SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

2000

1 November 2000

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

2000

1 November 2000

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 2000

The Committee presents its Fifteenth 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:

Aged Care Amendment Bill 2000

Child Support Legislation Amendment Bill (No. 2) 2000

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999

Gene Technology Bill 2000

Gene Technology (Licence Charges) Bill 2000

Taxation Laws Amendment (Superannuation Contributions) Bill 2000

Aged Care Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2000*, in which it made various comments. The Minister for Aged Care has responded to those comments in a letter dated 25 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. 13 of 2000

This bill was introduced into the House of Representatives on 7 September 2000 by the Minister for Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Aged Care Act 1997* to provide the Department of Health and Aged Care with greater powers over providers who cannot or will not comply with the Act. Specifically, the bill enables notice to be given to residents and relatives of residents where an approved provider of a residential aged care service faces withdrawal of approved provider status, revocation of places and evacuation of residents.

Where the approved provider of a residential aged care service is a corporate entity, the bill enables the taking of action to require the removal of key personnel of that entity. Such action may be taken where those key personnel have been convicted of an indictable offence, are of unsound mind or become bankrupt.

Old convictions, continuing consequences
Proposed new paragraph 10A-1(1)(a)

Schedule 2 of this bill amends the *Aged Care Act 1997* in relation to "key personnel" of approved providers. Item 10 of Schedule 2 inserts a new Division 10A in the Principal Act, making it an offence for a "disqualified individual" to be engaged as one of the key personnel of an approved provider. Proposed new paragraph 10A-1(1)(a) provides that an individual is a disqualified individual if he or she "has been convicted of an indictable offence".

Proposed new subsection (3) provides that an individual may be disqualified for a conviction occurring before, at or after the commencement of the section. The Explanatory Memorandum states that pre-commencement offences have been included "because of the concern that such individuals pose a risk to frail, often vulnerable, aged care recipients while they remain key personnel, particularly where they have direct responsibility (executive, management, overall nursing or day-to-day responsibility) for the care of those care recipients".

The Committee is mindful of the need to ensure the welfare of frail and vulnerable people in aged care. However, provisions such as those proposed raise a number of issues. First, proposed paragraph 10A-1(1)(a) does not specify what precise offences should lead to disqualification. This may see apparently 'irrelevant' offences taken into account while other apparently 'relevant' offences may be disregarded.

Under section 4G of the *Crimes Act 1914 (Cth)*, unless a contrary intention is apparent, indictable Commonwealth offences are those punishable by imprisonment for more than 12 months. Offences such as removing (in proclaimed waters) a fish from a net or trap while not the owner of that net or trap (under *Fisheries Act 1952* s 13A) or, without permission, using a transmitter on a foreign vessel, aircraft or space object to transmit radio or television programs to the general public in Australia (under *Radiocommunications Act 1992* s 195(1)) or possessing unlawfully imported whale products (under *Environment Protection and Biodiversity Conservation Act 1999* s 233(1)) are all punishable by imprisonment for more than 12 months. Therefore, these are all apparently relevant indictable Commonwealth offences for the purposes of paragraph 10A(1)(a) of this bill. A person convicted of any of these offences at any time would be permanently disqualified as a member of the key personnel of a provider of a residential aged care service even though there is little apparent relevance between the offence and aged care.

However, a nursing home proprietor or employee found guilty of influencing the vote of a nursing home resident under section 325A of the *Commonwealth Electoral Act 1918* (an offence punishable by imprisonment for only 6 months) would not have committed an indictable offence, and would therefore not come within the definition of a disqualified individual. Arguably, a conviction for such an offence would be highly relevant to a person's fitness to be involved as a provider of a residential aged care service.

A related issue concerns the reference to offences which are punishable by imprisonment for more than 12 months. As the Committee has previously noted, there is potential for unfairness in provisions which take away rights or privileges on the basis of the maximum penalty provided for the offence committed by a person, rather than the actual penalty imposed on him or her. A person found guilty of illegal fishing under section 13A of the *Fisheries Act 1952*, who received only a small fine for a comparatively minor breach of the legislation, would see themselves disqualified from involvement in the provision of aged care. However, a person found guilty of electoral fraud in a nursing home, who received the maximum penalty for a comparatively serious breach of the legislation, would not be disqualified.

It would be helpful if the bill set out a list of offences (perhaps those involving physical or emotional violence or cruelty, or fraud or dishonesty) the commission of which by a person would better reflect his or her suitability to provide aged care services.

A second issue concerns the inclusion of convictions recorded at any time before the commencement of the provision. Such a provision may be regarded as having retrospective effect, and exposing a person to double punishment for an offence which may have been committed many decades ago.

Comparable legislation recently considered by this Committee has limited consideration of 'old' offences in these circumstances to those committed within the previous ten years (see, for example, *Customs Amendment Act (No 2) 1999* s 67EB(3)(b) and *ACIS Administration Act 1999* s 29). It may be that a similar approach should be taken in the present instance.

The Committee, therefore, **seeks the Minister's advice** as to why the bill does not set out a regime of offences which are relevant to the disqualification of key personnel of aged care providers, and why the bill places no limit on the retrospective consideration of a person's previous 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

In Alert Digest 13/00 the Scrutiny of Bills Committee (the Committee) makes a range of comments in relation to the bill. The Committee also seeks my advice as to "why the bill does not set out a regime of offences which are relevant to the disqualification of key personnel of aged care providers, and why the bill places no limit on the retrospective consideration of a person's previous offences". My advice on each of those matters is set out below.

Regime of offences leading to disqualification

The Committee comments that the bill does not specify what precise offences should lead to disqualification of an individual who is a member of the key personnel of an approved provider of aged care. It further comments that reference to 'indictable offences' may see "apparently 'irrelevant' offences taken into account while other apparently 'relevant' offences may be disregarded".

The legislature has seen fit to make a distinction between indictable and summary offences. In some jurisdictions terminology such as 'serious' and 'simple' offences is used. In relation to each type of offence the only further distinction that is made is as to the magnitude of the penalty applicable to each offence. I contend that it is not appropriate for the bill to attempt introduce to the statute book a further, inevitably subjective, categorisation for the purposes of aged care legislation alone.

The Committee suggests that, by way of a possible "list of offences ... the commission of which by a person may better reflect his or her suitability to provide aged care services", those "involving physical or emotional violence or cruelty, or fraud or dishonesty" might be appropriate. I strongly disagree, for a number of reasons.

Such a list would inevitably be subject to interpretation. For example, it could be argued that apparently relevant offences for matters such as false imprisonment, or obstructing public officers would not fall within the list. It is unacceptable that such an additional raft of complexity should be allowed to cloud this important issue.

Further, by way of comparison, no such distinction is made in laws concerning a variety of other situations across the social spectrum. For example similar restrictions apply equally to Members of Parliament (who are ineligible for election under the Constitution if "convicted ... for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer"—i.e. equivalent to the Crimes Act reference to indictable offences cited by the Committee) and to applicants for vocational licences (who in various jurisdictions are precluded from becoming licensed on the basis of conviction for indictable offences without qualification).

I am firmly of the opinion that, if the result of legislative intent and judicial process is such that a person's actions can be considered to amount to a serious crime, then that person should not be held out to the public as an appropriate person to have a position of substantial influence in relation to frail, vulnerable older Australians.

