SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

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

THIRTEENTH REPORT OF 2000

The Committee presents its Thirteenth 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:

Crimes Amendment (Forensic Procedures) Bill 2000

Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000

Interactive Gambling (Moratorium) Bill 2000

Protection of the Sea (Civil Liability) Amendment Bill 2000

Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 [No. 2]

Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies—Integrity of Means Testing) Bill 2000

Crimes Amendment (Forensic Procedures) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2000*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 26 September 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. 12 of 2000

This bill was introduced into the Senate on 30 August 2000 by the Special Minister of State. [Portfolio responsibility: Justice and Customs]

The bill is based on the February 2000 draft Model Forensic Procedures Bill developed by the Model Criminal Code Officers' Committee under the auspices of the Standing Committee of Attorneys-General.

Schedule 1 to the bill proposes to amend the *Crimes Act 1914* to:

- facilitate the establishment of the CrimTrac national DNA database system by enabling the taking of forensic material from any serious convicted offender still under sentence;
- provide safeguards in relation to the taking of forensic material from volunteers for use in criminal investigations and placement of DNA information on the national DNA database system;
- provide procedures for the matching and use of DNA information obtained from forensic material designed to ensure there is no misuse of that information;
- provide for adequate procedures for the making of orders by State and Territory judges, magistrates and other court officers in relation to criminal matters; and
- provide for appropriate interjurisdictional recognition of orders under both Part 1D of the *Crimes Act 1914* and equivalent State and Territory legislation.

Schedule 2 of the bill proposes amendments to the *Mutual Assistance in Criminal Matters Act 1987* to clarify that a foreign restraining order, whatever its terms, once registered in an Australian court, will take effect as if it were an order in the form of a restraining order made under domestic law.

Wide power of delegation
Proposed section 23YQ

Among other things, item 77 of Schedule 1 to this bill proposes to insert a new section 23YQ in the *Crimes Act 1914 (Cth)*. This section authorises the AFP Commissioner to delegate all or any of his or her functions and powers to a constable or staff member.

With regard to this provision, the Explanatory Memorandum observes that it is "important that the Commissioner can delegate functions to forensic experts, database technicians etc as the Commissioner is not able to perform all the functions contemplated under Part 1D by him or herself".

Clearly, some limitation on the power of delegation is contemplated by the Explanatory Memorandum, which refers to potential delegates possessing specific qualifications, technical expertise or functional ability. The Committee, therefore, **seeks the Minister's advice** as to why these appropriate limitations cannot be included in the bill itself.

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 insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

As the Minister responsible for the Bill, I am happy to provide an explanation of the approach taken with proposed section 23YQ referred to in the Digest.

Proposed section 23YQ allows the Commissioner of the Australian Federal Police ('AFP') to delegate his or her functions, conferred under Part 1D of the *Crimes Act 1914,* to a constable or staff member. The functions conferred under Part 1D are minimal. However, they concern the Commissioner's obligations with respect to retaining and destroying forensic information and material obtained via forensic procedures performed under the auspices of Part 1D.

The Commissioner cannot exercise these functions personally. I note that the comments in the Digest indicate that the Committee accepts that a power of delegation is appropriate in these circumstances but that it would prefer the power to be limited by reference to a delegate's level of expertise or functional ability.

The potential delegates must all be appointed as AFP employees under the *Australian Federal Police Act 1979,* and are therefore subject to the provisions of that Act, as well as the provisions of the *Australian Federal Police Regulations,* the *Australian Federal Police (Discipline) Regulations,* the *Complaints (Australian*

Federal Police) Act 1981, the *Complaints (Australian Federal Police) Regulations,* and the Commissioner's Order relating to Professional Standards.

An example of a function conferred on the Commissioner occurs in the context of volunteers. The Commissioner must agree with the volunteer (or a parent or guardian if the volunteer is a child or incapable person) on the period of time for which a DNA profile obtained from the volunteer's forensic material can be stored on the national DNA database system (proposed sections 23XWR and 23YDAG(4)). If this agreed period of time for retention expires or the volunteer withdraws consent to the retention of the forensic material or of information obtained from an analysis of that material, then, the volunteer's forensic material must be destroyed and any material which could be used to discover the identity of the volunteer must be removed from the national DNA database system (proposed sections 23XWT(2), 23YC(2) and 23YDAG). The destruction of forensic material or the removal of identifying information from the DNA database will most likely require liaison between AFP members, forensic science experts and database technicians, among others. Accordingly, the range of potential delegates, their attributes and qualifications will be varied. It is difficult to limit the class of potential delegates in these circumstances without making the Bill unnecessarily complex. In this regard, I note that the power of delegation conferred on the Commissioner by section 69C of the *Australian Federal Police Act 1979* and section 20 of the *Complaints (Australian Federal Police) Act 1981* are cast in similarly broad terms to proposed section 23YQ. Therefore, the Commissioner has an unrestricted ability to delegate powers integral to the administration and operations of the AFP. However, this power is subject to the AFP's existing accountability measures. There do not appear to be good reasons for restricting the Commissioner's power of delegation here in relation to less complex functions. In my view, the very sensitive functions of the AFP Commissioner suggest that the office will be held by someone capable of making appropriate delegations.

Further, the Bill contains a strong incentive for the Commissioner to exercise his or her powers of delegation very carefully. This is because the retention and destruction requirements are underpinned by offences with a maximum penalty of 2 years' imprisonment. Accordingly, the Commissioner will only delegate his or her functions to persons of high personal integrity and with appropriate qualifications.

Another example of a function conferred on the Commissioner is the retention of tape recordings that are no longer required for investigatory or evidentiary purposes. An instance where retention might be desirable is if a constable is subject to disciplinary proceedings due to improper conduct when interviewing a person for the purposes of carrying out a forensic procedure. An AFP member aware of the circumstances surrounding the interview, rather than the Commissioner, will be better placed to determine whether retention of the recording is justified in all the circumstances.

Therefore, the potential delegates will have significantly different roles in the AFP and will have different qualifications and levels of expertise.

In view of the considerations enumerated above I believe the approach taken in proposed section 23YQ is reasonable.

The Committee thanks the Minister for this response.

Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2000*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 29 September 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. 10 of 2000

This bill was introduced into the House of Representatives on 28 June 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Criminal Code Act 1995* to protect United Nations and associated personnel and enable Australia to ratify the Convention on the Safety of United Nations and Associated Personnel.

