with the use and disclosure of AusCheck scheme personal information, including that such information is subject to the privacy protections in the *Privacy Act 1988* and that there are criminal penalties for the unlawful disclosure of information;
- that all AusCheck staff members are required to comply with the *Guidelines for Accessing Information on the AusCheck Database* (made under regulation 15 of the *AusCheck Regulations 2007*). The Minister states that the 'Guidelines provide a compulsory decision-making framework for AusCheck staff members to determine whether disclosure of AusCheck scheme personal information is appropriate and for prescribed purposes only.' Furthermore, the Guidelines require the public reporting of disclosures of personal information from the AusCheck database; and
- that this 'framework has been established in the form of guidelines, as these are administrative procedures that require updating on a frequent basis due to, for example, changes in ICT systems'.

*continued*

The committee notes this rationale for the use of guidelines rather than primary or delegated legislation in this instance; however the committee is also aware that there is no *requirement* for these guidelines to be in place. Regulation 15(1) of the AusCheck Regulations 2007 provides that ‘The Secretary *may* issue guidelines about the use and disclosure of information included in the AusCheck database.’

**While acknowledging the Minister’s advice, given that these proposed amendments will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies, the committee recommends that consideration be given to amending regulation 15(1) to at least specify that the Secretary ‘*must* issue guidelines about the use and disclosure of information included in the AusCheck database.’ This would at least ensure that there is a general legislative requirement that safeguards, such as those currently in the Guidelines, are *required* to be in place. The committee seeks the Minister’s advice in this regard.**

**In addition, the committee remains of the view that it would be useful to include at least some minimum safeguards relating to the use and disclosure of personal information in the primary legislation or regulations.**

**Pending the Minister’s further reply, the committee draws this matter, and the comments above, to the attention of Senators.**

# Criminal Code Amendment (Private Sexual Material) Bill 2015

Introduced into the House of Representatives on 12 October 2015  
By: Mr Watts and Ms TM Butler

## *Introduction*

The committee dealt with this bill in *Alert Digest No.12 of 2015*. Mr Tim Watts MP responded to the committee's comments in a letter received on 11 December 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 12 of 2015 - extract*

## **Background**

This bill amends the *Criminal Code Act 1995* to introduce three new offences in relation to the use of a carriage service to distribute private sexual material.

## **Trespass on personal rights and liberties—evidential onus** **Proposed section 474.24H**

Proposed section 474.24H introduces a number of defences in respect of the new offences relating to private sexual material. In relation to each defence the defendant bears an evidential burden in relation to the relevant matters. The explanatory memorandum states that it 'will generally be much easier for a defendant, rather than the prosecution to produce evidence showing that the circumstances to which the defences apply do in fact exist'. **While the committee notes this advice, this explanation is insufficiently detailed and the committee therefore requests further information from the Members that more clearly addresses the principles in relation to offence-specific defences outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

### ***Member's response - extract***

The defences proposed in section 474.24H mirror the defences in the Criminal Code for offences relating to 'child pornography material' and 'child abuse material', along with the addition of a new defence for 'media activities' in proposed subsection 474.24H(3). It would lead to inconsistent results if an evidential burden were placed on the defendant for the other identical defences in the Criminal Code, but not for the defences for the proposed new offences in the bill.

Reversing the onus of proof may be justified where it is particularly difficult for a prosecution to meet a legal burden. It may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. In regard to the defence for 'media activities' in proposed subsection 474.24H(3), the reversal is justified because the defence goes to why the defendant engaged in the conduct (paragraph (3)(a)), the intention of the defendant (paragraph (3)(b)) and the reasonable belief of the defendant (paragraph (3)(c)), all of which are peculiarly within the knowledge of the defendant.

The seriousness of a crime may justify placing a legal burden of proof on the accused. In regard to the other defences in proposed section 474.24H, the seriousness of the offending conduct means that the defendant should not even consider engaging in the conduct in reliance on the defence unless they can point to evidence suggesting that defence applies.

### ***Committee response***

The committee thanks the Member for this response and draws this additional information to the attention of Senators.

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

# Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Introduced into the Senate on 25 November 2015

Portfolio: Attorney-General

## *Introduction*

The committee dealt with this bill in the amendment section of *Alert Digest No.14 of 2015*. The Attorney-General responded to the committee's comments in a letter dated on 8 December 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 14 of 2015 - extract*

## **Background**

This bill amends the *Family Law Act 1975* (the Act) to:

- remove existing uncertainties around requirements for entering, interpreting and enforcing financial agreements;
- amend the coverage of spousal maintenance matters in agreements;
- introduce new offences relating to the wrongful retention of a child overseas;
- amend the arrest powers under the Act; and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.

## **Retrospective application**

### **Schedule 1, item 5, application of amendments of section 90E**

### **Schedule 1, item 22, application of amendments of section 90UH**

Existing section 90E of the *Family Law Act 1975* sets out the requirements for provisions in financial agreements relating to the maintenance of a spouse or child. Specifically, a provision in a financial agreement that relates to the maintenance of a spouse or a child is void unless it specifies the party for whose maintenance provision is made and the amount of, or value of the portion of property attributable to, the maintenance for the spouse or child.

The bill proposes amendments which would mean that there is no longer a requirement for an agreement to nominate a specific value for a maintenance provision when maintenance is being made by way of entitlement to property. The explanatory memorandum (at p. 11) states that this would give parties the option either to nominate a specific value for the



relevant property attributable to maintenance or to nominate a proportion of the relevant property attributable to maintenance.

In addition, the bill proposes to insert a new subsection 90E(2) to clarify that any amount, or proportion of the value of the relevant property attributable to the maintenance of a party or a child, may be nil. The explanatory memorandum (at p. 11) states that this would enable parties to waive spousal maintenance rights where parties are not dependent upon government assistance, enabling parties to opt out of spousal maintenance entitlements and obligations without adverse impact on the community.

Item 5 of the bill relates to the application of these amendments. The explanatory memorandum (at pp 11–12) explains the effect of item 5 as follows:

Subitem 5(1) would provide that the amendments to section 90E apply to all financial agreements made before, on, or after the commencement of the amendments. This means that the amendments would apply to provisions in existing financial agreements that:

- waive spousal maintenance, or
- specify an unvalued amount, or proportion of the relevant property, attributable to the maintenance of a party or child, instead of the value of the portion of the relevant property.

Many parties have made consensual agreements on the understanding that this was possible, and it would be contrary to public policy to cast uncertainty on the validity of those agreements.

Subitem 5(2) would clarify that the amendments would not validate a provision in a financial agreement if a court, prior to the commencement of the amendments, has made an order under the Act on the basis that the provision was void because of existing section 90E.

