SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2000

10 May 2000

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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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2000

The Committee presents its Sixth Report of 2000 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:

Family and Community Services Legislation Amendment Bill 2000

Jurisdiction of Courts Legislation Amendment Bill 2000

Pooled Development Funds Amendment Bill 1999

Telecommunications (Interception) Legislation Amendment Bill 2000

Family and Community Services Legislation Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 3 of 2000*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 3 April 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 3 of 2000

This bill was introduced into the House of Representatives on 9 March 2000 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the following four Acts:

Social Security Act 1991 to expand the definition of a "double orphan", and their eligibility to receive a double orphan pension, to include the situation where one parent is dead and the other is a long term remandee;

A New Tax System (Bonuses for Older Australians) Act 1999 to ensure that the disqualifying period for the self-funded retirees bonus ends on 30 June 2000; and

Social Security (Administration) Act 1999 and *Social Security (Administration and International Agreements) (Consequential Amendments) Act 1999* to correct minor inaccuracies.

Retrospective application
Subclause 2(2) and Schedule 1, item 7

By virtue of subclause 2(2) of this bill, the amendments proposed by Part 2 of Schedule 1 are to commence retrospectively on 1 July 1998. Additionally, by virtue of item 7 of Schedule 1, the amendments proposed by Part 3 of that Schedule – although commencing on 1 July 2000 – are to apply from 1 July 1998.

The Explanatory Memorandum accompanying the bill states that the amendments are beneficial to the recipients of double orphans benefit. As is its practice, the Committee makes no further comment where retrospectivity operates beneficially. However, the Explanatory Memorandum does not make clear why the date of 1 July 1998 has been chosen, beyond a somewhat cryptic reference to this as the date the problem "was first identified". The Committee, therefore, **would appreciate the Minister's advice** as to how the date of 1 July 1998 was chosen.

Given that the retrospective application of this bill is beneficial, the Committee makes no further comment on these provisions.

Relevant extract from the response from the Minister

Your Committee has sought my advice as to how the date of 1 July 1998 was chosen.

During 1998 representations were made to my office concerning the plight of a particular family which for reasons of privacy I will not identify by name. Both parents in the family had passed away, and care of the children was taken on by relatives of the family, who approached Centrelink for some assistance. Due to the application of the income test provisions, the assistance provided was substantially less than had been payable in respect of the children when they had been in the care of their natural parents.

This case brought to notice an instance of how the income test provisions might operate counter to public policy, in that it might provide a financial disincentive to take on the care of children in those circumstances.

On consideration of that, I gave instructions to my department to have legislation drafted to ensure that in those circumstances, the rate of assistance payable in respect of a double orphan should be no less than the rate that had been payable prior to the child becoming a double orphan, and that this beneficial provision should operate retrospectively to 1 July 1998 to cover the particular case I have described above.

I trust the above comments are of assistance to the Committee.

The Committee thanks the Minister for this response which clarifies the issue.

Jurisdiction of Courts Legislation Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 3 of 2000*, in which it made various comments. The Attorney-General responded to those comments in a letter dated 28 March 2000.

In its *Fifth Report of 2000*, the Committee thanked the Attorney-General for his response and noted that it would be concerned if the bill had any significant effect on the jurisdiction of the federal administrative law system. The Attorney-General has since provided a further response in a letter dated 13 April 2000.

A copy of the letter is attached to this report. An extract from the *Fifth Report of 2000* and relevant parts of the Attorney-General's further response are discussed below.

Extract from Fifth Report of 2000

This bill was introduced into the House of Representatives on 8 March 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend a number of Acts to:

- deal with some of the consequences of the High Court's decision in *Re Wakim; ex parte McNally* in relation to the inability of federal courts to exercise State jurisdiction;
- repeal provisions which purport to consent to the conferral of State jurisdiction on federal courts;
- confer federal jurisdiction on federal courts to review the decisions of Commonwealth officers and bodies made in performance of functions conferred on them by State and Territory law; and
- enable State and Territory Supreme Courts to exercise limited federal judicial review jurisdiction.

The bill also proposes to amend the *Administrative Decisions (Judicial Review) Act 1977,* the *Corporations Act 1989* and the *Judiciary Act 1903* to make provision with respect to the review of decisions in the criminal justice process to restrict access by defendants in criminal matters to administrative law remedies.