I believe that the same argument applies in relation to the distinction the Committee seeks to draw between the maximum penalty for a given indictable offence and the actual penalty. On this point I also note that the Committee has focussed only on the 'definition' of indictable offence in one enactment (the Commonwealth *Crimes Act*

1914), whereas the provision in the bill referring to indictable offences does so by reference to such an offence "against a law of the Commonwealth or of a State or Territory". As definitions of the term may vary from one jurisdiction to another, I consider that it would be unwise to attempt to qualify the matter in a generic way in the bill.

The Committee's suggestion that apparently 'relevant' offences may not be taken into account is also flawed to the extent that it fails to consider existing provisions of the Act. Measures concerning the suitability of approved providers and their key personnel generally are contained in s. 8-3 of the Act, with further measures for revocation of approval in the event of unsuitability in terms of that section being contained in s. 10-3. The bill specifically provides (in Item 6 of Schedule 2) that the proposed amendments do not limit the operation of s. 8-3, with the effect that regard can still be had to the effect of conviction of key personnel for relevant non-indictable offences on the ongoing suitability of approved providers under the Act.

Convictions prior to commencement

When examining the range of indictable offences, the Committee mentions that "[a] person convicted of any of these offences at any time would be permanently disqualified as a member of the key personnel of a provider…". The Committee further suggests that it may be appropriate to limit consideration of 'old' offences to those committed within the previous ten years.

In making these statements it appears that the Committee may have overlooked the specific preservation by the bill (in the proposed sub-clause 10A-1(6)) of the operation of the spent convictions scheme in the Crimes Act. This provision is intended to ensure that only the most serious of convictions should be matters which preclude individuals from taking up responsible positions in the community in the long term after they have served the appropriate waiting time.

Other matters

While the Committee has referred to action that may be taken in relation to approved providers that are corporate entities, I note that the Committee has not referred to another important issue for all approved providers in relation to disqualified individuals. The bill places an additional responsibility on all approved providers to take reasonable steps to ensure that none of their key personnel is a disqualified individual.

This measure complements offence and other provisions of the bill in providing the Department of Health and Aged Care with greater powers over providers who do not comply with their responsibilities under the Act. Specifically, it will enable consideration to be given to the imposition of sanctions on approved providers for non-compliance with the additional responsibility.

I would be grateful if you would include my response in any report the Committee makes to the Senate in relation to matters raised in the Alert Digest comments.

The Committee thanks the Minister for this response, in which she makes a number of observations.

The Minister observes that attempting to clarify offences relevant to a person's suitability to care for the frail aged would introduce "an additional raft of complexity".

The Committee notes that clause 58 of the Gene Technology Bill 2000 (discussed on p 463 of this report) determines a person's suitability to hold a licence by reference to "relevant convictions" (defined in that bill as a conviction for an offence "relating to the health and safety of people or the environment"). It was this approach that prompted the Committee's suggestion that relevant offences be clarified in this bill.

The Minister then observes that Members of Parliament are ineligible for election under the Constitution if convicted of an offence punishable by imprisonment for one year or longer. The Committee notes that section 44(ii) of the Constitution only disqualifies a person who "has been convicted and is under sentence, or subject to be sentenced" for such an offence. Once such a person has served his or her sentence, their disqualification is at an end: see *Nile v Wood* (1988) 167 CLR 133 at 139.

The Minister then observes that applicants for vocational licences in various jurisdictions "are precluded from becoming licensed on the basis of conviction for indictable offences without qualification".

The Committee reiterates the view, expressed in *Alert Digest No. 13 of 2000*, that comparable Commonwealth legislation which it has examined recently has explicitly limited consideration of 'old' offences to those committed within the previous ten years (see, for example, *Customs Amendment Act (No 2) 1999* s 67EB(3)(b); *ACIS Administration Act 1999* s 29; Gene Technology Bill 2000, clause 58).

The Minister then observes that "if the result of legislative intent and judicial process is such that a person's actions can be considered to amount to a serious crime, then that person should not be held out to the public as an appropriate person …"

The Committee accepts this observation. However, if a person has received only a small fine for an offence for which the maximum punishment is imprisonment for more than 12 months, then surely the result of the judicial process is that that person's actions can not be considered to have amounted to a serious crime. This is the point made by the Committee.

Finally, the Minister draws attention to the effect of the spent convictions scheme. This scheme is an example of legislation which operates by reference to the actual penalty imposed rather than the nominal maximum penalty. A conviction is spent where a person is not subject to imprisonment for an offence, or was not sentenced to imprisonment for more than 30 months.

Similarly, in its *Seventh Report of 1998* (at page 163), this Committee noted the recommendation of the Australian Electoral Commission that the Commonwealth Electoral Act be amended (as it subsequently was) to deny the right to vote to prisoners based on the actual sentence they were serving rather than the potential maximum sentence for their offence. The AEC noted that "a person serving an actual sentence of one month could be excluded from enrolment, while a person on a sentence of 59 months could be eligible [to enrol] depending on the potential maximum sentence in each case."

Under section 140 of the *Crimes Act 1900 (NSW)* a person who does more than $2 worth of damage to a plant with intent to steal it from a park is liable to be charged with larceny. In NSW, larceny is an indictable offence punishable by 5 years imprisonment. Under this bill, a person who, 9 years ago, damaged a plant with intent to steal it, would be unsuitable to be involved in the management of an aged care facility. While the Committee remains mindful of the need to ensure the welfare of frail and vulnerable people in aged care, the operation of proposed new paragraph 10A-1(1)(a), as drafted, seems somewhat arbitrary.

The Committee, therefore, continues to draw 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.

Child Support Legislation Amendment Bill (No. 2) 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2000*, in which it made various comments. The Minister for Community Services has responded to those comments in a letter dated 22 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 House of Representatives on 30 August 2000 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Schedule 1 to this bill proposes to amend the *Child Support (Assessment) Act 1989* to reduce the child support formula percentages where a non-resident parent has contact with his or her child or children for between 10% and 30% of the time. This is intended to recognise the additional costs of contact faced by non-resident parents and to encourage such parents to maintain contact with their children.

Schedule 2 proposes to lower the cap on income that can be subject to child support formula assessment (to approximately $79,000).

Schedule 3 proposes to create a new ground for departing from the child support formula assessment for a parent who earns additional income for the benefit of a child or children in the parent's current family.

Schedule 4 proposes to amend the *A New Tax System (Family Assistance) Act 1999* to increase the family tax benefit and child care benefit income test deductions for child support payers from 50% to 100%, by allowing for a dollar for dollar deduction for any child support paid. This means that child support payers with children in a new family will have their family tax benefit and child care benefit assessed on the actual income available to their new family.

Schedule 5 proposes to amend a number of Acts to reflect the fact that the child support function has moved from the Treasury portfolio to that of Family and Community Services. In particular, the Child Support Registrar will no longer be the Commissioner of Taxation.

Schedule 6 proposes to amend the *Child Support (Registration and Collection) Act 1988* to establish a system of departure prohibition orders, similar to that under the *Taxation Administration Act 1953*, to prevent persistent child support payment defaulters from attempting to leave Australia.

Schedule 7 proposes to amend the *Child Support (Assessment) Act 1989* to establish a regulation making power to allow certain amounts to be excluded from income so that the current $260 annual minimum child support liability will not apply.