The Convention, which came into effect on 15 January 1999, represents a response to the increasing number of violent attacks against persons connected with United Nations operations. Passage of the bill will enable Australia to become a party to the Convention.

The bill adds a new Division 71 to the *Criminal Code* which makes the crimes set out in the Convention offences in Australian domestic law. The offences include murder, manslaughter, intentionally or recklessly causing harm or serious harm, unlawful sexual penetration, kidnapping, unlawful detention, intentionally causing damage to official premises or property, or threatening to commit any of these offences, where the victims are UN and associated personnel.

Strict liability offences
Proposed new subsections 71.2(2) to 71.11 (2)

As noted above, this bill proposes to insert a new Division 71 in the Commonwealth *Criminal Code*. This Division deals with offences against United Nations and associated personnel. Strict liability will apply to certain physical elements of these offences – in general terms, to whether the person offended against was a UN or associated person who was engaged in a UN operation other than an enforcement action.

The Explanatory Memorandum states that the effect of these provisions is that "there are no fault elements for those particular elements of the offence and therefore it is immaterial whether the offender knows that the other person is a UN or associated person or that the UN or associated person is engaged in a relevant UN operation".

While this clearly explains the effect of these subsections, it does not provide a reason for imposing strict criminal liability in these circumstances. It is unclear, for example, whether strict liability is demanded by the appropriate UN Convention.

Further, the bill creates offences for which very significant penalties (including imprisonment for life) may be imposed. It is unclear whether, as a result of this bill, offences against UN or associated personnel, which contain a measure of strict liability, will carry greater penalties than apply to equivalent offences against other people, which contain no elements of strict liability.

The Committee, therefore, **seeks the advice of the Attorney-General** as to the reasons for imposing strict criminal liability in these circumstances, and as to the comparative penalty levels for these strict liability offences when compared with equivalent offences against non-UN or associated personnel.

Pending the Attorney's advice, the Committee draws Senators' attention to these provisions, as they may be considered to trespass unduly upon 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 Attorney-General

The Bill proposes to insert offences into the Criminal Code dealing with attacks against UN and associated personnel in accordance with the obligations contained in the Convention on the Safety of United Nations and Associated Personnel. The Committee asks for advice on the reasons for applying strict liability to certain physical elements of those offences and on whether the offences would carry greater penalties than apply to offences against other people.

The proposed offences would not require the prosecution to prove that an offender knew that his or her victim is a UN or associated person or knew that the victim is engaged in a UN operation that is not a UN enforcement action. In addition, proposed section 71.11 applies strict liability to an element of that offence which requires that the property attacked is occupied or used by a UN or associated person.

Those elements deal with the circumstances in which the relevant conduct occurs. The reason for including the elements is that they are necessary to trigger Commonwealth jurisdiction which would be based on the external affairs power arising from Australia's participation in the above Convention. The elements in question do not add to the gravity of the offences. A principle of criminal

responsibility recognised under existing law, and preserved in the *Criminal Code, is* that the prosecution should not be required to prove awareness on the part of a defendant to an element of an offence which is prescribed only for jurisdictional reasons.

A person will face criminal liability because of his or her conduct eg., in harming or causing the death of another person. To require proof that the person was also aware that the victim was a UN or associated person connected with a particular form of UN operation would seriously and unnecessarily inhibit the capacity of prosecutors to use the new offences, particularly in relation to attacks against civilians supporting UN operations. This is because a person accused of murdering or seriously injuring a UN worker might be able to argue that he or she did not even think about the status of the victim or the victim's connection with a UN operation. Likewise, a person accused of a violent attack on the official premises, private accommodation or means of transportation of a UN worker which endangers the UN worker's life might claim that they gave no consideration to who owned the property. It would not be a just result if a person accused of committing a serious attack against a UN worker were to escape liability because of a technicality of this nature following proof of the other elements on an offence.

A similar approach is also taken in the Criminal Code Amendment (Theft Fraud Bribery and Related Offences) Bill 1999 which will insert various theft and fraud related offences into the Criminal Code. In certain of those offences knowledge that a Commonwealth entity is involved is an element of the offence in order to trigger Commonwealth jurisdiction. Similarly that element of the offence does not play any other role, for example in defining the gravity of the offence. In that instance the view was taken that it should be an absolute liability element of the offence. You may recall that the Committee queried this issue in Alert Digest No. 19 of 1999. The response by my colleague the Minister for Justice and Customs, Senator the Hon Amanda Vanstone, in her letter to the Committee dated 13 March 2000 indicates that the approach taken in that instance is being taken for similar reasons to those which I have outlined above.

The decision to apply strict liability rather than absolute liability to offence elements in the present Bill has been taken because of the different circumstances which apply to the UN operations. As the Convention and Bill are intended to protect only specified classes of persons present in explosive and uncertain situations, it would be unreasonable to deny a defence of mistake of fact to an accused person.

Finally, I confirm that the Bill does not seek to impose greater penalties than apply to equivalent offences committed against a non-UN or associated person. While the present law of individual States and Territories may vary, the penalties proposed in the Bill are consistent with the penalties for equivalent criminal offences of general application as recommended to the Commonwealth, States and Territories by the Model Criminal Code Officers Committee of the Standing Committee of Attorney-General's as part of the Model Criminal Code Project.

I thank the Committee for its examination of the Bill and hope my response provides the clarification requested.

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

Interactive Gambling (Moratorium) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2000*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 3 October 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. 11 of 2000

This bill was introduced into the Senate on 17 August 2000 by the Special Minister of State. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to impose a 12 month moratorium on the development of the interactive gambling industry in Australia, by creating a new criminal offence – the provision of an interactive gambling service. Under the bill, a person is prohibited from providing such a service unless the person was already providing the service when the moratorium commenced on 19 May 2000. As a 12 month moratorium has been imposed, the offence ceases to have effect at midnight on 18 May 2001.

Reversal of the onus of proof
Clause 11

As noted above, clause 10 of this bill creates an offence of intentionally providing an interactive gambling service. Clause 11 states that, in a prosecution for an offence against clause 10, it is a defence if the defendant proves that he or she provided such a service before 19 May 2000, and that service had at least one arm's length paying customer, and the current service is substantially the same as the pre 19 May service, and is provided under the same name as that service. A note to clause 11 states that the defendant bears a legal burden in relation to all the matters mentioned in that clause.