Reducing the review rights of defendants
Schedule 2

Schedule 2 to this bill proposes a series of amendments relating to the review of administrative decisions made in the criminal justice process. Specifically, this Schedule proposes to amend a number of Acts to remove the right of defendants to access federal administrative law procedures and remedies. For example, defendants will no longer be able to use the *Administrative Decisions (Judicial Review) Act 1977* to challenge decisions to prosecute, or other decisions taken in the criminal justice process at any time after a prosecution has commenced, or when an appeal is on foot. Neither will defendants in State and Territory courts be able to use section 39B of the *Judiciary Act 1903* to bring an application in the Federal Court to review decisions of Commonwealth officers made in the prosecution process.

The Minister's Second Reading Speech states that the object of the bill is "to avoid the use of unmeritorious delaying tactics in the criminal justice process". While the bill may have this effect, it will also affect "meritorious" claims for review, and therefore the rights of defendants.

The Committee is concerned at such a significant reduction in the rights currently available to defendants, and **seeks the Attorney-General's advice** as to why such action is appropriate; how the action proposed in the bill is proportionate to the mischief it is aimed at; and whether an alternative approach should be adopted involving the imposition of time-limits on applications for review.

Pending the Attorney'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, and 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.

Relevant extract from the response from the Attorney-General dated 28 March 2000

I refer to your letter of 16 March 2000 regarding the Jurisdiction of Courts Legislation Amendment Bill, and the apparent reduction in the rights currently available to defendants in criminal matters. You have sought my views on why such action is appropriate, how the proposed action is proportionate to the mischief at which it is aimed, and whether an alternative approach should be adopted involving the imposition of time-limits on applications for review.

Schedule 2 of the Jurisdiction of Courts Legislation Amendment Bill addresses the divided jurisdiction in criminal proceedings, to prevent what is known as "collateral attack". This involves the bringing of applications for judicial review of decisions made in the criminal justice process in the Federal Court system. As you know, prosecutions for federal offences are conducted in State and Territory courts.

The tactic of bringing collateral proceedings in the Federal Court is frequently used in relation to white collar crime as a means of stalling a prosecution. The amendments will ensure that where a State or Territory court is hearing a criminal prosecution that arises under a Commonwealth law, the State or Territory courts will also be able to deal with any related administrative law challenge to decisions that were taken in the criminal justice process.

The main disadvantage of the existing law is that it provides the means to remove an action from the State or Territory court that is hearing the trial into the Federal Court system. That causes a loss of priority for the prosecutions in the State or Territory courts and substantially increases the duration and cost of proceedings.

It also allows the tactical use of delay by providing a separate three tiered appeal system which suspends the trial while issues are finally resolved. In addition to the direct costs of delay, there is also the consequence of loss of recall on the part of witnesses, and the possible unavailability of documentary evidence for investigators. These cannot be seen to be in the public interest.

You have suggested the imposition of time limits as a possible means of dealing with the problem of delay. Subject to judicial discretion, which, in fairness, I do not think should be removed, time limits already apply to applications for judicial review and the lodging of appeals. There are significant difficulties involved in attempting to limit the duration of trials, and it is virtually impossible to prevent delays due to adjournments, in the availability of hearing dates or the periods of waiting for the delivery of judgments. I do not believe that the imposition of time-limits on the management of proceedings in the Federal Court system would adequately address the issue of a defendant who sought to delay a criminal trial until a challenge (or sometimes sequential and multiple challenges) of criminal justice decisions and the appeals arising from those challenges had been dealt with.

Schedule 2 of the Bill removes the Federal Court's jurisdiction to review decisions about the criminal investigation or the criminal charge while any criminal proceedings remain on foot.

Defendants are not being denied judicial review remedies. Relevant decisions will still be subject to review by a court, either in the course of the criminal trial itself, when issues of the admissibility of improperly or unlawfully obtained evidence are being considered; or under the section 39B Judiciary Act jurisdiction which is being

conferred on State and Territory Supreme Courts by the Bill (amendments of the *Corporations Act 1989* proposed new section 51AA, and *Judiciary Act 1903* proposed new subsections 39B(1B) and (1C). That is a balanced outcome, and one which serves to streamline the criminal justice process.

The new system would place defendants in Commonwealth prosecutions in essentially the same position as their State counterparts. It would remove a means of attempting to defeat justice which is not open to State and Territory defendants, while preserving the safeguards against injustice required in a fair criminal justice system. I believe that the proposed amendments are proportionate to the forms of mischief they address, and streamline the procedures in a system where cost and delay currently present a major challenge to the administration of justice.

I trust that my explanation will satisfy your concerns on the issues you have raised.

The Committee thanks the Attorney-General for this considered response and notes that, under the bill, administrative law challenges to pre-trial decisions may still be heard by the court hearing the criminal prosecution. The Committee would be concerned if the bill had any significant effect on the jurisdiction of the federal administrative law system.