Schedule 8 proposes to vary the current requirement that supporting documents supplied with one party's application to depart from the child support formula assessment be provided to the other party to the child support arrangement.

Schedule 9 is intended to ensure that carers who are not parents or legal guardians of a child who has left home cannot be 'eligible carers' in relation to that child, and therefore cannot get child support, unless a parent or guardian has consented to the arrangement, or it is unreasonable for the child to live at home.

Schedule 10 proposes to amend the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* to make a number of technical amendments to correct and clarify minor matters.

Use of tax file numbers
Schedule 5, items 30 and 57

Item 30 of Schedule 5 to this bill proposes to include a new section 150D in the *Child Support (Assessment) Act 1989*, and item 57 of the same Schedule proposes to include a new section 16C in the *Child Support (Registration and Collection) Act 1988*. Each of these provisions will permit the Child Support Registrar to obtain from the Commissioner of Taxation the tax file numbers of persons for the purposes set out in each of the proposed sections.

In general terms, Schedule 5 to the bill proposes to transfer the functions of child support from the Treasury portfolio to that of Family and Community Services. At present, the Child Support Registrar is the Commissioner of Taxation and has access to this information. The Explanatory Memorandum states that these amendments "are to ensure that the flow of information between the Child Support Agency and the Australian Taxation Office that is integral to the child support function continues to operate effectively".

While this bill apparently only makes administrative re-arrangements with regard to the availability of tax file numbers, it nevertheless raises a number of issues.

First, it is not clear – either from the bill or the Explanatory Memorandum – whether the newly created Child Support Registrar will have the same information-gathering, enforcement and other powers as the Commissioner of Taxation has under the existing legislation. It may be appropriate that such powers be available to the Commissioner to be exercised as part of the broad taxation function. Arguably, it may be less appropriate that all of those powers be available to the Registrar to be exercised as part of a specific child support function. The Committee considers that this is a matter that should have been addressed in the Explanatory Memorandum accompanying the bill.

Secondly, the Committee again draws attention to 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 draws attention to 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 bill seems to represent another approach to "function creep". The tax file number regime is currently applicable in the area of child support because child support is within the jurisdiction of the Tax Office. This bill now proposes to transfer responsibility for child support to another Department. Therefore, by initially giving the Tax Commissioner responsibility for the administration of any function, and permitting the Commissioner to use the tax file number system in administering that function, and then later transferring that function with all its powers to another department, the use of tax file numbers in virtually any area of government activity would become legitimate.

The Committee has consistently expressed concern at the extension of the tax file number scheme to activities beyond taxation. This process has continued 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.

The Committee, therefore, **seeks the Minister's advice** as to whether the Child Support Registrar will have access to all the powers available to the Tax Commissioner under the current legislation. The Committee also **seeks the Minister's advice** as to why the tax file number system should be applied to the child support scheme when this is neither a matter involving taxation or the administration of taxation.

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

I suggest that it is not correct to refer to the Child Support Registrar as "newly created". The office of Registrar has existed in its own right since the commencement of the ***Child Support (Registration and Collection) Act 1988*** (the Registration and Collection Act), section 10 of which sets up the office. Section 10 also currently provides that the Commissioner of Taxation shall be the Registrar. This is because the current Commonwealth child support function was attached to the Australian Taxation Office (the ATO) from its inception until the 1998 portfolio changes. It was natural at the time that the head of the agency should hold both statutory offices.

However, I stress that the two offices are legislatively separate. The Registrar holds powers and performs functions, in the name of the Registrar, under the Registration and Collection Act and the ***Child Support (Assessment) Act 1989*****.** The Commissioner, on the other hand, holds powers and performs functions, in the name of the Commissioner, under the various taxation Acts. The fact that one person "wears two hats" does not alter the fact that the two offices are (and will remain) legally distinct, with distinct powers and functions.

In 1998, it was decided to align the child support function with the appropriate policy responsibility, and it was relocated to the Department of Family and Community Services. This was in contrast to the past alignment with the operational function within the Australian Taxation Office. Therefore, the main change made by the Bill is merely to omit the current link between the two separate statutory offices and to provide for the office of Registrar to be fulfilled by the General Manager of the Child Support Agency (the CSA). This is a reflection of the way the function has operated in practical terms all along.

The changes made by the Bill do not give the Registrar the same information gathering, enforcement and other powers as the Commissioner. The Registrar's powers in these respects are essentially the same as they always were, under the two child support Acts. The Commissioner's powers also remain the same, under the various taxation Acts.

The new provisions that have attracted your attention (allowing the Registrar to request people to provide TFNs, providing in some cases for the effect of not providing the number, and allowing the Registrar to require the Commissioner to provide information, including TFNs) are, in a real sense, merely technical. This is because their purpose is to allow the child support system to continue to operate basically as it has done to date, despite the relocation of the CSA.

The child support scheme relies heavily on taxation information in relation to making administrative assessments of child support and enforcing child support debts. This has been a significant factor in the CSA's success.

Firstly, administrative assessments of child support are based on the taxable income of both parents. The most efficient way for the CSA to obtain this information is to have it automatically provided through the ATO's systems. This requires the CSA to have access to the person's TFN. The alternative would be for the CSA to request the information in relation to each of its clients, and for the ATO to provide it, on an individual basis. This would be a costly and resource intensive process. As child support assessments may have to be made at any time, it would be impractical to undertake data-matching exercises since this would need to be done on a daily basis. The CSA currently issues in excess of 500,000 child support assessments each year.

Secondly, the CSA has the power to collect child support debts by intercepting tax refunds. This is effected by the CSA placing an indicator on the person's tax record to ensure that the refund is not released before the CSA has considered whether or not to intercept the refund. This also requires access to the person's TFN to make the process efficient. This represents approximately 10% of collections each year.

Thirdly, the CSA can investigate individual cases to initiate a change of assessment process if a parent's child support liability does not reflect their actual capacity to pay. This process requires the CSA to have access to the parent's tax records to establish the basis on which they have currently been assessed.

An important fact to note is that *86%* of the child support liability that should have been paid to the CSA since the start of the child support scheme has, in fact, been paid. In comparison with overseas jurisdictions, this is a remarkable collection rate. A significant part of this success is attributable to the CSA having full access to ATO data. This is only possible if the CSA has access to and can use TFNs.

The reforms introduced in this Bill do not provide the CSA with any additional access or powers in relation to TFNs than those it has currently. They are intended to preserve the existing arrangements in relation to access to taxation information and identification of child support clients. However, since the child support legislation will no longer be administered by the Commissioner, the amendments to the taxation legislation are necessary to articulate the purposes for which the CSA can seek and use TFNs - these purposes are the same as those currently in place. Therefore, they do not represent "function creep".

The new TFN provisions themselves are essentially replications of already established provisions in the social security and family assistance law, as set out in the Explanatory Memorandum.

I conclude by saying that the Privacy Commissioner was consulted fully during the drafting of the new TFN provisions, is aware of the circumstances and details of the changed administrative arrangements (as described above), and has agreed to the new provisions in this light.

The Committee thanks the Minister for response.