The Explanatory Memorandum states that this reversal of the onus of proof is necessary "because all the elements of the defence are matters that are peculiarly within the knowledge of the defendant", and that it "would be almost impossible for the prosecution to disprove the elements of the defence raised by the defendant, whereas it would be possible for the defendant to prove the elements on the balance of probabilities".

Current providers of interactive gambling services are licensed by State and Territory authorities. Given this, it should not be too difficult or expensive for the prosecution to prove that a person charged with an offence under clause 10 was not licensed, on 19 May 2000, to conduct a service of the same name and with substantially the same content as that being conducted by the defendant at the time he or she was charged. The Committee, therefore, **seeks the Minister's advice** as to the nature of the difficulties in requiring the prosecution to fulfil its usual duty and prove these elements of the offence.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly upon 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

The Committee has noted its concern on the reversal of the onus of proof in relation to the defence provided in clause 11 of the Bill. Clause 11 provides a defence to the offence of intentionally providing an interactive gambling service in clause 10. A defence is available if the defendant proves that:

a) they provided the service prior to 19 May 2000;
b) the current service is the same or substantially the same as the pre-19 May service;
c) the current service is provided under the same name as the pre-19 May service; and
d) the pre-19 May service had at least one arm's length paying customer.

The effect of clause 11 is that the defendant bears a legal burden in relation to the four elements of the defence. This requires the defendant to prove the existence of each element of the defence. This is a higher standard of proof than the normal evidential burden placed on the defendant. An evidential burden merely requires the defendant to point to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution then bears the burden of disproving the defence.

This higher standard of proof was placed on the defendant due to the difficulties for the prosecution to disprove the elements of the defence and the high costs that would

be associated with any investigation to disprove these elements. This is in contrast to the relative ease in which the defendant could prove the elements of the defence.

The Australian Federal Police (AFP) have advised that the particular difficulties that the prosecution would face in disproving the four elements of the defence are as follows:

a) defendant provided service prior to 19 May 2000

The only source of evidence available to the prosecution to prove that the service was not provided prior to 19 May 2000 would be the records held by the defendant or its Internet Service Provider (ISP). If these records have been lost or destroyed, it would be impossible for an investigator to gather evidence to disprove this element of the defence.

b) the current service is the same or substantially the same as the pre-19 May 2000 service

Disproving that the service is the same or substantially the same as the pre-19 May 2000 service could be extremely difficult as obtaining records of the pre-19 May 2000 service may be impossible due to the length of time that has elapsed, or if they have been destroyed. In this situation the AFP would have no way of comparing the current service to the pre-19 May service as it has no evidence of what services were provided prior to 19 May 2000.

c) the current service is provided under the same name as pre-19 May 2000 service

The same difficulties as above would apply to disproving this.

d) service had at least one arm's length customer prior to 19 May 2000

It may be difficult to gather evidence to disprove that the pre-19 May service had at least one arm's length customer if the records of the organisation or their ISP have been lost or destroyed. The only other source of evidence would be the organisation's accounting records that may not be sufficiently detailed to refute the existence of arm's length paying customers.

Proof that defendant was not licensed on 19 May 2000

The Committee suggests that it would not be too difficult or expensive for the prosecution to prove that a defendant was not licensed on 19 May 2000 to conduct a service of the same nature and with substantially the same content as being conducted by the defendant at the time she or he was charged. The AFP has confirmed this.

However, while this may be relevant to a separate offence of providing an interactive gambling service without a licence, it is not directly relevant to the offence in the Interactive Gambling (Moratorium) Bill 2000. The Bill prohibits a person from providing an interactive gambling service unless the person was already providing the service before 19 May 2000. The fact that a defendant was licensed to provide a service on 19 May 2000 does not conclusively prove that a defendant did in fact provide that service before 19 May 2000.

For example, a defendant may have been licensed on 18 May 2000 to provide a particular interactive gambling service, but did not provide the service until after 19 May 2000, and did not accept a paying customer until after 19 May 2000.

> Consequently the defendant may be guilty of an offence under clause 10 of the Bill, notwithstanding that the defendant was licensed prior to 19 May 2000 to provide a service of the same name and with substantially the same conduct as that being conducted by the defendant at the time he or she was charged.
>
> Therefore the existence of a valid licence would be of little evidentiary value to the prosecution. Evidence of the date of licensing would not enable the prosecution to disprove the elements of the defence beyond reasonable doubt, In contrast, the defendant is likely to hold the relevant information to easily prove, on the balance of probabilities, the elements of the defence. I trust this addresses the Committee's concerns.

The Committee thanks the Minister for this response.

Issues arising subsequent to the Digest

Following the publication of *Alert Digest No 11. of 2000*, the Committee received some further correspondence on the bill (dated 6 September) from commercial lawyers Norton Gledhill (copy appended to this report). The issues raised in this correspondence are discussed below.

Insufficiently defined administrative powers
Subclause 5(5)

Clause 5 of this bill defines an interactive gambling service. Subclause 5(3) deems certain services not to be interactive gambling services. Specifically, paragraph 5(3)(c) provides that "an exempt service" under subclause 5(5) is deemed not to be an interactive gambling service.

Subclause 5(5) states that "the Minister may, by writing, determine that each service included in a specified class of services is an ***exempt service***" for the purposes of clause 5.

Mr Anthony Seyfort from the law firm Norton Gledhill suggests that, if the bill is passed unamended, "the Minister will receive a very large number of submissions for exemption under clause 5(5), and there will be no statutory guidance for the applicants or the Minister as to how such applications should be framed or decided".

While the bill provides little statutory guidance for applicants seeking to have their services exempted from the new requirements, the Committee notes that, under subclause 5(7), a Ministerial determination under subclause 5(5) is a disallowable instrument. The Committee considers that the inclusion of this safeguard avoids the risk that rights, liberties or obligations may be unduly dependent upon insufficiently defined administrative powers. In these circumstances, the Committee makes no further comment on this provision.

Protection of the Sea (Civil Liability) Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2000*, in which it made various comments. The Minister for Transport and Regional Services responded to those comments in a letter dated 4 September 2000.