The explanatory memorandum appears to suggest that because some (perhaps many) parties have made agreements based on a misunderstanding of the current law that the amendments made by items 3 and 4 to section 90E should apply to those agreements on the basis that the proposed law would be consistent with those misunderstandings. Given that it is possible this retrospective operation of the law may cause detriment to some parties, **the committee seeks the Attorney-General's detailed advice in relation to the appropriateness of the retrospective application of these amendments, particularly the extent to which the retrospective application may cause detriment to a party to an existing financial agreement.**

**The committee notes that a similar issue arises in relation to the application of amendments of section 90UH (relating to Part VIIIAB financial agreements, i.e. those relating to de facto relationships) and therefore seeks similar advice in relation to item 22 of schedule 1.**

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

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

The Committee has requested my advice in relation to the retrospective application of these amendments, particularly in relation to the extent to which the retrospective application may cause detriment to a party to an existing financial agreement.

It would be unlikely that the retrospective application of the amendments could negatively affect parties to existing financial agreements which have been made in good faith. The amendments of sections 90E and 90UH are intended to ensure that, where parties to an existing financial agreement have either not specified an amount of maintenance, or have specified a nil amount, this will not result in that provision of the agreement being void. The retrospective application of these amendments is appropriate as they are intended to cure unintended technical non-compliance in existing financial agreements.

One of the requirements for an existing financial agreement to be valid is that each party must have received a signed statement from a legal practitioner that the practitioner provided the party with independent legal advice as to certain matters. Given this requirement, there is limited potential for the retrospective application of these amendments to cause detriment to, or have unforeseen consequences for, parties who have entered into a financial agreement in good faith.

Any potential for parties to be disadvantaged is further mitigated by the ability of the court to set aside a financial agreement in certain circumstances (as provided for in sections 90K and 90UM). In particular, existing paragraphs 90K(1)(d) and 90UM(1)(g) will continue to apply to agreements made prior to commencement. These paragraphs provide that a court may set aside a financial agreement if satisfied that, since the making of the agreement a material change of circumstances has occurred (relating to the care, welfare and development of a child of the marriage/relationship) and, as a result of that change, the child or a party to the agreement with caring responsibility for the child, will suffer hardship if the court does not set the agreement aside. The court may also set aside an agreement in cases of fraud (paragraphs 90K(1)(a) and 90UM(1)(a)) or unconscionable conduct (paragraphs 90K(1)(e) and 90UM(1)(h)).

As the retrospective nature of the amendments is unlikely to have a negative impact on agreements made in good faith, and any potential for parties to be disadvantaged is mitigated by the ability of the court to set aside an agreement in certain circumstances, I am of the view that the retrospective nature of the amendments is appropriate.

### *Committee response*

The committee thanks the Attorney-General for this detailed response.

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

**In light of the information provided above, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

### *Alert Digest No. 14 of 2015 - extract*

#### **Retrospective effect or application**

**Schedule 1, item 6, replacement section 90G and new sections 90GA and 90GB  
Schedule 1, item 23, replacement section 90UJ and new sections 90UJA and 90UJB**

Existing section 90G of the *Family Law Act 1975* specifies when a financial agreement is binding on the parties to the agreement. The explanatory memorandum (at p. 12) states that:

The wording of existing section 90G is confusing and has led to differing judicial interpretations, and has been further complicated by two sets of amendments following its initial introduction. Item 6 of the Bill would repeal existing section 90G and substitute new sections 90G, 90GA, and 90GB to improve the clarity of the rules relating to when financial agreements are binding.

In relation to the effect of the amendments to section 90G, the explanatory memorandum (at p. 12) explains that:

... there are effectively three forms of section 90G that apply to financial agreements depending on when the agreement was made. These are:

- the first section 90G—applying to financial agreements made from 27 December 2000 to 13 January 2004
- the second section 90G—applying to financial agreements made from 14 January 2004 to 3 January 2010, and

- the current section 90G—applying to financial agreements made from 4 January 2010 to present.

Replacement section 90G will set out the general rule for when financial agreements made after 26 December 2000 are binding.

New section 90GA would outline the conditions relating to legal advice for a financial agreement or termination agreement to be binding and is also intended to make it as clear as possible what conditions apply to which agreements, depending on the time they were entered into. New subsection 90GA(5) would provide that, in determining whether an agreement is binding, the court is not to consider whether the legal advice described in new subsection 90GA(2) has actually been provided. The explanatory memorandum (at pp 15–16) states that:

This means that the court should not go behind the statement provided by a legal practitioner to examine the content of advice. This would increase certainty for parties and for legal practitioners, by making it clear that if the conditions relating to statements about legal advice, as well as the extra conditions for agreements made after 3 January 2010 if applicable, are met, then that legal advice is taken to have been provided.

New section 90GB would provide that, on application by a spouse party, a court must make an order declaring that a financial agreement or a termination agreement is binding on the parties to the agreement, even if all of the relevant conditions in section 90GA for the agreement to be binding have not been met, if it is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made). The explanatory memorandum (at p. 16) states that this reflects the policy of existing subsection 90G(1A) of the Act.

The committee notes the intention of this provision to improve the clarity of the rules relating to when financial agreements are binding. However, also noting the complexity of the provisions, **the committee seeks the Attorney-General’s advice as to whether any of the proposed amendments may be considered to make changes that have retrospective effect or application. For example, the committee is interested in whether new subsection 90GA(5) which provides that a court is not to consider whether legal advice has actually been provided would apply to existing agreements and therefore raise the possibility that the amendment may cause detriment to a party to an existing financial agreement.**

**The committee notes that a similar issue arises in relation to proposed replacement section 90UJ and proposed new sections 90UJA and 90UJB (relating to Part VIIIAB financial agreements, i.e. those relating to de facto relationships) and therefore seeks similar advice in relation to item 23 of schedule 1.**

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

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

The Committee has requested my advice as to whether any of the proposed amendments may be considered to make changes that have retrospective effect or application. In particular, the Committee has drawn my attention to new subsection 90GA(5), and the potential detriment it could cause to a party to an existing financial agreement.

The amendments include a number of protections to reduce the possibility of a party suffering detriment as a result of a financial agreement. Under proposed subsections 90GA(2) and 90UJA(2), in all cases, regardless of the time period covered by the relevant agreement, there is a requirement for each spouse party to be provided with a signed statement from a legal practitioner that the practitioner provided the party with independent legal advice as to certain matters.

In addition, parties can seek to have a financial agreement set aside in circumstances set out in subsections 90K(1) and 90UM(1), including where it is alleged that the agreement is void, voidable or unenforceable; for example, because of duress (paragraphs 90K(1)(b) and 90UM(1)(e), as well as where fraud or unconscionable conduct are alleged (paragraphs 90K(1)(a) and (e), and 90UM(1)(a) and (h)). As set out above in relation to items 5 and 22, parties may also argue hardship in specified circumstances.