Abrogation of the privilege against self-incrimination
Schedule 6, Part 1

Part 1 of Schedule 6 to this bill proposes to insert a new Part VA in the *Child Support (Registration and Collection) Act 1988.* This new Part sets up a system of departure prohibition orders so that certain child support payers who have persistently failed to meet their child support commitments may be prevented from leaving Australia without making satisfactory arrangements to discharge those debts.

Among other things, Part VA contains proposed new section 72V. This section abrogates the privilege against self-incrimination for a person who provides information under proposed new section 72U. However, the section goes on to limit the circumstances in which information so provided may be admitted in evidence. In general terms, any information provided or anything obtained as a direct result is not admissible in evidence against the individual, other than in proceedings for knowingly providing false and misleading information.

While this provision attempts to strike a balance between the competing interests of obtaining information and protecting individual rights, the Committee notes that the provision refers only to information "obtained as a direct result" of complying with a request. Similar provisions usually provide an immunity for information "obtained as a direct or indirect consequence" of complying with a request (see, for example, proposed section 268BK to be included in the *Migration Act 1958* by the Migration Legislation Amendment (Overseas Students) Bill 2000; *Dairy Industry Adjustment Act 2000* s 40(2)(b); *Product Grants and Benefits Administration Act 2000* s 43(2)(b)).

With regard to this provision, the Explanatory Memorandum simply states that "the requirement to answer questions or produce documents in this way overrides the common law privilege against self-incrimination" but that "the use of incriminatory information against the person in proceedings other than under subsection 72U(5) itself will be prevented. This is in keeping with accepted Commonwealth criminal law policy".

Unlike many other similar provisions, proposed section 72V does not address the possible use in evidence of information, documents or things obtained indirectly as a result of compelling someone to incriminate himself or herself. The Committee, therefore, **seeks the Minister's advice** as to the reason for this departure from what seems to have been settled criminal law policy.

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 second substantial group of comments relates to proposed section 72V in the new provisions governing child support departure prohibition orders. The section provides an abrogation of the privilege against self-incrimination. However, it also provides that any information, document or thing obtained as a direct result of a person complying with a requirement to answer questions or produce documents may not generally be admitted in evidence. The Committee notes that current Commonwealth criminal law policy requires that the provision should refer to information, documents or things obtained as a direct or indirect result of the compliance, and seeks the Minister's advice as to the reason for the departure. from settled policy. The Committee has expressed concern that these changes 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.
>
> The Committee is correct in identifying this aspect of criminal law policy. The absence of a reference to the information, etc, being obtained as an indirect result of the compliance is an unintended drafting omission. I intend to move a Government amendment when the Bill is debated in the House of Representatives to rectify the omission.

The Committee thanks the Minister for this comprehensive response and for the amendment foreshadowed.

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No 19. of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 13 March 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. 19 of 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Criminal Code Act 1995* to:

- provide for a range of geographical jurisdictional options to apply to all offences;
- implement a scheme of theft, fraud, bribery, forgery and related offences (based on chapter 3 of the Model Criminal Code);
- provide additional protection for Commonwealth public officials from violence and harassment enabling the Commonwealth to prosecute those who seek to cause them harm (based on chapter 5 of the Model Criminal Code);
- provide protection of any part of the national infrastructure about which the Commonwealth has power and believes it is in the national interest to protect regardless of ownership details, including postal and communications services;

and amends 123 Acts and five regulations to repeal more than 250 offences as a consequence of amendments to the *Criminal Code Act 1995*.

Reversal of the onus of proof
Proposed new sections 14.1, 15.1, 15.2 and 15.3

Item 12 of this bill inserts a new set of general principles into Chapter 2 of the Criminal Code which deal with the geographical reach of Commonwealth offences. These are contained in a new Part 2.7, which contains proposed new sections 14.1, 15.1, 15.2 and 15.3. These sections are drafted to specify the geographical jurisdiction of the Criminal Code widely.

Proposed new subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) then allow for a defence to the liability imposed by the preceding provisions in each section. For example, proposed subsection 14.1(3) states that a person is not guilty of a relevant offence if the conduct constituting the alleged offence occurs wholly in a foreign country (but not on board an Australian aircraft or ship) and in the foreign country where the conduct took place there is no law that creates a corresponding offence. The defendant bears an evidential burden in relation to these matters, and the other comparable defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

With regard to proposed subsection 14.1(3), the Explanatory Memorandum states that it "provides the possibility of a defence" and that this defence is "that there was no offence in the place where the conduct occurred … the inquiry is not into whether the particular conduct alleged would have amounted to an offence of some kind or other under the law of [country] X … the inquiry is into whether [country] X has in its law a corresponding offence."

While significant, these words provide no explanation for the adoption of this form of drafting, nor do they seek to justify the imposition of an evidential burden on a defendant to raise issues of the content of foreign law.

Further, the relationship between proposed subsection 14.1(2) and 14.1(3) is not clear. Under subsection 14.1(2) the prosecution would bear the onus of proving that the conduct constituting the offence occurs partly or wholly in Australia. Under proposed subsection 14.1(3) the defendant bears an evidential burden of showing that the conduct constituting the offence occurred wholly in a foreign country. It is not clear how the two burdens are to relate in practice. The Committee, therefore, **seeks the Minister's advice** as to why these provisions have been drafted in this way, and why the defendant should bear an evidential burden in relation to the defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

Pending the Minister's advice, 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

The digest raises concerns that certain provisions in the Bill may be considered to trespass unduly on personal rights and liberties.

Geographical jurisdiction - onus of proof

Item 12 of the Bill inserts into Chapter 2 of the Criminal Code (which contains the general principles of criminal responsibility) a new set of provisions which deal with the geographical reach of Commonwealth offences. These provisions on geographical reach are contained in new Part 2.7, which contains proposed sections 14.1, 15.1, 15.2, 15.3 and 15.4.

Proposed Part 2.7 provides a range of options for geographical jurisdiction which it is proposed should be used to determine this issue in relation to specific offences. Each time an offence is developed it will be possible to select the appropriate option for geographical reach. If the offence requires only a narrow territorial basis for jurisdiction then proposed section 14.1 would apply as the 'default provision' without the need for reference to the issue. Proposed section 14.1 provides for a basic but narrow geographical jurisdiction based on a territorial connection to Australia.

The options in proposed sections 15.1, 15.2, 15.3 and 15.4 provide for more extensive jurisdiction, increasing in reach by degrees from category A (section 15.1) through to an unrestricted jurisdiction in category D (section 15.4). (The latter might be appropriate for those offences which are regarded as matters of universal jurisdiction such as piracy and the like.) It will be for the Parliament to determine on a case by case basis which of the provisions is appropriate for a particular offence. The presentation of the options in Part 2.7 is not in itself going to make the geographical jurisdiction of the Code wider than current provisions. Indeed it is quite possible that section 3A of the *Crimes Act 1914* provides for much broader jurisdiction than some of these options - particularly when compared to proposed section 14.1. (Section 3A states rather baldly, and unhelpfully, that the *Crimes Act 1914* 'applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories'.)

Proposed subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) provide for a defence where there is no law of a corresponding kind in the other country where conduct constituting the offence occurs. The provisions are protective of the rights of the citizen in that there is currently no specified defence of this nature under the existing *Crimes Act 1914* equivalent (section 3A). The defence is included to ensure there is no undue trespass on personal rights and liberties in relation to offences where standard or category A, B or C geographical jurisdiction applies. (There is, of course, no similar defence in relation to category D - unrestricted jurisdiction.)