In its *Twelfth Report of 2000*, the Committee sought further comment from the Minister in relation to strict liability offences. The Minister has further responded in a letter dated 12 September 2000. A copy of the letter is attached to this report. An extract from the *Twelfth Report* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 2000

This bill was introduced into the House of Representatives on 28 June 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Protection of the Sea (Civil Liability) Act 1981* to:

- require all ships of 400 gross tons or more entering or leaving an Australian port to maintain insurance to cover the cost of a clean up resulting from the spillage of bunker fuel or other oil;
- clarify the liability of a shipowner where the Australian Maritime Safety Authority (AMSA) has incurred expenses in exercising its powers under the *Protection of the Sea (Powers of Intervention) Act 1981*;
- clarify the ability of AMSA to recover costs and expenses incurred through the performance of its pollution combating function in the marine environment; and
- convert all penalties from dollar amounts to penalty units.

Strict liability offences
Proposed new subsection 19C(5)

Schedule 1 to this bill proposes to insert a new Part IIIA in the *Protection of the Sea (Civil Liability) Act 1981.* This Part makes provision for proof of the possession of adequate insurance cover by certain ships.

Proposed new subsection 19C create a number of offences. These include:

- entering or leaving a port in Australia without carrying a relevant insurance certificate;
- refusing to produce a relevant insurance certificate when requested; and
- leaving port without having been released from detention.

Subsection 19C(5) states that strict liability applies to these offences. In referring to this, the Explanatory Memorandum states that "for a strict liability offence, fault elements are not taken into account. That is, for a successful prosecution there is no need to consider intention, knowledge, recklessness or negligence. The only defence to a strict liability offence is mistake or ignorance of facts".

While this describes the nature of strict criminal liability in these circumstances, it does not explain why it should be imposed in relation to these offences. The Committee, therefore, **seeks the Minister's advice** as to why strict liability has been imposed in relation to these specific offences.

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.

Relevant extract from the response from the Minister dated 4 September 2000

The new section creates the following offences:

- entering or leaving a port in Australia without carrying a relevant insurance certificate
- refusing to produce a relevant insurance certificate when requested
- leaving port without having being released from detention.

The decision to include strict liability offences in the new section 19C was based on the aim of the section to offer increased protection to the Australian marine

environment. Ensuring that ships that enter Australian ports have adequate insurance to cover their liabilities in the event of an oil spill will offer two levels of protection. Firstly, it will mean that poorly maintained ships at obvious risk of an oil spill should not make trips to Australia because they won't be able to gain the appropriate insurance. Secondly, if there is an oil spill, liability for the clean up can be quickly established. The potential environmental consequences of a breach of the new section 19C justifies making the offences strict liability.

The offences in the new section 19C are modelled on the existing provisions in Part III of the Act and in particular section 15. Section 15 is already a strict liability offence. The explicit statement of strict liability in the new section 19C as compared to the existing section 15 reflects current drafting practices.

The Committee thanks the Minister for this response which indicates that the bill is intended to minimise risks to the marine environment. The Committee recognises that oil spills may have grave consequences for the marine environment, and ensuring that ships that enter Australian waters have adequate insurance to cover their liabilities in such an event is a significant matter. However, serious consequences, of themselves, are rarely an issue in the imposition of strict liability. Were they so, then murder would be an offence of strict liability.

It is often argued that strict liability is appropriate where it would be too difficult or too expensive to require the prosecution to prove particular matters, or where it is important to discourage careless non-compliance as well as intentional and reckless breaches. The Committee would, therefore, **appreciate the Minister's further advice** as to whether reasons such as these are applicable to the provisions in this bill.

Where a bill creates an offence of strict liability, the Committee considers that, as a matter of general principle, the reasons for its imposition should be set out in the Explanatory Memorandum that accompanies the bill.

Relevant extract from the further response from the Minister dated 12 September 2000

As suggested in the Committee's Twelfth Report, the proposed section 19C is intended to discourage careless non-compliance as well as intentional and reckless breaches. While the international community has made considerable progress on the issue of substandard ships in recent years, there remain some irresponsible ship owners and flag States that do not properly enforce shipping standards. For enforcement to be effective in this area, careless non-compliance and intentional and reckless breaches must be addressed effectively.

Because of the wide publicity to be given about the requirements for insurance, the master and the owner of every ship entering an Australian port will know, or ought to know, of the requirements for insurance. There are well established procedures to advise of changes to shipping regulations. These include:

- articles and notices in domestic and international trade journals;
- submission to the International Maritime Organization for circulation to over 150 member States; and
- the issuing of a Marine Notice by the Australian Maritime Safety Authority.

I trust the above advice addresses your concerns satisfactorily.

The Committee thanks the Minister for these responses which state that the offences in new section 19C are based on existing strict liability offences, and are intended to discourage careless non-compliance as well as intentional and reckless breaches.

Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 [No. 2]

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2000*, in which it made various comments. Senator Crossin has responded to those comments in a letter dated 6 September 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 4 of 2000

This bill was introduced into the Senate on 14 March 2000 by Senator Crossin as a Private Senator's bill.

The bill, which is identical in form with the Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000, introduced in the House of representatives on 13 March 2000, proposes to amend the *Sex Discrimination Act 1984* and *Human Rights and Equal Opportunity Commission Act 1978* to clarify existing protections and establish equity standards to ensure that pregnant, potentially pregnant and breastfeeding women are not discriminated against in the workplace. The bill also proposes to extend the anti-discrimination provisions to employees who are in the process of adopting a child.

Apparently non-disallowable instruments
Proposed new section 27A

Item 37 of Schedule 1 to this bill proposes to insert a new section 27A in the *Sex Discrimination Act 1984*. This new section authorises the relevant Minister to formulate 'pregnancy equity standards' in relation to the employment of women who are pregnant or potentially pregnant.

Provision is made for these standards to be laid before each House of the Parliament, and for either House to move to amend them. However, no reference is made to these instruments as disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. No provision seems to have been made for either House to disallow the standards, nor for the consequences of either House refusing to accept the standards, even as proposed to be amended.

The Committee, therefore, **seeks the advice of the Senator sponsoring the bill** as to whether pregnancy equity standards are disallowable, and as to the provision made in the bill where one House moves to amend such an instrument in a way unacceptable to the other House.

Pending the honourable member's advice, the Committee draws Senators' attention to this provision, 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.

Relevant extract from the response from the Senator

The Committee has sought advice as to whether pregnancy equity standards are disallowable, and as to the provision made in the Bill where one House moves to amend such an instrument in a way unacceptable to the other House.

