Senate Standing Committee for the Scrutiny of Bills

No. 13 of 2001

20 September 2001

Senate Standing Committee

for the

Scrutiny of Bills

Alert Digest No. 13 of 2001

20 September 2001

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

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, 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

TABLE OF CONTENTS

- Border Protection (Validation and Enforcement Powers) Bill 2001 5
- Migration Amendment (Excision from Migration Zone) Bill 2001 9
- Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001 12
- Migration Legislation Amendment Bill (No. 6) 2001 14

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Border Protection (Validation and Enforcement Powers) Bill 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to validate certain actions taken in relation to vessels carrying persons reasonably believed to be intending to enter Australia unlawfully. These provisions:

- apply to any action taken by the Commonwealth or others in relation to particular vessels in the period commencing on 27 August 2001 and ending on the day on which the bill commences;
- specify that any such action was lawful when it occurred; and
- provide that no proceedings against the Commonwealth or others may be instituted or continued in any court in respect of these actions.

In addition, Schedules 1 and 2 to the bill amend the *Customs Act 1901* and the *Migration Act 1958* to clarify the operation of certain existing powers in those Acts, and to provide additional powers in relation to vessels which are carrying persons who are believed to be attempting to enter Australia unlawfully.

Schedule 2 also proposes to amend the *Migration Act 1958* to provide for mandatory minimum penalties in relation to people smuggling offences.

Retrospective validation of 'any action'
Part 2

Part 2 of this bill deems <u>all actions</u> to have been lawful when they occurred, and provides that no civil or criminal proceedings may be instituted or continued against the Commonwealth, or a Commonwealth officer, or any other person who acted on behalf of the Commonwealth in respect of those actions.

Relevant actions are defined as <u>any action</u> taken during the validation period by the Commonwealth, or a Commonwealth officer, or by any other person,

acting on behalf of the Commonwealth, in relation to the *MV Tampa*, or the *Aceng*, or any other vessel carrying persons reasonably believed to be intending to enter Australia unlawfully, or any person on board any such vessel. Vessel is defined as having the same meaning as in the Migration Act, (where it includes an aircraft or an installation)

Clause 4 of the bill specifies the validation period as the period from 27 August 2001 until the date on which the bill commences (ie receives Royal Assent).

Clause 8 provides that compensation is payable for any acquisition of property under this Part.

These provisions raise a number of issues. First, they seek to validate actions retrospectively from 27 August. Secondly, they seek to validate <u>any action</u> in relation to two specified vessels, and in relation to any other unspecified vessel carrying persons reasonably believed to be intending to enter Australia unlawfully for an undefined period.

The Committee is usually concerned by provisions which retrospectively validate actions, particularly when they are expressed in such wide terms. The Committee, therefore, **seeks the Minister's advice** as to:

- whether these provisions have the effect of making lawful acts which are currently unlawful, or which would be unlawful if they occurred in Australia;
- why the validation is expressed so widely, and whether it would operate to validate <u>all</u> actions by an officer during the relevant period (including, for example, an action which caused the death of, or serious injury to, a person detained on a vessel);
- whether the actions which are retrospectively validated must have complied with guidelines as to conduct or other internal regulatory procedures, and what remedies would be available to a person where, for example, a Commonwealth official took action which was 'improper' but which was validated by the bill; and
- whether the phrase 'an intention to enter Australia' refers to Australian land or Australian territorial waters.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Detention and search of persons
Schedule 1, items 3 and 4; Schedule 2 items 8 and 9

Items 3 and 4 of Schedule 1 to this bill propose to insert certain provisions in the Customs Act. Items 8 and 9 of Schedule 2 propose to insert similar provisions in the Migration Act. In general terms, these provisions:

- prohibit the institution of proceedings for restraints on the liberty of persons where those persons are on board a detained ship or aircraft;
- empower officers to detain persons found on ships or aircraft and either bring them to the migration zone or to a place outside Australia;
- empower officers, without warrant, to search a detained person's clothing or property for weapons or items which might assist in an escape; and
- empower officers to use reasonable force to return a detained person to a ship.

These provisions raise a number of issues within the Committee's terms of reference. The Committee **seeks the Minister's advice** as to:

- why it is thought necessary to prohibit the institution of proceedings in relation to (presumably otherwise unlawful) detention;
- whether the powers to detain and search are to be carried out on the high seas or in Australia's territorial waters;
- why, given the availability of telephone warrants, it is appropriate that searches of detainees be conducted without warrant;
- whether this bill is seen as dealing with 'extraordinary circumstances' or a situation of emergency, and why these powers are not subject to a sunset clause.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Mandatory minimum sentences
Proposed new section 233C

Item 5 of Schedule 2 to this bill proposes to insert a new section 233C in the *Migration Act 1958*. This new provision will impose mandatory minimum sentences for various offences under that Act. In general, mandatory sentences limit the usual judicial discretion exercised when determining a proper sentence given all the circumstances of a particular offence.

The Committee **seeks the Minister's advice** as to why it is appropriate to give the Executive control by limiting judicial discretion in these circumstances.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Migration Amendment (Excision from Migration Zone) Bill 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to excise certain places from the migration zone in relation to those who arrive in those places unlawfully. These places referred to are:

- the Territory of Christmas Island (from 2pm on 8 September 2001);
- the Territory of Ashmore and Cartier Islands (from 2pm on 8 September 2001);
- the Territory of Cocos (Keeling) islands (from 12 noon on 17 September 2001);
- any other prescribed external Territory (from the time the relevant regulations commence);
- any prescribed island that forms part of a State or Territory (from the time the relevant regulations commence); and
- an Australian sea or resources installation (from the commencement of the bill).