The provisions impose an *evidential burden* upon the defendant in relation to these matters. The Criminal Code defines an *evidential burden* as the burden on the defendant to adduce or point to evidence that suggests a reasonable possibility that there is no corresponding foreign law, (sections 13.3(3) and (6) of the *Criminal Code*). If this occurs, then it is for the prosecution to prove beyond a reasonable doubt that there is a corresponding law. The burden of proof on the defendant is not a particularly onerous requirement. It would be unacceptably onerous on the prosecution to prove in every case beyond a reasonable doubt that there were laws of a corresponding kind, even where there was no evidence that this was an issue.

I turn now to your comment that the relationship between proposed subsections 14.1(2) and (3) is not clear. Proposed paragraph 14.1(2)(c) refers to ancillary offences, such as conspiracy or attempt or the like, which even under the most limited option for geographical jurisdiction may involve conduct constituting an offence which occurs wholly outside Australia. In those circumstances the defendant may have a defence under proposed subsection 14.1(3) if there is no corresponding offence in that country.

The Committee thanks the Minister for this detailed response and notes the breadth of the existing section 3A of the *Crimes Act 1914*. Nevertheless, it continues to have some concerns about the way in which requiring a defendant to adduce evidence about the content of foreign law will operate in practice. The Committee would appreciate a further briefing on this issue.

Imposition of absolute liability
Proposed new subsections 135.1(6) and 135.4(6)

Proposed new subsection 135.1(5) of the Criminal Code creates an offence of knowingly and dishonestly causing a loss to a Commonwealth entity. Proposed subsection 135.1(6) excludes the requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved. The Explanatory Memorandum notes this fact but gives no reason for the inclusion of the provision.

Similarly, proposed new subsection 135.4(5) creates an offence of conspiracy to dishonestly cause a loss to a Commonwealth entity. Again, proposed subsection 135.4(6) excludes the requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved. The Explanatory Memorandum makes no reference to the need for this provision.

The Committee, therefore, **seeks the Minister's advice** as to the reasons for applying absolute liability in relation to each of these provisions.

Pending the Minister's advice 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

Absolute liability and knowledge about the Commonwealth entity element

The Committee's next comment concerns proposed subsection 135.1(6) and 135.4(6), which exclude any requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved in relation to the offences under proposed subsections 135.1(5) and 135.4(5) respectively. The Committee sought advice as to the reason for applying absolute liability in relation to each of these provisions.

The essential reason for including this element (knowledge that a Commonwealth entity is involved) is to trigger Commonwealth jurisdiction. The element does not play any other role, eg in defining the gravity of the offence. Under the existing law the part of the offence which brings it within Commonwealth jurisdiction is not considered to be an element about which the prosecution must prove awareness on the part of the defendant.

Further it was recognised by the Gibbs Committee at p. 43 of its July 1990 report *Principles of Criminal Responsibility* as a principle which would need to be preserved under any new Criminal Code:

> One caveat should be made. If a circumstance of the offence adds something to its gravity the presumption that knowledge or intention is required should apply in respect of that circumstance, but if the circumstance is prescribed for jurisdictional reasons only the position would seem to be different. The matter may be illustrated by comparing sections 71 and 76 of the *Crimes Act 1914*. If the circumstance that the stolen property should be "property belonging to the Commonwealth" was introduced into section 71 for jurisdictional reasons only (as may well be the case) no fault should be required in respect of that element. The same would be true if the circumstance that the officer obstructed or resisted was a "Commonwealth officer" was introduced into section 76 for jurisdictional reasons, but if that circumstance is one of aggravation a fault element should be necessary. If our recommendation is adopted the general rule will be that the element of knowledge or intention is presumed to be required and it will be necessary for the draftsman to give attention to this question in all provisions such as sections 71 and 76.

The recommendation of the Gibbs Committee on this issue is correct in principle. If a person steals property he or she should face the consequences regardless of whether there was an awareness as to Commonwealth ownership of that property. To require proof that the person was also aware that it was Commonwealth property would seriously and unnecessarily inhibit the capacity of the prosecutors to use the new offences. This is because many defendants would be able to convincingly demonstrate that they did not even think about who owned the property. Further it is

also true that many in the community have very little appreciation of the divisions between Commonwealth and State/Territory functions. Many defendants would be able to demonstrate that they had no idea whether the property was owned by the Commonwealth or the State. It would not be a just result if defendants were able to escape liability following proof of all the other elements of each offence if a technicality of this nature were available to them.

The same drafting technique is used in relation to a number of offences in the proposed Bill. Those responsible for preparing the legislation have been very careful to ensure that the use of absolute liability is limited to elements of offences which have no bearing on the true culpability of the defendant. The *Criminal Code* introduces an approach to the creation of offences which emphasises the principle that the prosecution must prove fault in relation to elements that amount to conduct, circumstances or results which when combined provide sufficient culpability to warrant the imposition of a criminal conviction and penalty. The use of absolute liability in these offences is one of the few occasions where it is justified and does not conflict with that principle.

Proposed new subsections 131.1(3), 132.4(8), 132.6(2), 134.1(2), 134.2(2), 135.1(6), 135.4(5), 141.1(2), 142.1(2), 144.1(2)(4)(6)(8) and 145.2(2)(4)(6)(8) are all examples of the drafter implementing this recommendation of the Gibbs Committee. Under the *Criminal Code* all physical elements of an offence automatically have a fault element by virtue of section 5.6. The 'Commonwealth entity' element is a physical element of the offence. Therefore the appropriate way of drafting the offence to implement the Gibbs Committee recommendation is to specify that a fault element is *not* to apply. This is done by stating that absolute liability applies to that element of the offence (as envisaged by section 6.2). In this way the Code ensures that there is both transparency and certainty about what is required.

The Committee thanks the Minister for this detailed response.

Reversal of the onus of proof
Proposed new subsections 136.1(2), (3), (5) and (6); 137.1(2) and (3) and 137.2(2)

Proposed new subsection 136.1(1) creates an offence of making a false and misleading statement in an application for a licence, permit, authority, registration or a claim for benefit. One of the elements of this offence is that the person makes the statement knowing that it is false or misleading, or knowing that the statement omits any matter or thing without which it is misleading.

Proposed new subsection 136.1(2) states that subsection (1) does not apply "if the statement is not false or misleading in a material particular". Proposed new subsection (3) states that subsection (1) does not apply "if the statement did not omit any matter or thing without which the statement is misleading in a material particular". In each instance, the defendant bears an evidential burden in relation to these matters.

Proposed subsections 136.1(5) and (6) provide that a defendant bears an evidential burden in relation to similar matters where the alleged offence is recklessly making a false or misleading statement. Proposed subsections 137.1(2) and (3) provide that a defendant bears an evidential burden in relation to similar matters where the alleged offence is providing false or misleading information and proposed section 137.2(2) imposes a similar evidential burden on a defendant where the offence is producing a false or misleading document.

The Explanatory Memorandum states that this approach has been chosen because "it would be too onerous to require the prosecution to prove that the defendant knew or was reckless as to materiality". However, including the proposed defence "should ensure that materiality is taken into account".