Proposed new section 27A provides for pregnancy equity standards to be made and tabled in each House. Either House may amend the standards but they do not come into effect unless they are approved by both Houses, in the same form.

The standards are unusual and although they are instruments of delegated legislation they may be amended by either House and are subject to approval by both Houses. The Committee asks why the Bill did not provide for the standards to be disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act, 1907.* In fact, the proposed mechanism provides a greater degree of parliamentary oversight than disallowance because it includes the ability to amend and to approve.

The clause was modelled directly on Section 31 of the *Disability Discrimination Act 1992*. A research of the records show the Committee did not seek to clarify nor comment on the clause when it examined that Bill in 1992.

The Committee thanks the Senator for this response.

Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies—Integrity of Means Testing) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2000*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 18 September 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. 11 of 2000

This bill was introduced into the House of Representatives on 17 August 2000 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the *Social Security Act 1991, Veterans' Entitlements Act 1986, Farm Household Support Act 1992, Income Tax Assessment Act 1936* and the *Taxation Administration Act 1953* to revise the means test treatment of private companies and private trusts under social security and veterans' affairs laws.

These measures seek to ensure that recipients of benefits who hold their assets in private companies or private trusts receive comparable treatment under the means test to those recipients who hold their assets directly. Under the provisions, the assets and income of the company or trust are to be attributed to the person(s) who control the company or trust, or to the persons(s) who were the source of capital or corpus of the company or trust.

Extension of tax file number regime
Proposed new subsections 1209H(2) and 52ZZZT(2)

Among other things, this bill proposes to insert a new subsection 1209H(2) in the *Social Security Act 1991* and a new subsection 52ZZZT(2) in the *Veterans' Entitlements Act 1986*. These provisions will permit the Secretary of the Department of Family and Community Services and the Repatriation Commission respectively to obtain from the Commissioner of Taxation the tax file number (TFN) of a trust even though that trust is not a recipient of, or an applicant for, benefits under the relevant Acts.

The trust's TFN is to be provided if the Secretary (or Commission) has reason to believe that the relationship (whether direct or indirect) between a particular trust and a particular individual (or an associate of a particular individual) may be relevant to the operation of the other new provisions to be inserted by the bill.

The Explanatory Memorandum (at pp 99 and 100) notes that "Currently, with the exception of data-matching against tax returns conducted under the Data-matching Program, TFNs cannot be used in Centrelink/Australian Taxation Office information gathering for compliance purposes."

These subsections, therefore, mark a further step in the process of providing information ostensibly collected solely for taxation purposes to persons outside the Tax Office.

The Committee notes that this bill has been introduced to ensure equity in the treatment of all social security "customers" irrespective of how their assets are held. However, the Committee again notes the words of the then Treasurer in the Parliament on 25 May 1988 when referring to the proposed introduction of the tax file number scheme:

> The only purpose of the file number will be to make it easier for the Tax Office to match information it receives about money earned and interest payments.
>
> This system is for the exclusive and limited use of the Tax Office – it will simply allow the better use of information the Tax Office already receives.

The Committee also notes the words of the then member for Kooyong in the Parliament on 21 December 1990, that "since the inception of the tax file number in 1988 as an identifying system, we have seen the gradual extension of that system to other areas by way of a process sometimes referred to as function creep".

This process has continued and grown over a number of years, irrespective of the governing party of the day, and in spite of assurances that it would not occur. The provisions of this bill represent yet another example of this process.

In these circumstances, 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.

Relevant extract from the response from the Minister

As you have noted, the proposed subsections 1209H(2) in the *Social Security Act 1991* and 52ZZZT(2) in the *Veterans' Entitlements Act 1986* allow for the collection of TFNs from the Commissioner of Taxation if the Secretary or the Repatriation Commission believes it to be relevant to the operation of the trusts and companies measure.

The operation of these provisions will not interfere with the personal rights or liberties of any income support customers. In fact, the enactment of these provisions will help to avoid any such interference.

Private trusts have no other unique means of identification other than their TFN. There is no general registration system for private trusts, as there is for private companies. As you would be aware, private companies can be identified by, among other things, their Australian Company Number, which is a public number. However, private trusts are unable to be identified in this same way.

To work out the proper rate of payment to an income support customer, as a result of this measure, it will be necessary to be certain as to the identity of the trust whose assets and income are to be attributed to that customer. The use of the trust's TFN is the only way in which Centrelink can be certain as to the identity of the trust. I am aware that there are many trusts throughout Australia with similar, or identical, titles. Obviously, it would be unfortunate for the assets of the wrong "Smith Family Trust" to be allocated to a member of the Smith family.

If a more public unique numbering system, such as Australian Company Numbers, existed, it could be used for this purpose. However, in the absence of such a system, I believe that for the benefit of the customer, the use of a trust's TFN is the safest method to identify the proper entity and ensure that the customer receives their correct rate of payment.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

Minister for Justice and Customs

Senator the Hon Amanda Vanstone

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27 SEP 2000

Senate Standing C'ttee for the Scrutiny of Bills

00/9315

26 SEP 2000

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

Dear ~~Senator Cooney~~ Barney,

I refer to the Scrutiny of Bills Alert Digest No.12 of 2000 ('the Digest') where the Standing Committee seeks advice in relation to proposed section 23YQ of the Crimes Amendment (Forensic Procedures) Bill 2000 ('the Bill').

As the Minister responsible for the Bill, I am happy to provide an explanation of the approach taken with proposed section 23YQ referred to in the Digest.

Proposed section 23YQ allows the Commissioner of the Australian Federal Police ('AFP') to delegate his or her functions, conferred under Part 1D of the *Crimes Act 1914*, to a constable or staff member. The functions conferred under Part 1D are minimal. However, they concern the Commissioner's obligations with respect to retaining and destroying forensic information and material obtained via forensic procedures performed under the auspices of Part 1D.

The Commissioner cannot exercise these functions personally. I note that the comments in the Digest indicate that the Committee accepts that a power of delegation is appropriate in these circumstances but that it would prefer the power to be limited by reference to a delegate's level of expertise or functional ability.