Relevant extract from the further response from the Attorney-General dated 13 April 2000

The Committee has asked me whether the proposals in the Bill were proportionate to the mischief in question and whether an alternative approach should be adopted involving the imposition of time limits on review.

My response, part of which was published in the Committee's Fifth Report of 2000, appears to have satisfied the Committee on those issues.

However, the 12 April Report suggests that the Committee has a residual concern that the JOCLA Bill may have a significant effect on the jurisdiction of the federal administrative law system.

The effect of Schedule 2 of that bill is to suspend the jurisdiction of the Federal Court in relation to decisions made in the criminal justice process for the period between the commencement of a prosecution and the final determination of any appeal(s) arising from it. Only jurisdiction in relation to a decision to prosecute will be removed. For that period, the relevant jurisdiction is vested in the State and Territory courts which deal with the prosecutions.

Before commencement of a prosecution and following its conclusion, including any appeals, the jurisdiction of the Federal Court remains available to determine any administrative law issues which the defendant may wish to have resolved.

That is the nature of the impact of Schedule 2 to the JOCLA Bill on the jurisdiction of the Federal court, and on the federal administrative law system.

The Federal Court of Australia has been provided with a copy of the bill and has expressed no concerns about its effect. The States and Territories have also been consulted and support the changes.

The Committee thanks the Attorney-General for this further response.

Pooled Development Funds Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No 1 of 2000*, in which it made various comments. The Minister for Industry, Science and Resources has responded to those comments in a letter dated 29 February 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2000

This bill was introduced into the House of Representatives on 8 December 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Pooled Development Funds Act 1992* to:

- extend the Pooled Development Funds (PDF) Program until 30 June 2003 and to review the Program before that date;
- make PDFs a more attractive proposition for Australian superannuation funds, overseas pension funds and other investors; and
- specify that, from 5 August 1999, lower tier investments by controlled investee companies must comply with statutory requirements.

Retrospective application
Schedule 1, subitem 27(5)

Item 15 of Schedule 1 to this bill proposes to insert a new section 28A in the *Pooled Development Funds Act 1992*. Proposed new section 28A specifies that the Act applies to investments made by a Pooled Development Fund (PDF) through controlled interposed entities as if the PDF had made the investments directly.

The Explanatory Memorandum observes that this change is necessary because "some PDFs had undertaken, or were considering, investments in businesses, through controlled eligible investee companies, which would not satisfy the Act's eligibility criteria if they were made directly by the PDF".

By virtue of subitem 27(5) of Schedule 1 to this bill, this amendment is to apply retrospectively from 4 August 1999. This raises two issues: whether the retrospective application of this provision will adversely affect any person, and why the date of 4 August 1999 was chosen.

With regard to adverse effect, the Regulation Impact Statement states that the amendment is expected to have a "negligible" impact on existing PDFs. Out of a total of 210 investees who had received funds from registered PDFs, only 2 businesses, invested in by one PDF, could be adversely affected by "the closing off of this loophole". In addition, the size of the investments by this PDF are "relatively small".

With regard to the date of effect, it seems open to inference that this was the date of a press release announcing the changes. The Explanatory Memorandum refers to 4 August 1999 as "the date of an announcement of the change". The Minister's Second Reading Speech refers to 5 August 1999 in similar terms. Given this general lack of certainty, the Committee **seeks the Minister's confirmation** that the date of 4 August 1999 represents the date of a press release announcing the proposed change.

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.

Relevant extract from the response from the Minister

> I welcome the opportunity to respond to the two issues the Committee has raised in the Digest, namely, whether the retrospective application of this provision will adversely affect any person and why the date of 4 August 1999 was chosen.
>
> First, section 28A is not retrospective as it applies only to new investments made from 5 August 1999, the day after the Government's media announcement detailing the change. Also, it will help deliver equitable treatment for the vast majority of PDFs that have not sought to abuse the Program.
>
> Second, the Government announced the change on 4 August 1999, as soon as possible after the decision had been made so as to limit the scope for abuse. The announcement was made in a joint media release by the Treasurer and myself entitled *Pooled Development Fund Program Tightened.* The Bill specifies that the change applies to investments made after 4 August 1999 (that is from 5 August 1999).

The Committee thanks the Minister for this response.

Telecommunications (Interception) Legislation Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 3 of 2000*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 27 April 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 3 of 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Attorney General. [Portfolio responsibility: Attorney General]

The bill proposes to amend the *Telecommunications (Interception) Act 1979* to:

- enable access to certain intercepted material by the Inspector of the Police Integrity Commission of New South Wales;
- provide for named person warrants;
- provide for foreign communication warrants;
- remove an obsolete requirement for the Australian Federal Police to execute certain warrants; and
- provide for disclosure of intercepted information in certain further proceedings.