The Committee has previously accepted that it may be appropriate to impose an evidential burden on a defendant to raise an issue where it would be too onerous to require the prosecution to disprove it (see for example, the discussion of Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 in the Committee's *Seventh Report of 1999*).

However, it is not clear whether the provisions as drafted require the prosecution to prove materiality and the defendant to raise the issue of lack of knowledge of materiality, or whether materiality will only become an issue if the defendant raises it. In addition, these provisions seem part of a large number of provisions which seek to impose an evidential burden on a defendant. It is not clear whether these provisions simply make explicit the existing law, or whether they are imposing new burdens on defendants. The Committee, therefore, **seeks the Minister's advice** on these issues.

Pending the Minister's advice, 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

Reversal of the Onus of Proof - Materiality

The next comment by the Committee concerns a series of provisions in section 136.1 and 137.1. Proposed subsection 136.1 creates an offence of making a false and misleading statement. New subsection 136.1(2) states that the offence does not apply 'if the statement is not false or misleading in a material particular'. The defendant bears an evidential burden in relation to this matter. The Committee observes that it is not clear whether this provision (and a number of other similar provisions) simply restates the existing law, or whether they impose new burdens on the defendant.

Proposed new subsections 136.1(2)(3)(5)(6), 137.1(2)(3) and 137.2(2) are a collection of general offences with lower penalties that will replace scores of false and misleading statement type offences presently scattered throughout the Commonwealth statute book. During the development of the offences it was recognised that materiality of the statement may be an issue in some cases and that the offences should ensure there is some consideration of that issue in appropriate cases. However, it was also recognised that to require prosecutors to prove materiality in all these minor offences would be unduly onerous.

Subsection 13.1(2) of Chapter 2 of the *Criminal Code* makes it clear that the prosecution bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof. Subsection 13.3(3) of the Code states that a defendant who wishes to rely on any exemption bears the evidential burden. The proposed subsections are exemptions - so the prosecutor is required to prove that the misstatement, etc was material once the defendant adduces or points to evidence it was not material. This should not be a difficult thing for a defendant to do. For example, if an application for an allowance indicated the person was 39 years of age when if fact the correct age was 42, the defendant could point out that the guidelines for the payment of the allowance show that the age difference would not have made any difference in relation to eligibility for the particular amount of allowance. It would then be for the prosecution to prove beyond reasonable doubt that knowing the exact age was material with respect to one of the criteria. For this type of offence it is not unreasonable to have a process of this nature.

It is also worth noting that the equivalent offence in the *Crimes Act 1914* (section 29C) and the replacement recommended by the Gibbs Committee contain no mention of materiality (see draft section 29C at p.24 of Part IX of their July, 1990 Interim Report). In other words, the prosecution would not have to prove that a misstatement is material in order to make out the offence. The offences in the Bill are much more considerate of personal rights and liberties.

I thank the Committee for its examination of the Bill and hope my responses provide sufficient clarification of the rationale behind these provisions.

The Committee thanks the Minister for this detailed response.

Gene Technology Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2000*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 11 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. 9 of 2000

This bill was introduced into the House of Representatives on 22 June 2000 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill, which represents a major component of a national scheme of legislation, proposes to establish a regulatory framework to protect public health and safety and to protect the environment from risks associated with gene technology. The scheme operates by identifying and assessing risks posed by, or as a result of, gene technology, and by managing risks through the regulation of certain dealings with genetically modified organisms (GMOs).

The bill establishes a statutory officer, to be known as the Gene Technology Regulator, to perform various statutory functions; and three Committees (the Gene Technology Technical Advisory Committee, the Gene Ethics Committee and the Gene Technology Community Consultative Group) to provide scientific, ethical and policy advice respectively to the Regulator and/or the Ministerial Council established under an Intergovernmental Agreement on Gene Technology.

Strict liability offences
Clauses 33, 35, 36 and 37

Clauses 33 and 35 of this bill impose strict liability for the offences of dealing with a genetically modified organism (GMO) without a licence, and breaching the conditions of a GMO licence. Strict liability permits a person to be convicted of the offence if the prosecution simply proves the fact of a contravention – the prosecution need not prove that the conduct was done intentionally or recklessly.

Clauses 32 and 34 provide that the same conduct, if done intentionally or recklessly, is also a criminal offence, for which a greater penalty may be imposed, and the provisions are therefore in accord with the *Criminal Code*.

Similarly, clauses 36 and 37 impose strict liability for some aspects of the conduct specified in those clauses (breach of conditions on the GMO Register, and undertaking a notifiable low risk dealing otherwise than in accordance with the regulations).

In setting out the background to these provisions, the Explanatory Memorandum fails to provide any reason for the imposition of strict liability in each of the relevant circumstances. The Committee, therefore, **seeks the Minister's advice** as to this issue.

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

During consultations on the Gene Technology Bill 2000, stakeholders stressed the importance of the legislation having a range of offences, or "tiered offences", enabling appropriate responses to a range of possible infringements of the legislation, varying in significance and consequence.

The legislation therefore establishes various offences relating to unauthorised activities, including certain strict liability offences. Strict liability elements within offences offer a firm compliance model, which is necessary where issues of public health, safety and protection of the environment are at stake. The consequences of improper use of a GMO are considerable and, as such, in many cases substantial or 'best efforts' compliance is insufficient. For example, a person may be licensed to conduct experimentation with a live, genetically modified virus or vaccine within a laboratory and under strict conditions of physical containment. The requirement that the work be undertaken under conditions of physical containment is critical for managing the safety of the GMO. If the GMO were dealt with outside containment, this could cause significant risk to health and safety and to the environment. As such, strict compliance with the conditions applicable to the GMO dealing is essential.

It should be noted, however, that while the proposed legislation does prescribe strict liability offences for the reason described above, fault is still required to be demonstrated for key elements of these offences.

For example, to be found guilty of a strict liability offence for dealing with a GMO without a licence, the person must know that they are dealing with a GMO. This substantially limits the prospect of an inadvertent offence. If a person does not realise they are dealing with a GMO, they do not commit the offence. If a person

does know they are dealing with a GMO, it is reasonable to require them to deal with the GMO strictly in accordance with the legislation.

Parliament has traditionally shown a willingness to enact strict liability offences with reasonable penalties in legislation directed to protecting public health, safety and the environment. One key example is the numerous strict liability offences in Part 13 of the *Environment Protection and Biodiversity Conservation Act 1999* that carry 500 penalty unit maximum penalties.

The Committee thanks the Minister for this response.

Aggravated offences and "significant damage"
Clause 38

Clause 38 of this bill states that an offence is an aggravated offence "if the commission of the offence causes significant damage, or is likely to cause significant damage, to the health and safety of people or to the environment". The purpose of this clause is to assist in the application of clauses 32 to 34, which provide for considerably higher penalties in the case of aggravated offences.

However, the bill does not define, or seek to provide a meaning for the notion of, "significant" in relation to damage which has been, or may be, caused by the conduct of an accused. Given that aggravated offences are to attract much higher penalties, the Committee **seeks the Minister's advice** as to why an important term such as "significant damage" is not defined in the legislation.

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

Leaving the term 'significant damage' undefined allows for a court to decide, in any given case, whether the harm that has been caused by an offence in relation to a GMO justifies conviction and punishment as an aggravated offence. If the notion of 'significant damage' were defined in the legislation, there would be a risk that a person would come within or outside the definition on technical grounds. Leaving scope for the judiciary to exercise decision-making discretion, to do justice in a given case, has often been seen as an important safeguard of civil liberties.