The bill also proposes to amend the *Migration Act 1958* to prevent non-citizens who enter Australia at one of the specified places or installations after the relevant 'excision time' without a visa from making a valid visa application unless the Minister determines that such a person should be able to make such an application in the public interest.

Retrospective operation
Schedule 1, item 2

Item 2 of Schedule 1 to this bill specifies dates and times for the 'excision' of various offshore places from the Australian migration zone. Under this item, the Territories of Christmas Island and Ashmore and Cartier Islands are deemed to have been 'excised' from the migration zone from 2pm on

8 September 2001. The Territory of Cocos (Keeling) Islands is deemed to have been 'excised' from 12 noon on 17 September 2001.

The Explanatory Memorandum does not indicate why these dates and times have been chosen, nor whether any person will be disadvantaged by the retrospective operation of these provisions. The Committee **seeks the Minister's advice** as to these matters. The Committee also **seeks the Minister's advice** as to the head of power which authorises the excision of various parts of Australia from the migration zone.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Henry VIII clause
Schedule 1, item 1

Item 1 of Schedule 1 to this bill proposes to add a new definition of 'excised offshore place' in the *Migration Act 1958*. Paragraph (d) of this definition extends the meaning of this term to "any other external Territory that is prescribed by the regulations". Paragraph (e) of this definition extends the meaning of the term to "any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph".

These provisions authorise a statutory definition to be amended simply by the passing of a regulation. While such regulations would be subject to Parliamentary scrutiny and disallowance, they would nevertheless have full force and effect from the time they were made and, depending on the pattern of Parliamentary sittings, might not be scrutinised by the Parliament for a period of some months.

The Committee **seeks the Minister's advice** as to why it is appropriate that such a significant definition is able to be amended by regulation.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Wide discretion
Proposed new section 46A

Item 4 of Schedule 1 to the bill proposes to insert a new section 46A in the *Migration Act 1958*. This provision gives the Minister an apparently unfettered discretion to determine whether an application for a visa by an offshore entry person is a valid application. However, proposed subclause 46A(4) provides that any such determination must be reported to each House of the Parliament.

In these circumstances, the Committee makes no further comment on this provision.

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* and the *Migration Regulations 1994* to provide powers to deal with unauthorised arrivals who land in places or installations excised from the migration zone.

Schedule 1 to the bill:

- provides an officer with a discretionary power to detain, in certain circumstances, a non-citizen who is in, or is seeking to enter, a specified "excised offshore place";
- introduces a new power to take an "offshore entry person" from Australia to a declared country in certain circumstances, and clarify that this does not amount to immigration detention; and
- bars certain legal proceedings relating to the entry, status and detention of a non-citizen who entered Australia at a specified "excised offshore place" after the relevant "excision time" without a visa and the exercise of powers under new section 198A.

Schedule 2 amends the Migration Regulations to create a new class of visa, to be known as the Refugee and Humanitarian (Class XB) visa. The purpose of this new visa class is to provide for the grant of a temporary visa to:

- a non-citizen who entered Australia at an "excised offshore place" after the relevant "excision time" without a visa; and
- a non-citizen who is outside his or her home country and is not a non-citizen who entered Australia at an "excised offshore place" after the relevant "excision time" without a visa.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Bar on certain legal proceedings
Proposed new section 494AA

Item 7 of Schedule 1 to this bill proposes to insert a new section 494AA in the *Migration Act 1958*. This provision would prohibit the institution or continuance of any legal proceedings against the Commonwealth, or an officer of the Commonwealth, or anyone acting on behalf of the Commonwealth, which relate to offshore entry persons.

The Explanatory Memorandum states that this provision "is intended to ensure that court proceedings are not used by an 'offshore entry person' to frustrate the resolution of his or her immigration status, movement to a 'declared country' or to obtain desirable migration outcomes".

The Committee is concerned by provisions which remove access to the courts. The Committee, therefore, **seeks the Minister's advice** as to how court proceedings have been used by 'offshore entry persons' to frustrate the resolution of their immigration status.

> *Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

Migration Legislation Amendment Bill (No. 6) 2001

This bill was introduced into the House of Representatives on 28 August 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- clarify the application of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees in Australia; and
- promote integrity in protection visa application and decision-making processes.

The bill also contains application provisions.

Drawing inferences from a refusal to produce documents
Proposed new sections 91V and 91W

Proposed new subsections 91V(3) and (5) of the *Migration Act 1958*, to be inserted by item 5 of Schedule 1 to this bill, would permit the Minister to draw "any reasonable inference unfavourable to [a person's] credibility" if the person is asked to verify on oath or affirmation information which they have previously provided, and the person fails to do so.

Similarly, proposed new subsection 91W(2) permits the Minister to draw "any reasonable inference unfavourable to [a person's] identity [or] nationality" if the person is asked to provide documentary evidence thereof, and the person fails to do so.

Such provisions appear to limit a person's right to remain silent, and their right not to have unfavourable inferences drawn from the fact that they have said nothing. While the right to remain silent, in the context of a criminal trial, generally relates to the accused person's failure to provide any evidence of their actions or whereabouts, and has not been regarded as extending to the right either to refrain from verifying information already provided, or to refrain from providing documentary evidence of personal details such as one's

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

name or nationality, these provisions propose to extend this to what are non-criminal – essentially administrative – matters.

The Committee **seeks the Minister's advice** as to why it is appropriate that unfavourable inferences be drawn in administrative proceedings, and what the consequences of drawing those unfavourable inferences might be.

While these provisions are not strictly within the Committee's terms of reference, the Committee nevertheless draws Senators' attention to them.

Drafting note
Schedule 1, item 10

Item 10 of Schedule 1 to this bill consists solely of the heading to the item, with no substantive enacting words.

Other than this, the Committee has no comment on this provision.