### *Committee response*

The committee thanks the Attorney-General for this response.

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

**In light of the information provided above, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

***Alert Digest No. 14 of 2015 - extract***

**Retrospective application**

**Schedule 2, item 9, application of amendments relating to offers of settlement**

Division 4 of Part 1 of Schedule 2 makes amendments concerning whether the fact an offer of settlement has been made can be disclosed to the family law courts. The amendments would allow parties to disclose to the courts the fact that an offer to settle has been made, but disclosing the terms of the offer would remain prohibited.

Item 9 applies these changes, not only to offers made on or after commencement but also to offers made before commencement. The explanatory memorandum (at p. 35) states that this is appropriate 'to allow the court to consider whether an offer to settle has been made for case management and similar purposes'. **The committee seeks the Attorney-General's advice as to whether it is possible that a party may suffer detriment due to the application of the amendments to offers which have been made prior to the new law commencing.**

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

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

The Committee has requested my advice as to whether it is possible that a party may suffer detriment due to the application of the proposed amendments to offers of settlement made before commencement.

It would be very unlikely for a party to suffer detriment as a result of this amendment.

Current section 117C requires that, in certain proceedings, the fact that an offer (made in accordance with any applicable Rules of Court) has been made, and the terms of the offer, must not be disclosed to the court, except for the purposes of the consideration by the court of whether it should make an order as to costs under subsection 117(2) and the terms of any such order. Existing subsection 117C(3) provides that a judge of the court is not disqualified from sitting in proceedings only because the fact that an offer has been made is, contrary to subsection 117(2), disclosed to the court.

Under the amendments proposed in the Bill, there would no longer be a prohibition on disclosing to the court the fact that an offer has been made. Subsection 117C(3) would be repealed as it would no longer have any practical effect.

It is very unlikely that parties would suffer any detriment as a result of the retrospective application of this amendment. While it would no longer be prohibited to disclose to the court that an offer of settlement has been made, this disclosure is already made (and will continue to be made) in the context of the court's consideration of costs. Importantly, the prohibition on disclosing the terms of the offer to the court is not amended by the Bill and would continue to apply in all cases. I consider that this strikes the appropriate balance between encouraging parties to negotiate and reach early settlement of matters on terms that are satisfactory to both parties, and the ability of the court to supervise matters.

Further, given that under the existing law, disclosing the existence of an offer to the court does not disqualify the judge from sitting, there is unlikely to be any practical effect on existing cases by removing that requirement in its entirety.

#### ***Committee response***

The committee thanks the Attorney-General for this detailed response.

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

**In light of the information provided above, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

I also thank the committee for pointing out the errors in the Explanatory Memorandum, and will provide Parliament with the relevant corrections at the next available opportunity.

***Committee response***

The committee thanks the Attorney-General for this undertaking to provide Parliament with corrections to the explanatory memorandum at the next available opportunity in response to the committee's identification of two apparent errors in the explanatory memorandum accompanying the bill.



# Health Legislation Amendment (eHealth) Bill 2015

Introduced into the House of Representatives on 17 September 2015

Portfolio: Health

*This bill received Royal Assent on 26 November 2015*

## ***Introduction***

The committee dealt with this bill in *Alert Digest No. 14 of 2014*. The Minister responded to the committee's comments in a letter dated 2 November 2015. The committee sought further information and the Minister responded in a letter dated 1 December 2015. A copy of the letter is attached to this report.

## ***Alert Digest No. 11 of 2015 - extract***

## **Background**

This bill amends the *Personally Controlled Electronic Health Records Act 2012*, *Healthcare Identifiers Act 2010*, *Privacy Act 1988*, *Copyright Act 1968*, *Health Insurance Act 1973* and *National Health Act 1953* to:

- change the name of the Personally Controlled Electronic Health Records (PCEHR) system to the My Health Record system;
- enable opt-out trials to be undertaken for individuals;
- abolish the PCEHR Jurisdictional Advisory Committee and the Independent Advisory Council;
- introduce new civil and criminal penalties;
- amend the privacy framework; and
- amend mandatory data breach notification requirements for participants.

## **Delegation of legislative power—Henry VIII clause Schedule 1, subitem 136(3)**

Subitem 136(3) makes express provision for rules (delegated legislation) made for the purpose of subitem 136(2) to modify the operation of the *Healthcare Identifiers Act 2010*, the *Personally Controlled Electronic Health Records Act 2012*, and the *Privacy Act 1988*.

This provision is a 'Henry VIII clause', in that it may allow the Minister to modify the operation of the specified Acts by making rules (explanatory memorandum, p. 105). Although it is recognised that such clauses should in general be avoided, the explanatory

memorandum (at p. 106) suggests that the clause is needed for transitional purposes and that it is consistent with similar rule-making powers in other amendment bills:

The purpose of this provision is to allow the Minister to deal with any unforeseen or unintended consequences that may arise at a later date, specifically regarding the opt-out trials and the changes in governance of the System Operator to the Australian Commission for eHealth. In particular, as it is intended that the Australian Commission for eHealth will be made under the PGPA Act and PGPA Rules at a later date, this provision is intended to help avoid any unintended consequences from this change. The rule-making power provides legislative authority to address a range of practical situations that might arise with a transfer of functions or when a machinery of government change occurs. Where a rule is made that could potentially modify the application of an Act, which another Minister is responsible for, it is intended for those rules to be made only after that other Minister has been consulted.

Paragraph [136(4)(e)] prohibits the making of rules that directly amend the text of the Act. “Directly amend” means to make an amendment that would need to be incorporated in any reprint of the Act by the Government Printer (see section 2 of the *Acts Publication Act 1905*). Paragraph [136(4)(e)] does not prohibit a rule that modifies the effect of a provision, such as by providing that a provision has effect as if it had been amended in a specified way, but does not make a direct amendment of any Act.

Although it may be accepted that Henry VIII clauses may be appropriate in certain circumstances, the changes resulting from opt-out trials and any general future decision to apply the opt-out system nationally may be significant. **In these circumstances the committee seeks more information from the Minister, and examples of possible circumstances in which the power could be needed, to assist the committee in understanding why the clause is necessary.**

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

### ***Minister’s initial response - extract***

Subitem 136(3) could be considered a “Henry VIII clause” in that it potentially allows the Minister to make Rules modifying the operation of the *Healthcare Identifiers Act 2010*, the *My Health Records Act 2012* (currently named the *Personally Controlled Electronic Health Records Act 2012*) and the *Privacy Act 1988*. Subitem 136(3) is located in Part 2 (Rulemaking powers, application and transitional provisions) of Schedule 1 of the Bill.