The potential delegates must all be appointed as AFP employees under the *Australian Federal Police Act 1979*, and are therefore subject to the provisions of that Act, as well as the provisions of the *Australian Federal Police Regulations*, the *Australian Federal Police (Discipline) Regulations*, the *Complaints (Australian Federal Police) Act 1981*, the *Complaints (Australian Federal Police) Regulations*, and the Commissioner's Order relating to Professional Standards.

An example of a function conferred on the Commissioner occurs in the context of volunteers. The Commissioner must agree with the volunteer (or a parent or guardian if the volunteer is a child or incapable person) on the period of time for which a DNA profile obtained from the volunteer's forensic material can be stored on the national DNA database system (proposed sections 23XWR and 23YDAG(4)). If this agreed period of time for retention expires or the volunteer withdraws consent to the retention of the forensic material or of information obtained from an analysis of that material, then, the volunteer's forensic material must be destroyed and any material which could be used to discover the identity of the volunteer must

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be removed from the national DNA database system (proposed sections 23XWT(2), 23YC(2) and 23YDAG). The destruction of forensic material or the removal of identifying information from the DNA database will most likely require liaison between AFP members, forensic science experts and database technicians, among others. Accordingly, the range of potential delegates, their attributes and qualifications will be varied. It is difficult to limit the class of potential delegates in these circumstances without making the Bill unnecessarily complex. In this regard, I note that the power of delegation conferred on the Commissioner by section 69C of the *Australian Federal Police Act 1979* and section 20 of the *Complaints (Australian Federal Police) Act 1981* are cast in similarly broad terms to proposed section 23YQ. Therefore, the Commissioner has an unrestricted ability to delegate powers integral to the administration and operations of the AFP. However, this power is subject to the AFP's existing accountability measures. There do not appear to be good reasons for restricting the Commissioner's power of delegation here in relation to less complex functions. In my view, the very sensitive functions of the AFP Commissioner suggest that the office will be held by someone capable of making appropriate delegations.

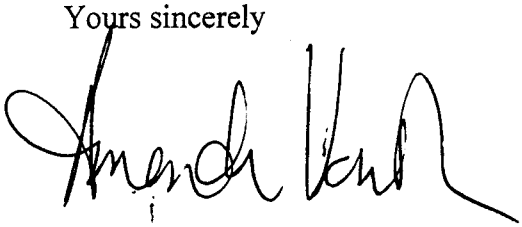
Further, the Bill contains a strong incentive for the Commissioner to exercise his or her powers of delegation very carefully. This is because the retention and destruction requirements are underpinned by offences with a maximum penalty of 2 years' imprisonment. Accordingly, the Commissioner will only delegate his or her functions to persons of high personal integrity and with appropriate qualifications.

Another example of a function conferred on the Commissioner is the retention of tape recordings that are no longer required for investigatory or evidentiary purposes. An instance where retention might be desirable is if a constable is subject to disciplinary proceedings due to improper conduct when interviewing a person for the purposes of carrying out a forensic procedure. An AFP member aware of the circumstances surrounding the interview, rather than the Commissioner, will be better placed to determine whether retention of the recording is justified in all the circumstances.

Therefore, the potential delegates will have significantly different roles in the AFP and will have different qualifications and levels of expertise.

In view of the considerations enumerated above I believe the approach taken in proposed section 23YQ is reasonable.

Yours sincerely



AMANDA VANSTONE

The Hon Daryl Williams AM QC MP

Attorney-General

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3 OCT 2000

Senate Standing C'ttee
for the Scrutiny of Bills

00/5383 ISL RG
00/203475 CRL MC

29 SEP 2000

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

Dear Senator Cooney

I refer to your letter of 17 August 2000 concerning issues raised in the Scrutiny of Bills Alert Digest No. 10 of 2000 in relation to the Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000 ('the Bill').

The Bill proposes to insert offences into the *Criminal Code* dealing with attacks against UN and associated personnel in accordance with the obligations contained in the Convention on the Safety of United Nations and Associated Personnel. The Committee asks for advice on the reasons for applying strict liability to certain physical elements of those offences and on whether the offences would carry greater penalties than apply to offences against other people.

The proposed offences would not require the prosecution to prove that an offender knew that his or her victim is a UN or associated person or knew that the victim is engaged in a UN operation that is not a UN enforcement action. In addition, proposed section 71.11 applies strict liability to an element of that offence which requires that the property attacked is occupied or used by a UN or associated person.

Those elements deal with the circumstances in which the relevant conduct occurs. The reason for including the elements is that they are necessary to trigger Commonwealth jurisdiction which would be based on the external affairs power arising from Australia's participation in the above Convention. The elements in question do not add to the gravity of the offences. A principle of criminal responsibility recognised under existing law, and preserved in the *Criminal Code*, is that the prosecution should not be required to prove awareness on the part of a defendant to an element of an offence which is prescribed only for jurisdictional reasons.

A person will face criminal liability because of his or her conduct eg., in harming or causing the death of another person. To require proof that the person was also aware that the victim was a UN or associated person connected with a particular form of UN operation would seriously and unnecessarily inhibit the capacity of prosecutors to use the new offences, particularly in relation to attacks against civilians supporting UN operations. This is because

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a person accused of murdering or seriously injuring a UN worker might be able to argue that he or she did not even think about the status of the victim or the victim's connection with a UN operation. Likewise, a person accused of a violent attack on the official premises, private accommodation or means of transportation of a UN worker which endangers the UN worker's life might claim that they gave no consideration to who owned the property. It would not be a just result if a person accused of committing a serious attack against a UN worker were to escape liability because of a technicality of this nature following proof of the other elements on an offence.

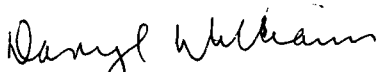
A similar approach is also taken in the Criminal Code Amendment (Theft Fraud Bribery and Related Offences) Bill 1999 which will insert various theft and fraud related offences into the *Criminal Code*. In certain of those offences knowledge that a Commonwealth entity is involved is an element of the offence in order to trigger Commonwealth jurisdiction. Similarly that element of the offence does not play any other role, for example in defining the gravity of the offence. In that instance the view was taken that it should be an absolute liability element of the offence. You may recall that the Committee queried this issue in Alert Digest No. 19 of 1999. The response by my colleague the Minister for Justice and Customs, Senator the Hon Amanda Vanstone, in her letter to the Committee dated 13 March 2000 indicates that the approach taken in that instance is being taken for similar reasons to those which I have outlined above.