The bill also proposes transitional provisions and makes technical and consequential amendments to the *Australian Security Intelligence Organisation Act 1979* and the *Telecommunications (Interception) Act 1979*.

On 13 March 2000, the Committee received a briefing on the provisions of the bill from officers of the Attorney-General's Department and the Australian Security Intelligence Organisation, and expresses its appreciation to those officers for that briefing.

Search and entry without judicial warrant
Proposed new subsections 9B(2) and 11D(1)

As noted above, Schedule 2 to this bill makes provision for the issue of named person warrants and foreign communications warrants. Proposed new section 9A authorises the Attorney-General to issue a telecommunications interception warrant in relation to a named person. Proposed subsection 9B(2) states that, where such a warrant authorises entry onto premises, the warrant may, if the Attorney-General thinks fit, provide that entry may be made without consent first being sought, and may authorise measures that the Attorney-General is satisfied are necessary for that purpose.

Among other things, proposed new subsection 11D(1) makes similar provision in relation to foreign intelligence warrants, and gives the Attorney-General similar powers.

Neither of these subsections provides for the issue of a warrant by an independent judicial officer. However, neither provision makes any change in the law, but merely re-enacts the effect of the current subsections 9(4) and 11A(3) of the principal Act.

At a briefing on the bill, the Committee was informed that the policy underlying this approach was that "the reasons for telecommunications interception under the ASIO Act are national security reasons, and those reasons properly reside with the Executive arm of government".

The Committee was also informed of various accountability arrangements which were said to minimise the potential for abuses in the issue of warrants. For example, with regard to ASIO, a case had first to be developed within the organisation and had to be signed off by the head of the organisation's Collection Division. The organisation's Legal Adviser had to be satisfied that the proposal was consistent with the law, and the Director-General of Security had to personally sign the request to the Attorney-General. The Attorney-General's Department had to certify that the request was consistent with the law, and the Attorney-General himself (or herself) had to personally approve the issue of the warrant. There were additional accountability requirements through the reports of the Inspector-General of Intelligence and Security.

A number of other accountability measures have previously been suggested to the Committee in similar circumstances. These include:

- providing that a warrant be returned to, or acquitted before, the court or person who issued it, together with information on its exercise;

- imposing a time-limit on the exercise of a warrant; and
- where a warrant is issued by a Minister or a Departmental officer, requiring the issuer to report (in general terms) on the number of occasions such warrants were issued in a year.

Accordingly, the Committee **seeks the Attorney-General's advice** on the applicability of such safeguards in the circumstances proposed by this bill.

On this issue, the Committee notes that it intends to report to the Senate on search and entry provisions in Commonwealth legislation, but proposes to make no further comment on these provisions at this time.

Relevant extract from the response from the Attorney-General

I understand the Committee is concerned about the provisions in the Bill authorising entry on premises in connection with ASIO interception activities and has sought advice on the possible application of three accountability measures which have been suggested to the Committee. These suggested measures are:

(a) providing that a warrant be returned to, or acquitted before, the court or the person who issued it, together with information on its exercise;

(b) imposing a time limit on the exercise of a warrant; and

(c) where a warrant is issued by a Minister or a departmental officer, requiring the issuer to report (in general terms) on the number of occasions such warrants were issued in a year.

In my view these accountability measures are largely provided for already.

Section 17 of the *Telecommunications (Interception) Act 1979* (the Act) obliges ASIO to report to the Attorney-General within three months of the expiry of a warrant, on the extent to which interception of communications under the warrant assisted ASIO in the performance of its functions. Similarly, a law enforcement agency obtaining an interception warrant must report to the Attorney-General (through the responsible State Minister in the case of State law enforcement agencies), within three months of expiry, certain stipulated information about the execution of that warrant. This requirement covers warrants authorising entry on premises. This requirement coupled with the auditing function of the Commonwealth and State Ombudsmen provides a high degree of accountability. I do not think that a requirement to report back to, or acquit a warrant before, the person issuing it would measurably enhance the accountability regime of the Act.

In relation to the second measure, it is not entirely clear from the Committee's letter what it meant by the imposition of a time limit on the execution of a warrant. If the Committee was concerned about the duration of warrants, the Act already limits them. Subsection 9(5) of the Act imposes a maximum period of six months on a

warrant issued to ASIO and subsection 49(3) provides for a maximum period of 90 days for warrants issued to law enforcement agencies. In both cases, warrants may be renewed for further periods up to the relevant prescribed maximum but the agency seeking renewal must re-argue the relevant criteria before the person issuing the warrant.