Subitem 136(3) has been included in the Bill to allow the Minister to deal with any unintended or unforeseen circumstances that may arise in the future, in particular as part of transitional arrangements in relation to opt-out and in relation to changes of governance

arrangements as governance mechanisms for the My Health Record system are moved out of the *My Health Records Act 2012* and subordinate legislation and into rules proposed to be made under section 87 of the *Public Governance, Performance and Accountability Act 2013*.

As the purpose of the provisions is to assist with unintended or unforeseen circumstances, it is difficult to provide specific examples of when the rule-making power may be used. However, possible circumstances may include where certain *My Health Records Act 2012* governance mechanisms need to be retained for a short period after ‘governance restructure day’ (as defined in the Bill) to ensure appropriate mechanisms remain in place until the Australian Commission for eHealth becomes fully operational.

Henry VIII clauses are not uncommon as part of transitional arrangements. Item 136 in the Bill is modelled on a very similar provision in the *Governance of Australian Government Superannuation Schemes Legislation Amendment Act 2015* – see Item 22 of Schedule 2 of that Act.

As a disallowable instrument, any Rules made under subitem 136(3) would be subject to Parliamentary scrutiny and would be open to disallowance. Subitem 136(4) limits the types of rules that the Minister is able to make under item 136.

### ***Committee initial response***

The committee thanks the Minister for this response, and in particular notes that:

1. Subitem 136(3) has been included in the bill to allow the Minister to deal with any unintended or unforeseen circumstances that may arise in the future, in particular as part of transitional arrangements in relation to opt-out and in relation to changes of governance arrangements as governance mechanisms for the My Health Record system are moved out of the *My Health Records Act 2012* and subordinate legislation and into rules proposed to be made under section 87 of the *Public Governance, Performance and Accountability Act 2013*; and

2. Possible circumstances in which the provisions may be used include ‘where certain *My Health Records Act 2012* governance mechanisms need to be retained for a short period after ‘governance restructure day’ (as defined in the bill) to ensure appropriate mechanisms remain in place until the Australian Commission for eHealth becomes fully operational.’

The committee also notes the Minister’s advice that the provision is modelled on similar clauses and that any Rules will be disallowable.

However, when delegated legislation can have the effect of overriding primary legislation for the purpose of transitional arrangements the committee prefers that the power is limited to a timeframe appropriate for the particular circumstances. **The committee therefore requests the Minister’s further advice as to whether the provision can be amended to include a sunset provision that reflects the intended transitional use of the provision, rather than leaving the timing unconstrained.**

### ***Minister's further response - extract***

The Committee requested that additional information be included in the explanatory memorandum to the Bill regarding evidential onus, the incorporation of written instruments as they exist from time to time, and the use of delegated legislation to make the My Health Record system operate on an opt-out basis nationally. The Committee also sought my advice as to whether amendments could be made to the Bill in relation to a 'Henry VIII clause' in the Bill.

The Bill was passed by Parliament on 12 November 2015 so it is not possible to amend the explanatory memorandum or the Bill. However, my Department will endeavour to incorporate the additional information I provided to the Committee on 2 November 2015 into other material that is provided to stakeholders or is published on the eHealth website at [www.ehealth.gov.au](http://www.ehealth.gov.au).

In respect of the proposed amendment to apply a time limit to any legislative instrument made in reliance of the 'Henry VIII clause' that would have the effect of overriding the primary legislation, if such an instrument is made I assure you it will be for transitional purposes only. Once the transition to the Australian Digital Health Agency (previously referred to as the Australian Commission for eHealth) is complete, I would propose to remove the power to make such an instrument at the next opportunity.

### ***Committee response***

The committee thanks the Minister for the undertaking to incorporate the additional explanatory material regarding evidential onus, the incorporation of written instruments as they exist from time to time, and the use of delegated legislation to make the My Health Record system operate on an opt-out basis nationally in material provided to stakeholders or on the eHealth website.

The committee takes this opportunity to reiterate that the purpose of its requests for material to be included in explanatory memoranda is based on the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).

The committee also welcomes the Minister's assurance that any legislative instrument made in reliance of the 'Henry VIII clause' (i.e. one that would have the effect of overriding the primary legislation) will be for transitional purposes only and that once the transition to the Australian Digital Health Agency is complete it is proposed to remove the power to make such an instrument at the next opportunity.

*Continued*

The committee takes this opportunity to reiterate the committee's preference that when delegated legislation can have the effect of overriding primary legislation for the purpose of transitional arrangements the power should be limited to a timeframe appropriate for the particular circumstances.

**The committee draws this issue to the attention of the Regulations and Ordinances Committee for information.**

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

# Omnibus Repeal Day (Spring 2015) Bill 2015

Introduced into the House of Representatives on 12 November 2015

Portfolio: Prime Minister

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 13 of 2014*. The Assistant Minister for Productivity responded to the committee's comments in a letter dated 11 January 2016. A copy of the letter is attached to this report.

## *Alert Digest No. 13 of 2015 - extract*

## **Background**

This bill amends or repeals legislation across 14 portfolios.

The bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No. 3) 2015 and the Amending Acts 1990 to 1999 Repeal Bill 2015.

## **Parliamentary scrutiny—guidelines for ‘omnibus repeal day’ bills**

### **General comment**

This bill is the fourth ‘omnibus repeal day’ bill to be considered by the Parliament.

The committee concurs with the Clerk of the Senate's view that ‘periodic repeal of spent legislation ensures that the statute book is effective as a statement of the current law, and the rights, obligations and duties applicable to those within the jurisdiction of the Commonwealth’. However, the Clerk also indicated that omnibus and statute law revision bills which propose amendments across a large number of portfolios have been of concern to Senators, who have queried the scope of amendments contained in them.

When the Omnibus Repeal Day (Autumn 2014) Bill 2014 (the Autumn 2014 bill) was being considered by the Finance and Public Administration Legislation Committee in April 2014, the Clerk noted that as ‘omnibus repeal day’ bills were to be introduced twice per year:

...it may be useful from the point of view of parliamentary scrutiny for there to be some known legislative policy parameters for the exercise...A statement from the executive government about what it expects such bills to cover and – perhaps more importantly – not cover would be a useful adjunct to parliamentary scrutiny and would assist in optimising the limited resources of both Houses. (Submission 2 to the Finance and Public Administration Legislation Committee, p. 4)

In its report on the Autumn 2014 bill the Finance and Public Administration Legislation Committee stated that it 'is supportive of the suggestion by the Clerk of the Senate that guidelines to assist parliamentary scrutiny be developed by government' (p. 11).