The decision to apply strict liability rather than absolute liability to offence elements in the present Bill has been taken because of the different circumstances which apply to the UN operations. As the Convention and Bill are intended to protect only specified classes of persons present in explosive and uncertain situations, it would be unreasonable to deny a defence of mistake of fact to an accused person.

Finally, I confirm that the Bill does not seek to impose greater penalties than apply to equivalent offences committed against a non-UN or associated person. While the present law of individual States and Territories may vary, the penalties proposed in the Bill are consistent with the penalties for equivalent criminal offences of general application as recommended to the Commonwealth, States and Territories by the Model Criminal Code Officers Committee of the Standing Committee of Attorney-General's as part of the Model Criminal Code Project.

I thank the Committee for its examination of the Bill and hope my response provides the clarification requested.

Yours sincerely



DARYL WILLIAMS

SENATOR THE HON RICHARD ALSTON
Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

RECEIVED
3 OCT 2000
Senate Standing C'ttee for the Scrutiny of Bills

03 OCT 2000

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

Dear Senator ~~Cooney~~ Barney.

The Committee's Alert Digest 11/00 commented on the Interactive Gambling (Moratorium) Bill.

The Committee has noted its concern on the reversal of the onus of proof in relation to the defence provided in clause 11 of the Bill. Clause 11 provides a defence to the offence of intentionally providing an interactive gambling service in clause 10. A defence is available if the defendant proves that:

a) they provided the service prior to 19 May 2000;
b) the current service is the same or substantially the same as the pre-19 May service;
c) the current service is provided under the same name as the pre-19 May service; and
d) the pre-19 May service had at least one arm's length paying customer.

The effect of clause 11 is that the defendant bears a legal burden in relation to the four elements of the defence. This requires the defendant to prove the existence of each element of the defence. This is a higher standard of proof than the normal evidential burden placed on the defendant. An evidential burden merely requires the defendant to point to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution then bears the burden of disproving the defence.

This higher standard of proof was placed on the defendant due to the difficulties for the prosecution to disprove the elements of the defence and the high costs that would be associated with any investigation to disprove these elements. This is in contrast to the relative ease in which the defendant could prove the elements of the defence.

The Australian Federal Police (AFP) have advised that the particular difficulties that the prosecution would face in disproving the four elements of the defence are as follows:

a) defendant provided service prior to 19 May 2000
The only source of evidence available to the prosecution to prove that the service was not provided prior to 19 May 2000 would be the records held by the

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defendant or its Internet Service Provider (ISP). If these records have been lost or destroyed, it would be impossible for an investigator to gather evidence to disprove this element of the defence.

b) the current service is the same or substantially the same as the pre-19 May 2000 service
Disproving that the service is the same or substantially the same as the pre-19 May 2000 service could be extremely difficult as obtaining records of the pre-19 May 2000 service may be impossible due to the length of time that has elapsed, or if they have been destroyed. In this situation the AFP would have no way of comparing the current service to the pre-19 May service as it has no evidence of what services were provided prior to 19 May 2000.

c) the current service is provided under the same name as pre-19 May 2000 service
The same difficulties as above would apply to disproving this.

d) service had at least one arm's length customer prior to 19 May 2000
It may be difficult to gather evidence to disprove that the pre-19 May service had at least one arm's length customer if the records of the organisation or their ISP have been lost or destroyed. The only other source of evidence would be the organisation's accounting records that may not be sufficiently detailed to refute the existence of arm's length paying customers.

Proof that defendant was not licensed on 19 May 2000

The Committee suggests that it would not be too difficult or expensive for the prosecution to prove that a defendant was not licensed on 19 May 2000 to conduct a service of the same nature and with substantially the same content as being conducted by the defendant at the time she or he was charged. The AFP has confirmed this.

However, while this may be relevant to a separate offence of providing an interactive gambling service without a licence, it is not directly relevant to the offence in the Interactive Gambling (Moratorium) Bill 2000. The Bill prohibits a person from **providing** an interactive gambling service unless the person was already providing the service before 19 May 2000. The fact that a defendant was licensed to provide a service on 19 May 2000 does not conclusively prove that a defendant did in fact provide that service before 19 May 2000.

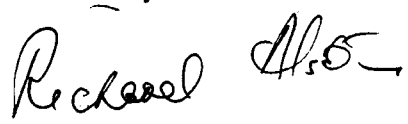
For example, a defendant may have been licensed on 18 May 2000 to provide a particular interactive gambling service, but did not provide the service until after 19 May 2000, and did not accept a paying customer until after 19 May 2000. Consequently the defendant may be guilty of an offence under clause 10 of the Bill, notwithstanding that the defendant was licensed prior to 19 May 2000 to provide a service of the same name and with substantially the same conduct as that being conducted by the defendant at the time he or she was charged.

Therefore the existence of a valid licence would be of little evidentiary value to the prosecution. Evidence of the date of licensing would not enable the prosecution to disprove the elements of the defence beyond reasonable doubt. In contrast, the

defendant is likely to hold the relevant information to easily prove, on the balance of probabilities, the elements of the defence.

I trust this addresses the Committee's concerns.

Yours sincerely



RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

Norton Gledhill

COMMERCIAL LAWYERS

RECEIVED
6 SEP 2000
Senate Standing C'ttee
for the Scrutiny of Bills

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6 September 2000

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Total Number of Pages 2

Mr James Warmenhoven
Secretary
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

Dear Mr Warmenhoven

Interactive Gambling (Moratorium) Bill 2000

I refer to our telephone conversation today.

In addition to the aspects of the above Bill which were the subject of comment in your Committee's Alert Digest No 11 of 2000, I believe that clause 5(5) offends the second principle set out in Senate Standing Order 24(1)(a), namely that the clause "*make[s] rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers*".

Your Committee's concern about that should be heightened by this week's report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on the Bill. That report concluded that clause 5(5) was an "adequate" answer to the concerns of witnesses appearing before that Committee about unintended consequences of the Bill as drafted.

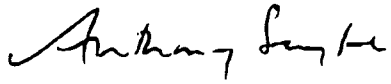
As an aside, I find it quite extraordinary that such Committee recommended that the Bill proceed despite admitting a lack of understanding of the unintended consequences raised by at least two organisations: "*... it is not clear how the Bill has an unintended consequence (par 1.96, page 21).*" The unintended consequences are extremely serious and the Committee should have understood them before reaching a conclusion. I could explain them clearly if another opportunity were to arise.