Alternatively, if the Committee had in mind a requirement that an interception warrant be executed within a specified period after being issued to an agency then the existing legislation and operational practice makes such a requirement unnecessary. I understand that interception warrants are executed by agencies as soon as conditions and resources allow and few, if any, are left unexecuted. If for some reason a warrant issued to a law enforcement agency cannot be executed at all then agencies will use the discretion in section 57 of the Act to revoke the warrant. If the reason for not executing the warrant immediately is that one or more of the grounds on which the warrant was originally issued no longer exist, then revocation is mandatory. There is a corresponding requirement for ASIO in section 13 of the Act.

The third measure recommends annual reporting on ministerial warrants authorising entry on premises. Such ministerial warrants authorising interception of communications are issued only to ASIO. Full details of warrants issued in a year are collected and reported to the Attorney-General as responsible Minister, to the Government in ASIO's classified annual report and to the Inspector-General of Intelligence and Security. However, for reasons of security, these details are not made public. Because the normal processes of public scrutiny are not possible, the Inspector-General of Intelligence and Security plays an important part in monitoring ASIO's compliance with the law, the propriety of its activities and its observance of human rights. Under his legislation, the Inspector-General has an enforceable right to full and unimpeded access to all ASIO's records to enable him to perform his statutory functions.

The Committee also drew to the attention of Senators, without further comment, the amendments to give the Inspector of the Police Integrity Commission access to intercepted material collected by other agencies. The Committee mentioned this as an example of legislative creep which is continually widening the scope of the Act.

It is true that this new statutory agency will have access to intercepted material, however, I do not agree that overall access, in a whole of government sense, is necessarily being widened. The function of investigating police corruption in New South Wales is not a new function nor is access to intercepted information for this purpose a departure from the existing policy of the Act. The policy of the Act is that intercepted information can be used for purposes connected with the investigation of police corruption. The Inspector's supervisory function is an integral part of the anti-corruption machinery in New South Wales. That function would be inhibited if the Inspector could not have access to the same information, including intercepted information, that the Police Integrity Commission itself had access to. In reality, the amendments simply reflect a change in administrative arrangements in New South Wales rather than an extension of the uses to which intercepted information may be put.

The Committee thanks the Attorney-General for this response.

Barney Cooney
Chairman

03 APR 2000

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04 APR 2000

Senate Standing C'ttee
for the Scrutiny of Bills

MINISTER FOR FAMILY AND COMMUNITY SERVICES
MINISTER ASSISTING THE PRIME MINISTER FOR THE STATUS OF WOMEN

Senator Barney Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in response to the Scrutiny of Bills Alert Digest No. 3 of 2000, dated 15 March 2000, which contained comments by your Committee on the *A New Tax System (Family Assistance and Related Measures) Bill 2000* and the *Family and Community Services Legislation Amendment Bill 2000.*

In relation to the *A New Tax System (Family Assistance and Related Measures) Bill 2000 (the Family Assistance Bill)* the Committee points out some confusion, arising from an editing error in the Explanatory Memorandum for the Bill, over which family assistance decisions are and are not reviewable. Advice is sought as to the reasons for excluding the decisions specified in new subsection 104(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* from the general scheme of internal and external review.

I hope that the following explanation sets right the confusion caused by this untoward error.

Certain decisions by approved child care services

Paragraphs (a) and (b) of new subsection 104(1) exclude from review the Secretary's determination of child care benefit entitlement in so far as it relates to certain decisions made by an approved child care service. This may be whether the determination of entitlement is made in relation to an individual or the service being eligible for child care benefit.

PARLIAMENT HOUSE
CANBERRA ACT 2600

The formal rate of child care benefit for sessions of care provided during an income year, in respect of an individual or a service eligible for child care benefit by fee reduction, is generally worked out after the end of the income year as part of the Secretary's determination of entitlement. However, the formal rate for certain sessions is set during the year, while an individual is conditionally eligible. These sessions are those in relation to which a special rate applies because the family is in hardship or the child is at risk of serious abuse or neglect, generally certified for an initial period by the service providing the care.

If a child is at risk and no individual is already conditionally eligible, then the service may make itself eligible for a period. This is purely for the purpose of providing child care, at a special rate of child care benefit, to help persuade the child's family to place the child into care and away from the at risk situation.

The formal certifications of rate by the service are applied by the Secretary in the eventual determination of the individual's or service's entitlement to be paid child care benefit for the income year.