**As it now appears that 'omnibus repeal day' bills will be brought before the Parliament on a regular basis, in order to assist parliamentary scrutiny of these bills the committee requests the Assistant Minister's advice as to whether the government has given consideration to developing guidelines in relation to what may be included in (and what types of matters will be excluded from) such bills.**

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

### ***Assistant Minister's response - extract***

#### ***Parliamentary Scrutiny - Guidelines for Omnibus Repeal Day Bills***

Omnibus Repeal Day Bills are designed to bring forward non-contentious repeals or amendments to legislation that are low in complexity and are generally considered to be too small to warrant separate stand-alone bills. As Bill coordinator, the Department of the Prime Minister and Cabinet takes advice from the Office of Parliamentary Counsel, and other portfolios, on the appropriateness of measures for inclusion in an Omnibus Repeal Day Bill.

There are no current plans for the Government to develop guidelines in relation to what may be included (or should be excluded) from Omnibus Bills. This provides a necessary degree of flexibility that encourages portfolios to tender small changes and other such house-keeping measures that may otherwise go unaddressed if not included in an Omnibus Bill.

### ***Committee response***

The committee thanks the Assistant Minister for this response.

The committee notes the Assistant Minister's advice that there are no current plans for the government to develop guidelines in relation to what may be included (or should be excluded) from Omnibus Bills as the current approach provides 'a necessary degree of flexibility'. While the current approach provides flexibility, the committee reiterates the observation of the Clerk outlined above that:

"...it may be useful from the point of view of parliamentary scrutiny for there to be some known legislative policy parameters for the exercise...A statement from the executive government about what it expects such bills to cover and – perhaps more importantly – not cover would be a useful adjunct to parliamentary scrutiny and would assist in optimising the limited resources of both Houses."

#### **The committee draws this issue to the attention of Senators.**

As noted above, the Senate Finance and Public Administration Legislation Committee (the F&PA Committee) has previously commented on this matter. The committee notes that this bill is currently subject to an inquiry by that committee.

**The Scrutiny of Bills Committee will continue to examine Omnibus Bills and reports of the F&PA Committee and comment on any matters relevant to the committee's terms of reference where it is appropriate to do so in the future.**

### ***Alert Digest No. 13 of 2015 - extract***

#### **Parliamentary scrutiny—new and previously introduced measures General comment**

This bill includes some measures contained in the Omnibus Repeal Day (Spring 2014) Bill 2014 (the Spring 2014 bill), as well as new measures. The Spring 2014 bill is currently before the House of Representatives following amendments made to that bill by the Senate.

In the committee's *Alert Digest No. 15 of 2014* (pp 43–49) and *First Report of 2015* (pp 91–98) the committee commented on three measures in the Spring 2014 bill. These related to:



- the proposed repeal of specific consultation provisions in various Acts within the Communications portfolio;
- a proposed amendment to the *Social Security (Administration) Act 1999* which would allow a person to disclose certain protected information for research or policy development purposes; and
- the impact on Parliamentary scrutiny of the removal of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* as a Schedule to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

While the first two measures are included in the current bill, it appears that the third measure is not. The committee has restated its comments in relation to the first two measures below.

As this bill is an omnibus bill which proposes amendments across a large number of portfolios, the committee considers that it would assist Parliamentary scrutiny if the explanatory memorandum to the bill identified whether measures are new or whether they reflect items previously introduced. This would enable Senators and others to quickly determine which measures have not yet been considered by the Parliament. **The committee therefore seeks the Assistant Minister's advice as to whether the explanatory memorandum to the bill can be amended to specify whether items are new or previously introduced measures.**

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

### ***Assistant Minister's response - extract***

#### ***Parliamentary Scrutiny -Amendment to the Explanatory Memorandum***

The inclusion of non-contentious measures from the Omnibus Repeal Day (Spring 2014) Bill 2014 was considered appropriate in order to expedite the implementation of those measures. I intend to table an Addendum to the Explanatory Memorandum in the Autumn 2016 sitting to clearly identify those replicated measures.

### *Committee response*

The committee thanks the Assistant Minister for this response.

**The committee notes that an addendum to the explanatory memorandum, which clearly identifies the replicated measures in this bill, was tabled in the Senate on 2 February 2016. The committee thanks the Assistant Minister for providing this additional material which will assist Parliamentary scrutiny by enabling Senators and others to quickly determine which measures in the bill have not yet been considered by the Parliament.**

### *Alert Digest No. 13 of 2015 - extract*

#### **Inappropriate delegation of legislative power Part 2 of Schedule 3**

This Part seeks to repeal various provisions in Communications and the Arts portfolio legislation that requires rule-makers to consult before making certain legislative instruments (such as industry standards, including disability standards for telecommunications related customer equipment).

This Part is identical to Part 2 of Schedule 2 to the Omnibus Repeal Day (Spring 2014) Bill 2014. In the committee's *Alert Digest No. 15 of 2014* and *First Report of 2015* the committee made comments in relation to these measures and sought the then Parliamentary Secretary's advice. **The committee draws Senators' attention to the edited extract of the committee's comments (with updated item and other references) and the then Parliamentary Secretary's response outlined at pages 33–37 of the committee's *Alert Digest No. 13 of 2015*.**

*The committee draws Senators' attention to these comments, as these identical provisions may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## ***Assistant Minister's response - extract***

### ***Concerns regarding Schedule 3 (Communications and the Arts)***

I thank the Committee for its views on the proposed repeal of provisions in Communications and the Arts portfolio legislation requiring rule makers to consult before making certain legislative instruments. The proposed repeals in Part 2 of Schedule 3 to the Bill form part of a broader reform of statutory consultation requirements in the portfolio, as there is currently a variety of inconsistent approaches to both duration and type of statutory consultations.

Relying on the standardised consultation requirements already provided for in Section 17 of the Legislative Instruments Act 2003 (the LI Act) will reduce the complexity and inflexibility of current arrangements, providing stakeholders with certainty and consistency, and allow rule-makers to undertake appropriate consultations that are, for practical purposes, the same.

Moreover, while the Committee has decided to leave consideration of the appropriateness of the proposed amendments to the Senate as a whole, it is worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be detailed in the associated explanatory statement and, accordingly, if the Parliament was dissatisfied with the level of consultation undertaken, the instrument could be disallowed.

### ***Committee response***

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

## ***Alert Digest No. 13 of 2015 - extract***

### **Trespass on personal rights and liberties—use or disclosure of personal information**

#### **Part 1 of Schedule 12**

This Part is identical to Part 3 of Schedule 7 to the Omnibus Repeal Day (Spring 2014) Bill 2014.

Item 1 of Schedule 12 seeks to make an addition to paragraph 202(2)(e) of the *Social Security (Administration) Act 1999* to allow a person to disclose (or further use or record) protected information that has been disclosed to them under subsection 202(2C) of the Act for the purpose of research, statistical analysis or policy development, where it is consistent with the purpose of the initial disclosure.