The use of terms such as 'significant harm' and 'substantial damage' in serious offences, without those terms being further defined in the Act, has previously proven acceptable to the Parliament in relation to legislation dealing with health, safety and the environment. Examples include section 44 of the *Space Activities Act 1998* ('substantial harm to public health', 'substantial damage to property'); section 35 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* ('substantial damage to property') and a range of offences in Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* ('significant impact', which the Act does not define, although it does provide that it may be defined in regulation).

One of the key arguments for requiring certainty in offence provisions is to ensure that people can confidently organise their affairs while remaining within the law. In the case of proposed section 38, this argument is not applicable. Part 4, Division 2 of the Gene Technology Bill clearly prohibits improper conduct with respect to a GMO or GMO licence, and makes this improper conduct an offence regardless of whether the offender's conduct will cause significant damage to health, safety or the environment. A person cannot legitimately claim that they thought an improper dealing in a GMO or breach of a GMO licence was lawful because it did not cause 'significant damage'. This concept only results in conduct that would already be an offence, being treated as an aggravated offence.

The Committee thanks the Minister for this response.

Old convictions, continuing consequences
Clause 58

Clause 58 of this bill provides that, in deciding whether a person or company is "suitable" to hold a licence under the bill, the Gene Technology Regulator must have regard to any relevant conviction. A relevant conviction is defined as a conviction for an offence "relating to the health and safety of people or the environment" that occurred within the previous 10 years and that was punishable by a fine of $5000 or by imprisonment for 1 year.

Such provisions may be regarded as somewhat arbitrary, and as imposing a double penalty on the person or company concerned in that the fact of a conviction is held against them, possibly long after the offence was committed.

Further, such provisions, in referring to offences "punishable" by a fine or imprisonment, are potentially inequitable in that they take account of nominal penalties but not of penalties actually imposed. For example, a person who has actually served a sentence of imprisonment of 6 months for a relevant offence which was punishable by imprisonment for 6 months (ie the worst category of such an offence) would not have this sentence taken into account. However, a person who was fined $50 for a relevant offence punishable by imprisonment for a year (ie not at all a serious category of such an offence) would have this sentence taken into account.

There is a real possibility that such a provision may lead to a refusal to grant a licence in circumstances of apparent unfairness. The Committee, therefore, **seeks the Minister's advice** as to the appropriateness of requiring such old convictions to be taken into account.

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

Clause 59 of the Gene Technology Bill 2000 provides that the Regulator must not issue a licence unless the Regulator is satisfied that the applicant is a suitable person to hold the licence. Clause 58 further describes a range of matters that the Regulator may take into account in determining the suitability of an applicant, including any relevant convictions.

These provisions are important, from a policy perspective, because the system of controls described in the Gene Technology Bill depends on effective management of any risks posed by GMOs. If the Regulator grants a licence for a person or persons to deal with a GMO (for example, to conduct experiments with a live or viable GMO), the Regulator must be satisfied that the person can manage the risks posed by the proposed dealing with the GMO. From a policy perspective, prior convictions are an important consideration because misuse of GMOs may have serious consequences, and it is necessary in the interests of community protection for the Regulator to take into account whether a person has a prior record of criminal misconduct.

With respect to the Committee's concerns regarding the appropriateness of considering old convictions, we note that under proposed subsection 58(4), the consideration of prior convictions is subject to the spent convictions scheme in Part VIIC of the *Crimes Act 1914*. This scheme provides an overall benchmark for the way in which prior convictions are to be treated by the Commonwealth.

Under this scheme, certain criminal convictions are taken to be 'spent' where:

- the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months; and

- a prescribed period of time has elapsed since the conviction (five years where the offence was committed by a minor, ten years in all other cases); and

- no further offences have been committed during the period referred to in (ii) above.

Subject to certain exclusions, where a conviction for a Commonwealth or external Territory offence is spent, the person is not required to disclose to any person in any State or Territory the fact that they have been charged with or convicted of the offence. Further, the person is not required to disclose the conviction to any Commonwealth or State authority in a foreign country. Subject to the same exclusions, a person is not required to disclose a spent conviction for a State or foreign offence to any person in an external Territory or to any Commonwealth authority in a State or foreign country. Where a spent conviction need not be disclosed by the offender, it is not to be disclosed by a third party, or to be taken into account by a decision maker.

Clause 58 of the Bill, in combination with the operation of the spent convictions scheme (which is explicitly referenced in the Bill) strikes a balance between:

- the need for the Regulator to be satisfied that a person is suitable to hold a licence to deal with a GMO (that may potentially be dangerous to public health and safety or the environment if managed improperly); and

- the importance of protecting individual liberties and ensuring that there is no compulsion to disclose spent convictions.

The Committee thanks the Minister for this response which explains the operation of the provision in this bill.

Search and entry without a warrant
Clause 158

Clause 158 of this bill permits the entry of an inspector onto premises without a warrant if the inspector has reasonable grounds for suspecting that something on the premises indicates that the Act or regulations have not been complied with, and the inspector considers it necessary to exercise this power "to avoid an imminent risk of death, serious illness, serious injury or to protect the environment".

Entry without a warrant is a matter of concern to the Committee, and was canvassed at length in the Committee's *Fourth Report of 2000*. Specifically, at paragraph 1.44 of that Report, the Committee noted that "entry onto premises without consent may be reasonable in situations of emergency, serious danger to public health, or where national security is involved. However, in such situations it is appropriate that a judicial officer, rather than a Minister or Departmental Secretary, should authorise that entry".

While the Committee is mindful of the need to minimise risks to health or the environment, clause 158 appears to permit an entry (with no need to obtain any form of authorisation from anyone) where an inspector considers it "necessary" to avoid a risk to health "or to protect the environment". There is no requirement either for 'reasonable' necessity or for a 'significant' threat to the environment. The Committee, therefore, **seeks the Minister's advice** as to the appropriateness of an entry power expressed in such wide terms.

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

Subsection 158(3) of the Gene Technology Bill 2000 provides that:

"The inspector may exercise the powers in subsection (2) only to the extent that it is necessary-for the purpose of avoiding an imminent risk of death, serious illness, serious injury or serious damage to the environment."

The limitation on the general entry power which provides that an inspector can exercise powers 'only to the extent that is necessary for the purpose of avoiding an imminent risk...' is an objective requirement. It is not enough for the inspector to consider intervention necessary. For the exercise of powers to be valid, the exercise of entry and other powers must in fact be necessary in the terms described in subsection 158(3). This substantially limits the powers of the inspector and ensures that the entry powers are only used in circumstances that are objectively necessary to avoid imminent risk of death, serious illness, serious injury or serious damage to the environment.

The Committee thanks the Minister for this response.

Gene Technology (Licence Charges) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2000*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 11 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. 9 of 2000

This bill was introduced into the House of Representatives on 22 June 2000 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

Introduced with Gene Technology Bill 2000, this bill provides the framework to enable annual charges to be levied by regulation in respect of licences issued under the Gene Technology Bill 2000.