New subparagraphs 104(1)(a)(i) and (b)(ii) exclude from review the elements of the Secretary's determination of entitlement that are based on certifications of rate made by the service during the income year on the basis of hardship or child at risk. New subparagraph 104(1)(b)(i) excludes from review the element based on the service's own decision to make itself eligible for the purpose of delivering such a rate in a child at risk case. These exclusions are consistent with the fact that the service's decisions themselves are not reviewable because, not being decisions of an "officer", they do not fall within the broad review power provided by new subsection 104(1).

Thus, the decisions of the service itself, and of the Secretary in so far as they are based on the service's decisions, are not reviewable. The reason for this is to protect the effectiveness of this important area of child care policy. If a family using an approved child care service is in hardship or a child is at risk, the service may authorise a higher level of child care benefit if it thinks that this will help the situation. If the service were to make such a decision and later have it overruled on review by the Secretary, for example, (including on review of the relevant elements of the Secretary's own determination of entitlement) the service would have a debt to repay. This insecurity would lead to services being unwilling to make such decisions and this, in turn, would prevent families or children in difficulty from receiving the extra help that the Government intends them to receive.

Any concerns that these discretions might be overused, or inappropriately used, by services are addressed by the presence of new section 80 of the *A New Tax System (Family Assistance) Act 1999*, under which the Secretary may remove a service's discretions if it has demonstrated a pattern of abusing the discretions.

Similarly excluded from review are certifications made by the service in relation to the weekly limit of hours that applies to a conditionally eligible individual, or to the service itself if it is eligible. The weekly limit of hours is the maximum number of hours for which child care benefit may be paid in a week. The service also has discretions in this area, in relation to a child at risk or 24 hour care, to allow child care benefit to be paid for a higher number of hours in the week than would otherwise be available.

The weekly limit of hours has a direct impact on the level of child care benefit paid and so is in the same category as the rate certifications mentioned above. Again, these are areas in which the service must be able to respond immediately to the needs of families and children in some difficulty, without fear of later owing a debt because of a review.

> The amount of fee reductions for a reporting period is calculated by the service. The Secretary makes an acquittal determination in reliance on the amount of fee reductions reported by the service. The amount of fee reductions the service gets after the advance has been acquitted is the amount the service reports. The level of the advance, which is only an interim amount, does not affect the amount of fee reductions the service gets.

Advances to approved child care services

Paragraph (c) of new subsection 104(1) excludes from review a decision by the Secretary under the provisions that relate to advances to approved child care services.

The advance payment provisions in new Part 8A, Division 2 provide an administrative system that supports the working of the new child care benefit system as far as it relates to payment of child care benefit by fee reductions. The advance provisions are separate to child care benefit entitlement provisions.

Individuals who are determined to be conditionally eligible for child care benefit by fee reduction for care provided by an approved child care service are entitled to have their child care fees reduced each time the fees are charged. The fees are reduced in anticipation of a determination of entitlement setting out the rate and amount of child care benefit of a conditionally eligible individual. While the determination of entitlement is made by the Secretary after the end of each income year during which the individual was so eligible, the reduction of fees occurs throughout the income year.

New Part 8A, Division 1 requires an approved child care service to reduce fees that the service charges conditionally eligible individuals. To ensure that the reduction of fees does not affect the business operation of the service, the advance provisions in new Part 8A, Division 2 allow the Secretary to fund the fee reductions the service makes so that the service effectively receives 100% of its fee (partly through the reduced fees paid by the individuals and partly through the funding). It is done via the 2-stage process, that is, payment of an advance amount to an approved child care service for a reporting period (eg a calendar quarter) and the acquittal of the advance amount (under new sections 219Q and 219S) after that period. The result of the process is that the amount the service eventually gets under the advance provisions is equal to the amount of fee reductions made by the service during the period.

Given that the amount of the advance is an interim amount, it would not be appropriate to provide formal review procedure relating to the determination of advances. The advance provisions are designed to operate in a way that provides funds to services at the level they need to cover the services' ongoing fee reduction expenses. The Secretary's discretion in deciding the level of advances allows the Secretary to set the amount of money being advanced to the service at the level the service is expected to need (as a matter of administration the amount required by the service is consulted with the service). The amount the service receives as a result of the operation of the provisions in new Part 8A, Division 2 is simply the reimbursement of services' fee reductions expenses. Any discrepancy between the amount of fee reductions made by the service and the amount the service receives as an advance amount is simply adjusted at the payment of the subsequent advance.
As such, a review mechanism for decisions concerning advances is not necessary.