The proposal is justified in the explanatory memorandum on the basis that it would eliminate ‘the burden on researchers having to seek permission’ and that it ‘enhances the social and economic value of public sector information’ (p. 56). The statement of compatibility (at pp 95–97) also provides a detailed explanation for the proposed approach. The statement suggests that safeguards are in place which will ensure that disclosures under this provision will not constitute arbitrary interferences with a person’s privacy. For example, the Privacy Act will apply in relation to the management of protected information in cases where a person’s identity could be ascertained from the information.

**Noting the detailed explanation provided for the approach, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators’ attention to this part, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.*

## ***Assistant Minister's response - extract***

### ***Concerns regarding Schedule 12 (Social Services)***

I thank the Committee for its views on the proposed amendment to the *Social Security (Administration) Act 1999* to allow for the further use of protected information. While the Committee has decided to leave consideration of the appropriateness of the proposed

amendment to the Senate as a whole, it is worth noting that any further use of protected information will only be permissible for a purpose or purposes consistent with the initial disclosure, thus ensuring continuing compliance with the applicable provisions in the *Privacy Act 1988*.

***Committee response***

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

Senator Helen Polley  
Chair





**Minister for Small Business**  
**Assistant Treasurer**  
The Hon Kelly O'Dwyer MP

Senator Helen Polley  
Chair of the Senate Standing Committee for Scrutiny of Bills  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Senator Polley

A handwritten signature in blue ink that reads 'Helen'.

On 3 December 2015, Ms Toni Dawes, Committee Secretary, wrote on behalf of the Senate Standing Committee for the Scrutiny of Bills requesting information in relation to the Corporations Amendment (Financial Advice) Bill 2015 (the Bill). The Committee has requested advice regarding the explanation of one of the regulation-making powers in the Bill's supplementary explanatory memorandum.

I appreciate the concern the Committee raises in relation to the Bill's supplementary explanatory memorandum. The regulation-making power is intended to provide the Government with the flexibility to deem certain benefits, originally exempted from conflicted remuneration, as conflicted remuneration.

This intention was outlined in the revised explanatory memorandum provided to the Senate in September 2014:

*3.75 Similarly, if a future remuneration structure is developed that, prima facie, is not captured by the ban on conflicted remuneration – but is clearly contrary to the spirit or intent of the ban – regulation-making powers that proscribe such payments provide a way to address this problem (page 40).*

The supplementary explanatory memorandum did not cover this regulation-making power as the parliamentary amendments did not make any further changes to the power, and including detail on the power would fall outside the normal scope of the document.

As the Parliament has previously been provided the information the Committee has requested, I do not propose to revise the supplementary explanatory memorandum.

I trust this letter addresses the concerns raised by the Committee.





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

15/9570

2 FEB 2016

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

scrutiny.sen@aph.gov.au

Dear Chair

**Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015**

Thank you for your letter of 3 December 2015 regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the above Bill in *Alert Digest No. 14 of 2015*.

I enclose my response to this request, which I trust will assist the Committee in its consideration of the Bill.

Should your office require any further information, the responsible adviser for this matter in my office is David Hughes, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

**Michael Keenan**

Encl: Response to request for further information from the Senate Standing Committee for the Scrutiny of Bills.

**Crimes Legislation Amendment (Proceeds of Crime and Other Measures)  
Bill 2015**

**Delegation of legislative power**

**Schedule 4, item 2**

This item repeals the existing definition of ‘foreign law enforcement agency’ in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and inserts a new definition that includes Europol and Interpol. The explanatory memorandum contains a detailed general justification for this aspect of the bill, which emphasises the importance of enabling information to be shared with international law enforcement organisations as they often play an important role in the facilitation of transnational investigations.

However, the new definition also provides for a regulation-making power to prescribe additional international bodies, including (but not limited to) those with multijurisdictional law enforcement coordination and cooperation functions. The explanatory memorandum notes that regulations prescribing these bodies will be disallowable and, as such, the prescription of any additional bodies will remain subject to a level of Parliamentary scrutiny (see p. 45).

Nevertheless, the implications for individual privacy of sharing AUSTRAC information are significant, and the committee expects that important matters will usually be included in primary legislation unless a comprehensive and compelling justification is provided. **The committee therefore requests the Minister’s more detailed justification for seeking to prescribe additional international bodies by regulation rather than including any such amendment in future primary legislation.**

**Minister for Justice’s response:**

The ability to prescribe additional international bodies through regulation is both reasonable and necessary in order to ensure that any newly-constituted international bodies, in particular those with multi-jurisdictional law enforcement coordination and cooperation functions similar in nature to INTERPOL and Europol, are able to be listed in future as expeditiously as possible. The strategic and tactical value of financial intelligence in the detection and disruption of transnational crime diminishes significantly over time. By enabling the timely addition of future international bodies to the existing definition of ‘foreign law enforcement agencies’, this measure will ensure that the value of AUSTRAC financial intelligence information is preserved and able to be appropriately leveraged by the necessary agencies and networks. This will both assist in fulfilling our international obligations to combat money laundering and the financing of terrorism, and beneficially affect Australia’s relations with foreign countries and international organisations.

## Trespass on personal rights and liberties—privacy

### Schedule 5, item 3

The amendment will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. In each case the disclosure must be for the performance of functions relating to law enforcement or national security.

The statement of compatibility and explanatory memorandum justify this measure in part on the basis that appropriate safeguards will remain in place to protect disclosure of AusCheck personal information under the AusCheck legislation (see pp 6–7 and 15–16).

One of the safeguards discussed relates to AusCheck’s ‘robust administrative procedures and practices’ for ensuring that its information is managed in an open and transparent way. Further, it is emphasised AusCheck has developed *Guidelines for Accessing Information on the AusCheck Database* under regulation 15 of the AusCheck regulations which ‘establish a compulsory framework for providing access to AusCheck information’. Although these practices and the Guidelines do constitute practical safeguards, it is a matter of concern that the existence of safeguards such as these is not required by law. **As such, the committee seeks the Minister’s advice as to whether consideration has been given to enshrining practices and policy in law to provide assurance that the safeguards are robust and permanent. Alternatively, the committee seeks the Minister’s advice as to whether consideration has been given to establishing at least a general legislative requirement that safeguards, such as those currently used, are required to be in place.**

### Minister for Justice’s response:

The amendments in Schedule 5, Item 3 will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. The broadening of disclosure is however limited to that which is necessary for the purpose of the performance of functions relating to law enforcement or national security.

The use and disclosure of AusCheck scheme personal information is protected by law. AusCheck scheme personal information is subject to the privacy protections in the *Privacy Act 1988*, including the Australian Privacy Principles (APPs). Section 15 of the *AusCheck Act 2007* also prescribes criminal penalties for the unlawful disclosure of AusCheck scheme personal information by any person, which carries a maximum penalty of two years imprisonment.