It is clear that if the Bill passes unamended the Minister will receive a very large number of submissions for exemption under clause 5(5), and there will be no statutory guidance for the applicants or the Minister as to how such applications should be framed or decided.

Given the above, I suggest that clause 5(5) be the subject of concern expressed in the next Alert Digest and a report to the Senate.

I am willing to provide any advice or assistance which your Committee may require.

Yours sincerely



Anthony Seyfort
Partner

The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader National Party of Australia

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15 SEP 2000
Senate Standing C'ttee
for the Scrutiny of Bills

12 SEP 2000

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

Dear Senator Cooney

I refer to the letter of 7 September 2000 from Mr James Warmenhoven, the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee), concerning the Protection of the Sea (Civil Liability) Amendment Bill 2000 (the Bill).

In its Twelfth Report of 2000 (6 September 2000), the Committee sought my further advice as to why strict liability applies to offences under new section 19C which is to be inserted into the *Protection of the Sea (Civil Liability) Act 1981* by Schedule 1 of the Bill.

As suggested in the Committee's Twelfth Report, the proposed section 19C is intended to discourage careless non-compliance as well as intentional and reckless breaches. While the international community has made considerable progress on the issue of substandard ships in recent years, there remain some irresponsible ship owners and flag States that do not properly enforce shipping standards. For enforcement to be effective in this area, careless non-compliance and intentional and reckless breaches must be addressed effectively.

Because of the wide publicity to be given about the requirements for insurance, the master and the owner of every ship entering an Australian port will know, or ought to know, of the requirements for insurance. There are well established procedures to advise of changes to shipping regulations. These include:

- articles and notices in domestic and international trade journals;
- submission to the International Maritime Organization for circulation to over 150 member States; and
- the issuing of a Marine Notice by the Australian Maritime Safety Authority.

1901-2001
Centenary of Federation

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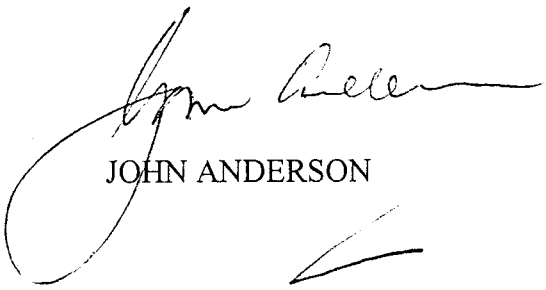
I trust the above advice addresses your concerns satisfactorily.

Yours sincerely



JOHN ANDERSON

PARLIAMENT OF AUSTRALIA · THE SENATE

TRISH CROSSIN

LABOR SENATOR FOR THE NORTHERN TERRITORY

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
SG.49
Parliament House

Dear Senator Cooney,

SEX DISCRIMINATION LEGISLATION AMENDMENT (PREGNANCY AND WORK) BILL 2000

Thankyou for your letter of 6 April 2000 from the Secretary of your Committee, seeking advice in relation to the formulation of 'pregnancy equity standards' in the *Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill, 2000* ("the Bill") and referred to in Alert Digest No. 4 of 2000.

The Committee has sought advice as to whether pregnancy equity standards are disallowable, and as to the provision made in the Bill where one House moves to amend such an instrument in a way unacceptable to the other House.

Proposed new section 27A provides for pregnancy equity standards to be made and tabled in each House. Either House may amend the standards but they do not come into effect unless they are approved by both Houses, in the same form.

The standards are unusual and although they are instruments of delegated legislation they may be amended by either House and are subject to approval by both Houses. The Committee asks why the Bill did not provide for the standards to be disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act, 1907.* In fact, the proposed mechanism provides a greater degree of parliamentary oversight than disallowance because it includes the ability to amend and to approve.

The clause was modelled directly on Section 31 of the *Disability Discrimination Act 1992.* A research of the records show that the Committee did not seek to clarify nor comment on the clause when it examined that Bill in 1992.
Yours Sincerely,

Trish Crossin

Senator Trish Crossin 6/9/00

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RECEIVED
20 SEP 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

1 SEP 2000

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

Dear Senator

I am writing in response to comments made by your Committee in its Alert Digest No. 11 of 2000 in relation to the Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Bill 2000 (the Bill).

I understand that the Committee feels that the provisions in the Bill, which allows the Secretary of the Department of Family and Community Services and the Repatriation Commission to collect the tax file number (TFN) of a private trust from the Commissioner of Taxation, 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.

As you have noted, the proposed subsections 1209H(2) in the *Social Security Act 1991* and 52ZZZT(2) in the *Veterans' Entitlements Act 1986* allow for the collection of TFNs from the Commissioner of Taxation if the Secretary or the Repatriation Commission believes it to be relevant to the operation of the trusts and companies measure.

The operation of these provisions will not interfere with the personal rights or liberties of any income support customers. In fact, the enactment of these provisions will help to avoid any such interference.

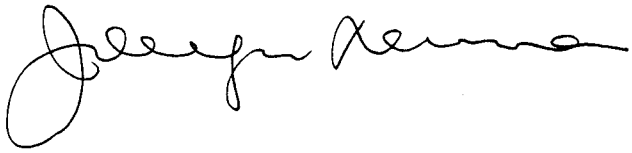
Private trusts have no other unique means of identification other than their TFN. There is no general registration system for private trusts, as there is for private companies. As you would be aware, private companies can be identified by, among other things, their Australian Company Number, which is a public number. However, private trusts are unable to be identified in this same way.

PARLIAMENT HOUSE
CANBERRA ACT 2600

To work out the proper rate of payment to an income support customer, as a result of this measure, it will be necessary to be certain as to the identity of the trust whose assets and income are to be attributed to that customer. The use of the trust's TFN is the only way in which Centrelink can be certain as to the identity of the trust. I am aware that there are many trusts throughout Australia with similar, or identical, titles. Obviously, it would be unfortunate for the assets of the wrong "Smith Family Trust" to be allocated to a member of the Smith family.

If a more public unique numbering system, such as Australian Company Numbers, existed, it could be used for this purpose. However, in the absence of such a system, I believe that for the benefit of the customer, the use of a trust's TFN is the safest method to identify the proper entity and ensure that the customer receives their correct rate of payment.

Yours sincerely



JOCELYN NEWMAN