I turn now to the Committee's comments on the on the *Family and Community Services Legislation Amendment Bill 2000*, and in particular, that certain of the provisions contained in the Bill relating to double orphans have retrospective effect to 1 July 1998.

Your Committee has sought my advice as to how the date of 1 July 1998 was chosen.

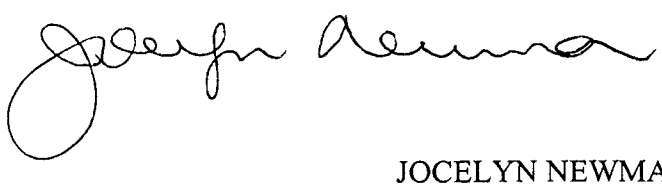
During 1998 representations were made to my office concerning the plight of a particular family which for reasons of privacy I will not identify by name. Both parents in the family had passed away, and care of the children was taken on by relatives of the family, who approached Centrelink for some assistance. Due to the application of the income test provisions, the assistance provided was substantially less than had been payable in respect of the children when they had been in the care of their natural parents.

This case brought to notice an instance of how the income test provisions might operate counter to public policy, in that it might provide a financial disincentive to take on the care of children in those circumstances.

On consideration of that, I gave instructions to my department to have legislation drafted to ensure that in those circumstances, the rate of assistance payable in respect of a double orphan should be no less than the rate that had been payable prior to the child becoming a double orphan, and that this beneficial provision should operate retrospectively to 1 July 1998 to cover the particular case I have described above.

I trust the above comments are of assistance to the Committee.

Yours sincerely



JOCELYN NEWMAN

The Hon Daryl Williams AM QC MP

Attorney-General

13 April 2000

CRL00/1903

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13 APR 2000
Senate Standing C'ttee
for the Scrutiny of Bills

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your Secretary's letter of 13 April 2000 drawing my attention to the Committee's report of 12 April 2000 on the Jurisdiction of Courts Legislation Amendment Bill 2000 (the JOCLA Bill).

Your Secretary advised that the Committee had discussed my response of 28 March 2000 to its comments on the JOCLA Bill in *Alert Digest NO 3 of 2000.* The Committee had asked me whether the proposals in the Bill were proportionate to the mischief in question and whether an alternative approach should be adopted involving the imposition of time limits on review.

My response, part of which was published in the Committee's Fifth Report of 2000, appears to have satisfied the Committee on those issues.

However, the 12 April Report suggests that the Committee has a residual concern that the JOCLA Bill may have a significant effect on the jurisdiction of the federal administrative law system.

The effect of Schedule 2 of that bill is to suspend the jurisdiction of the Federal Court in relation to decisions made in the criminal justice process for the period between the commencement of a prosecution and the final determination of any appeal(s) arising from it. Only jurisdiction in relation to a decision to prosecute will be removed. For that period, the relevant jurisdiction is vested in the State and Territory courts which deal with the prosecutions.

Before commencement of a prosecution and following its conclusion, including any appeals, the jurisdiction of the Federal Court remains available to determine any administrative law issues which the defendant may wish to have resolved.

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That is the nature of the impact of Schedule 2 to the JOCLA Bill on the jurisdiction of the Federal court, and on the federal administrative law system.

The Federal Court of Australia has been provided with a copy of the bill and has expressed no concerns about its effect. The States and Territories have also been consulted and support the changes.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

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2 MAR 2000
Senate Standing C'ttee
for the Scrutiny of Bills

SENATOR THE HON NICK MINCHIN

Minister for Industry, Science and Resources

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
SG 49, Parliament House
CANBERRA ACT 2600

29 FEB 2000

Dear Barney,

I refer to Mr James Warmenhoven's letter of 17 February 2000 concerning comments contained in the Scrutiny of Bills Alert Digest No.1 of 2000 on the Pooled Development Funds Amendment Bill 1999 (the Bill).

I welcome the opportunity to respond to the two issues the Committee has raised in the Digest, namely, whether the retrospective application of this provision will adversely affect any person and why the date of 4 August 1999 was chosen.

First, section 28A is not retrospective as it applies only to new investments made from 5 August 1999, the day after the Government's media announcement detailing the change. Also, it will help deliver equitable treatment for the vast majority of PDFs that have not sought to abuse the Program.

Second, the Government announced the change on 4 August 1999, as soon as possible after the decision had been made so as to limit the scope for abuse. The announcement was made in a joint media release by the Treasurer and myself entitled *Pooled Development Fund Program Tightened.* The Bill specifies that the change applies to investments made after 4 August 1999 (that is from 5 August 1999).