Pursuant to regulation 15(2) of the *AusCheck Regulations 2007*, all AusCheck staff members are required to comply with the *Guidelines for Accessing Information on the AusCheck Database*. The Guidelines provide a compulsory decision-making framework for AusCheck staff members to determine whether disclosure of AusCheck scheme personal information is appropriate and for prescribed purposes only. This framework has been established in the form of guidelines, as these are administrative procedures that require updating on a frequent basis due to, for example, changes in ICT systems.

Failure of an AusCheck staff member to comply with the Guidelines may constitute a criminal offence under section 15 of the *AusCheck Act 2007*. The Attorney-General’s Department considers that this is a significant legislative incentive to comply with the Guidelines, and ensures that the safeguards on information held by AusCheck are robust and

permanent. Information provided by AusCheck to other agencies will also be protected by these agencies' own privacy or secrecy obligations.

AusCheck is required under the Guidelines to publicly report disclosures of personal information from the AusCheck database to recognised Commonwealth authorities and accredited agencies, in the Attorney-General's Department Annual Report. This includes the names of the authorities or agencies to which information was provided and the purposes, frequency and method of provision of access to personal information.

AusCheck's privacy notice and Guidelines will be updated to clarify the agencies and purposes for which an individual's personal information may be provided. The privacy notice is provided to all individuals who are background checked through AusCheck and is published on the AusCheck website.



# Tim Watts MP

FEDERAL LABOR MEMBER FOR GELLIBRAND



11 December 2015

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

Dear Senator Polley,

## **Criminal Code Amendment (Private Sexual Material) Bill 2015**

Thank you for your letter dated 12 November 2015 regarding the Criminal Code Amendment (Private Sexual Material) Bill 2015. I understand that the Committee is concerned that proposed section 474.24H may be considered to trespass unduly on personal rights and liberties because it introduces a number of defences that place an evidential burden on the defendant.

The defences proposed in section 474.24H mirror the defences in the Criminal Code for offences relating to 'child pornography material' and 'child abuse material', along with the addition of a new defence for 'media activities' in proposed subsection 474.24H(3). It would lead to inconsistent results if an evidential burden were placed on the defendant for the other identical defences in the Criminal Code, but not for the defences for the proposed new offences in the bill.

Reversing the onus of proof may be justified where it is particularly difficult for a prosecution to meet a legal burden. It may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. In regard to the defence for 'media activities' in proposed subsection 474.24H(3), the reversal is justified because the defence goes to why the defendant engaged in the conduct (paragraph (3)(a)), the intention of the defendant (paragraph (3)(b)) and the reasonable belief of the defendant (paragraph (3)(c)), all of which are peculiarly within the knowledge of the defendant.

The seriousness of a crime may justify placing a legal burden of proof on the accused. In regard to the other defences in proposed section 474.24H, the seriousness of the offending conduct means that the defendant should not even consider engaging in the conduct in reliance on the defence unless they can point to evidence suggesting that defence applies.

Thank you again for taking the time to inform me of your concerns on this matter.

Yours sincerely,

**Tim Watts MP**  
**Federal Member for Gellibrand**



97 Geelong Road, Footscray VIC 3011  
Tel: 03 9687 7661 F: 03 9687 7151  
[www.timwatts.net.au](http://www.timwatts.net.au)

 [www.facebook.com/timwattsmg](http://www.facebook.com/timwattsmg)  
 @timwattsmg





ATTORNEY-GENERAL

CANBERRA

MC15-009955

Ms Toni Dawes  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

08 DEC 2015

Dear Ms Dawes

Thank you for the opportunity to respond to the comments about the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 made by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest 14 of 2015, which was released on 2 December 2015.

I also thank the committee for pointing out the errors in the Explanatory Memorandum, and will provide Parliament with the relevant corrections at the next available opportunity.

I will deal with each of the issues raised by the committee in turn below.

**Retrospective application**

**Schedule 1, item 5, application of amendments of section 90E**

**Schedule 1, item 22, application of amendments of section 90UH**

The Committee has requested my advice in relation to the retrospective application of these amendments, particularly in relation to the extent to which the retrospective application may cause detriment to a party to an existing financial agreement.

It would be unlikely that the retrospective application of the amendments could negatively affect parties to existing financial agreements which have been made in good faith. The amendments of sections 90E and 90UH are intended to ensure that, where parties to an existing financial agreement have either not specified an amount of maintenance, or have specified a nil amount, this will not result in that provision of the agreement being void. The retrospective application of these amendments is appropriate as they are intended to cure unintended technical non-compliance in existing financial agreements.

One of the requirements for an existing financial agreement to be valid is that each party must have received a signed statement from a legal practitioner that the practitioner provided the party with independent legal advice as to certain matters. Given this requirement, there is limited potential for the retrospective application of these amendments to cause detriment to, or have unforeseen consequences for, parties who have entered into a financial agreement in good faith.

Any potential for parties to be disadvantaged is further mitigated by the ability of the court to set aside a financial agreement in certain circumstances (as provided for in sections 90K and 90UM). In particular, existing paragraphs 90K(1)(d) and 90UM(1)(g) will continue to apply to agreements made prior to commencement. These paragraphs provide that a court may set aside a financial agreement if satisfied that, since the making of the agreement a material change of circumstances has occurred (relating to the care, welfare and development of a child of the marriage/relationship) and, as a result of that change, the child or a party to the agreement with caring responsibility for the child, will suffer hardship if the court does not set the agreement aside. The court may also set aside an agreement in cases of fraud (paragraphs 90K(1)(a) and 90UM(1)(a)) or unconscionable conduct (paragraphs 90K(1)(e) and 90UM(1)(h)).

As the retrospective nature of the amendments is unlikely to have a negative impact on agreements made in good faith, and any potential for parties to be disadvantaged is mitigated by the ability of the court to set aside an agreement in certain circumstances, I am of the view that the retrospective nature of the amendments is appropriate.

### **Retrospective effect or application**

#### **Schedule 1, item 6, replacement section 90G and new sections 90GA and 90GB**

#### **Schedule 1, item 23, replacement section 90UJ and new sections 90UJA and 90UJB**

The Committee has requested my advice as to whether any of the proposed amendments may be considered to make changes that have retrospective effect or application. In particular, the Committee has drawn my attention to new subsection 90GA(5), and the potential detriment it could cause to a party to an existing financial agreement.

New sections 90GB, 90UJB and subsections 90GA(5) and 90UJA(5) are intended to apply to the courts' future consideration (after the proposed amendments take effect) of any financial agreement.

The amendments include a number of protections to reduce the possibility of a party suffering detriment as a result of a financial agreement. Under proposed subsections 90GA(2) and 90UJA(2), in all cases, regardless of the time period covered by the relevant agreement, there is a requirement for each spouse party to be provided with a signed statement from a legal practitioner that the practitioner provided the party with independent legal advice as to certain matters.