I have forwarded a hard and disc copy of this letter to Mr Warmenhoven as requested.

Yours sincerely

Nick Minchin
Enc

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27 APR 2000

Senate Standing C'ttee
for the Scrutiny of Bills

The Hon Daryl Williams AM QC MP

Attorney-General

00/1562 ISL

27 APR 2000

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 16 March 2000 from Mr James Warmenhoven to my Office drawing my attention to comments about the Telecommunications (Interception) Legislation Bill 2000 (the Bill) which the Committee made in Alert Digest No 3 of 2000.

I understand the Committee is concerned about the provisions in the Bill authorising entry on premises in connection with ASIO interception activities and has sought advice on the possible application of three accountability measures which have been suggested to the Committee. These suggested measures are:

(a) providing that a warrant be returned to, or acquitted before, the court or the person who issued it, together with information on its exercise;

(b) imposing a time limit on the exercise of a warrant; and

(c) where a warrant is issued by a Minister or a departmental officer, requiring the issuer to report (in general terms) on the number of occasions such warrants were issued in a year.

In my view these accountability measures are largely provided for already.

Section 17 of the *Telecommunications (Interception) Act 1979* (the Act) obliges ASIO to report to the Attorney-General within three months of the expiry of a warrant, on the extent to which interception of communications under the warrant assisted ASIO in the performance of its functions. Similarly, a law enforcement agency obtaining an interception warrant must report to the Attorney-General (through the responsible State Minister in the case of State law enforcement agencies), within three months of expiry, certain stipulated information about the execution of that warrant This requirement covers warrants authorising entry on premises. This requirement coupled with the auditing function of the Commonwealth and State Ombudsmen provides a high degree of accountability. I do not think that a requirement to report back to, or acquit a warrant before, the person issuing it would measurably enhance the accountability regime of the Act.

In relation to the second measure, it is not entirely clear from the Committee's letter what it meant by the imposition of a time limit on the execution of a warrant. If the Committee was concerned about the duration of warrants, the Act already limits them. Subsection 9(5) of the Act imposes a maximum period of six months on a warrant issued to ASIO and subsection 49(3) provides for a maximum period of 90 days for warrants issued to law enforcement

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agencies. In both cases, warrants may be renewed for further periods up to the relevant prescribed maximum but the agency seeking renewal must re-argue the relevant criteria before the person issuing the warrant.

Alternatively, if the Committee had in mind a requirement that an interception warrant be executed within a specified period after being issued to an agency then the existing legislation and operational practice makes such a requirement unnecessary. I understand that interception warrants are executed by agencies as soon as conditions and resources allow and few, if any, are left unexecuted. If for some reason a warrant issued to a law enforcement agency cannot be executed at all then agencies will use the discretion in section 57 of the Act to revoke the warrant. If the reason for not executing the warrant immediately is that one or more of the grounds on which the warrant was originally issued no longer exist, then revocation is mandatory. There is a corresponding requirement for ASIO in section 13 of the Act.

The third measure recommends annual reporting on ministerial warrants authorising entry on premises. Such ministerial warrants authorising interception of communications are issued only to ASIO. Full details of warrants issued in a year are collected and reported to the Attorney-General as responsible Minister, to the Government in ASIO's classified annual report and to the Inspector-General of Intelligence and Security. However, for reasons of security, these details are not made public. Because the normal processes of public scrutiny are not possible, the Inspector-General of Intelligence and Security plays an important part in monitoring ASIO's compliance with the law, the propriety of its activities and its observance of human rights. Under his legislation, the Inspector-General has an enforceable right to full and unimpeded access to all ASIO's records to enable him to perform his statutory functions.

The Committee also drew to the attention of Senators, without further comment, the amendments to give the Inspector of the Police Integrity Commission access to intercepted material collected by other agencies. The Committee mentioned this as an example of legislative creep which is continually widening the scope of the Act.

It is true that this new statutory agency will have access to intercepted material, however, I do not agree that overall access, in a whole of government sense, is necessarily being widened. The function of investigating police corruption in New South Wales is not a new function nor is access to intercepted information for this purpose a departure from the existing policy of the Act. The policy of the Act is that intercepted information can be used for purposes connected with the investigation of police corruption. The Inspector's supervisory function is an integral part of the anti-corruption machinery in New South Wales. That function would be inhibited if the Inspector could not have access to the same information, including intercepted information, that the Police Integrity Commission itself had access to. In reality, the amendments simply reflect a change in administrative arrangements in New South Wales rather than an extension of the uses to which intercepted information may be put.

Yours sincerely

Daryl Williams

DARYL WILLIAMS