In addition, parties can seek to have a financial agreement set aside in circumstances set out in subsections 90K(1) and 90UM(1), including where it is alleged that the agreement is void, voidable or unenforceable; for example, because of duress (paragraphs 90K(1)(b) and 90UM(1)(e)), as well as where fraud or unconscionable conduct are alleged (paragraphs 90K(1)(a) and (e), and 90UM(1)(a) and (h)). As set out above in relation to items 5 and 22, parties may also argue hardship in specified circumstances.

### **Retrospective application**

#### **Schedule 2, item 9, application of amendments relating to offers of settlement**

The Committee has requested my advice as to whether it is possible that a party may suffer detriment due to the application of the proposed amendments to offers of settlement made before commencement.

It would be very unlikely for a party to suffer detriment as a result of this amendment.

Current section 117C requires that, in certain proceedings, the fact that an offer (made in accordance with any applicable Rules of Court) has been made, and the terms of the offer,



must not be disclosed to the court, except for the purposes of the consideration by the court of whether it should make an order as to costs under subsection 117(2) and the terms of any such order. Existing subsection 117C(3) provides that a judge of the court is not disqualified from sitting in proceedings only because the fact that an offer has been made is, contrary to subsection 117(2), disclosed to the court.

Under the amendments proposed in the Bill, there would no longer be a prohibition on disclosing to the court the fact that an offer has been made. Subsection 117C(3) would be repealed as it would no longer have any practical effect.

It is very unlikely that parties would suffer any detriment as a result of the retrospective application of this amendment. While it would no longer be prohibited to disclose to the court that an offer of settlement has been made, this disclosure is already made (and will continue to be made) in the context of the court's consideration of costs. Importantly, the prohibition on disclosing the terms of the offer to the court is not amended by the Bill and would continue to apply in all cases. I consider that this strikes the appropriate balance between encouraging parties to negotiate and reach early settlement of matters on terms that are satisfactory to both parties, and the ability of the court to supervise matters.

Further, given that under the existing law, disclosing the existence of an offer to the court does not disqualify the judge from sitting, there is unlikely to be any practical effect on existing cases by removing that requirement in its entirety.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)





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

Ref No: MC15-019578

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

Dear Senator Polley

I refer to the correspondence of 12 November 2015 from the Senate Standing Committee for the Scrutiny of Bills for further actions in relation to the Health Legislation Amendment (eHealth) Bill 2015, as identified in the Committee's Twelfth Report of 2015 (11 November 2015).

The Committee requested that additional information be included in the explanatory memorandum to the Bill regarding evidential onus, the incorporation of written instruments as they exist from time to time, and the use of delegated legislation to make the My Health Record system operate on an opt-out basis nationally. The Committee also sought my advice as to whether amendments could be made to the Bill in relation to a 'Henry VIII clause' in the Bill.

The Bill was passed by Parliament on 12 November 2015 so it is not possible to amend the explanatory memorandum or the Bill. However, my Department will endeavour to incorporate the additional information I provided to the Committee on 2 November 2015 into other material that is provided to stakeholders or is published on the eHealth website at [www.ehealth.gov.au](http://www.ehealth.gov.au).

In respect of the proposed amendment to apply a time limit to any legislative instrument made in reliance of the 'Henry VIII clause' that would have the effect of overriding the primary legislation, if such an instrument is made I assure you it will be for transitional purposes only. Once the transition to the Australian Digital Health Agency (previously referred to as the Australian Commission for eHealth) is complete, I would propose to remove the power to make such an instrument at the next opportunity.

Thank you for the opportunity to respond to the Committee's report.

Yours sincerely





THE HON DR PETER HENDY MP  
ASSISTANT MINISTER FOR PRODUCTIVITY

Reference: C15/130635

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

  
Dear Senator Polley

Thank you for the letter of 26 November 2015 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Omnibus Repeal Day (Spring 2015) Bill 2015 (the Bill). I welcome the opportunity to address the Committee's questions on the Bill as presented in the Alert Digest No. 13 of 2015.

***Parliamentary Scrutiny – Guidelines for Omnibus Repeal Day Bills***

Omnibus Repeal Day Bills are designed to bring forward non-contentious repeals or amendments to legislation that are low in complexity and are generally considered to be too small to warrant separate stand-alone bills. As Bill coordinator, the Department of the Prime Minister and Cabinet takes advice from the Office of Parliamentary Counsel, and other portfolios, on the appropriateness of measures for inclusion in an Omnibus Repeal Day Bill.

There are no current plans for the Government to develop guidelines in relation to what may be included (or should be excluded) from Omnibus Bills. This provides a necessary degree of flexibility that encourages portfolios to tender small changes and other such house-keeping measures that may otherwise go unaddressed if not included in an Omnibus Bill.

***Parliamentary Scrutiny – Amendment to the Explanatory Memorandum***

The inclusion of non-contentious measures from the Omnibus Repeal Day (Spring 2014) Bill 2014 was considered appropriate in order to expedite the implementation of those measures. I intend to table an Addendum to the Explanatory Memorandum in the Autumn 2016 sitting to clearly identify those replicated measures.

### ***Concerns regarding Schedule 3 (Communications and the Arts)***

I thank the Committee for its views on the proposed repeal of provisions in Communications and the Arts portfolio legislation requiring rule makers to consult before making certain legislative instruments. The proposed repeals in Part 2 of Schedule 3 to the Bill form part of a broader reform of statutory consultation requirements in the portfolio, as there is currently a variety of inconsistent approaches to both duration and type of statutory consultations.

Relying on the standardised consultation requirements already provided for in Section 17 of the *Legislative Instruments Act 2003* (the LI Act) will reduce the complexity and inflexibility of current arrangements, providing stakeholders with certainty and consistency, and allow rule-makers to undertake appropriate consultations that are, for practical purposes, the same.

Moreover, while the Committee has decided to leave consideration of the appropriateness of the proposed amendments to the Senate as a whole, it is worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be detailed in the associated explanatory statement and, accordingly, if the Parliament was dissatisfied with the level of consultation undertaken, the instrument could be disallowed.

### ***Concerns regarding Schedule 12 (Social Services)***

I thank the Committee for its views on the proposed amendment to the *Social Security (Administration) Act 1999* to allow for the further use of protected information. While the Committee has decided to leave consideration of the appropriateness of the proposed amendment to the Senate as a whole, it is worth noting that any further use of protected information will only be permissible for a purpose or purposes consistent with the initial disclosure, thus ensuring continuing compliance with the applicable provisions in the *Privacy Act 1988*.

I hope the Committee finds the information contained herein to be of use.

Yours sincerely

DR PETER HENDY

11 / 1 / 2016