Setting a rate of levy by regulation
Subclause 4(2)

Subclause 4(2) of this bill permits the charges to be levied under the bill to be set by regulation, with no upper limit specified in the bill itself. The Committee consistently draws attention to such legislation, which creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Explanatory Memorandum, in its Financial Impact Statement, notes that the intention of the bill is to ensure that the costs incurred by the Gene Technology Regulator, in fulfilling the functions set out in the Gene Technology Bill 2000, are to be recovered from those who use the service. However, this limitation is not expressed in the bill itself. As it stands, the bill would seem to permit taxes to be levied by delegated legislation, and may therefore be regarded as inappropriately delegating legislative power. The Committee **seeks the advice of the Minister** on this issue.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to inappropriately delegate legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Sub-clause 4(1) of the Gene Technology (Licence Charges) Bill 2000, if enacted, would be the provision which operates to make persons liable to pay a charge. The Bill does not permit taxes or charges to be levied by delegated legislation, it is simply the amount of the charge or tax which is to be determined by delegated legislation.

The kind of formulation which is contained in clause 4 of the Gene Technology (Licence Charges) Bill 2000 (ie, 'the amount of the charge for a financial year is such amount as is prescribed by the regulations') is relatively common and has been included in a number of Acts including the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*. Indeed, Parliament has sometimes gives the power to determine the amount of a charge to a Commonwealth agency or body.

For example, in the recent case of Airservices Australia v Canadian Airlines International Limited, the High Court considered a number of issues related to charges imposed under the *Civil Aviation Act 1988.* That Act allowed the Civil Aviation Authority to make determinations fixing charges payable for the use of air route and airport services facilities. Similarly, the *Copyright Act 1958* enabled the Copyright Tribunal to determine particular amounts to be factored into the determination of certain royalties.

In summary, it is the Bill which, if enacted, will operate to impose the charge. It is only the amount of the charge that will be left to be determined by regulation, which will also be subject to Parliamentary scrutiny.

The Committee thanks the Minister for this response. However, the Committee reiterates its view that, where a bill provides for the amount of a levy to be set by regulation, it is important that the bill itself contain some limitation on this amount – whether this be a specified upper limit, or a method or formula by which the levy can be calculated. Where no such limit is set out, there is a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee, therefore, continues to draw Senators' attention to this provision, as it may be considered to inappropriately delegate legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Taxation Laws Amendment (Superannuation Contributions) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2000*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 31 October 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 14 of 2000

This bill was introduced into the House of Representatives on 7 September 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Fringe Benefits Tax Assessment Act 1986* to prevent individuals reducing their taxable income by entering into aggressive tax planning schemes involving superannuation. This will be achieved by:

- clarifying the definition of 'eligible employee' in section 82AAA of the *Income Tax Assessment Act 1936* to put beyond doubt the fact that a taxpayer cannot be an employee of themselves;
- amending the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to deny deductions for employer contributions knowingly made to non-complying superannuation funds; and
- amending the *Fringe Benefits Tax Assessment Act 1986* to ensure that the exclusion of payments to superannuation funds and retirement savings accounts from the term 'fringe benefits' applies only to payments made for the employee – contributions made by an employer for the benefit of an associate of the employee will be subject to fringe benefits tax.

The bill also contains application and transitional provisions.

The Committee considered this bill in *Alert Digest No. 13 of 2000* in which it referred to the issue of legislation by press release. The Committee has since received correspondence from the Taxation Institute of Australia (copy appended to this *Digest*) which draws attention to other aspects of the bill. These aspects are discussed below.

The superannuation rights of Australians temporarily working overseas Schedules 1, 2 and 3

The Taxation Institute of Australia (TIA) states that this bill impacts adversely on Australians who, as residents, have provided for their retirement in complying superannuation funds that later become non-complying funds as a result of a period of non-residency by the main contributor (for example, through an overseas posting for more than 6 months). Specifically, the TIA states that "if an Australian is overseas for a short period they should be extended the same tax treatment as their fellow Australians, not treated in the same way we treat foreigners working in Australia who ultimately are likely to retire in their home countries".

The Committee, therefore, **seeks the Minister's advice** as to the effect of the bill on the superannuation entitlements of Australians working overseas for a period but intending to retire in Australia.

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.

Extract from the response from the Assistant Treasurer

The issue raised by the Committee specifically relates to individuals who provide for their own retirement in self managed superannuation funds that later "become non-complying funds as a result of a period of non-residency by the main contributor (for example, through an overseas posting of more than six months)".

This issue, although unrelated to and not in any way changed by the new Bill, is now resolved.

The Government announced on 4 October 2000 that it would amend the relevant legislation to make it easier for the trustees of self managed superannuation funds to retain complying status. This announcement has generated strongly positive responses from a wide range of industry bodies.

I have attached a copy of the media release for you convenience.

I trust this has been of some assistance to you.

Extract from Press Release No. 49 dated 4 October 2000

> "The Assistant Treasurer, Senator Rod Kemp, today announced that the Government would be amending the *Income Tax Assessment Act 1936* to make it easier for SMSF trustees to retain complying fund status.
>
> The Government wants to ensure that a fund does not become non-complying, and suffer the tax consequences, where a member/trustee temporarily works overseas, Senator Kemp said.

Under the proposed changes, the central management and control test for residency will continue to be satisfied so long as the member/trustee's move overseas generally does not exceed two years.

In addition, it will no longer be necessary for a member to reside in Australia for all of a year of income in order for the 'active member' test to be met.

The amendments will take effect from date of Royal Assent."

The Committee thanks the Assistant Treasurer for this response and the accompanying Press Release which indicates that the issue has been addressed in amendments made to the bill.

The Committee notes the observation of the Taxation Institute of Australia that the relevant Press Release "goes some of the way to addressing the impact upon funds but does not deal with the inconsistent treatment of Australians posted offshore". The Taxation Institute does not further elaborate on this observation.

The Committee considers that the Institute should directly inform the Assistant Treasurer of those issues of inconsistency which remain outstanding after the most recent amendments.

Barney Cooney
Chairman

Minister for Aged Care

The Hon Bronwyn Bishop MP

Parliament House
Canberra ACT 2600
Telephone: (02) 6277 7280
Facsimile: (02) 6273 4138

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

cc. James Warmenhoven, Committee Secretary (SG49, Parliament House)

Barney

Dear Senator ~~Cooney~~

SCRUTINY OF BILLS ALERT DIGEST NO. 13 OF 2000
AGED CARE AMENDMENT BILL 2000

The Aged Care Amendment Bill 2000 (the bill) was passed without amendment by the House of Representatives on 11 October 2000 and has now been introduced into the Senate.

In Alert Digest 13/00 the Scrutiny of Bills Committee (the Committee) makes a range of comments in relation to the bill. The Committee also seeks my advice as to "why the bill does not set out a regime of offences which are relevant to the disqualification of key personnel of aged care providers, and why the bill places no limit on the retrospective consideration of a person's previous offences". My advice on each of those matters is set out below.

Regime of offences leading to disqualification

The Committee comments that the bill does not specify what precise offences should lead to disqualification of an individual who is a member of the key personnel of an approved provider of aged care. It further comments that reference to 'indictable offences' may see "apparently 'irrelevant' offences taken into account while other apparently 'relevant' offences may be disregarded".

The legislature has seen fit to make a distinction between indictable and summary offences. In some jurisdictions terminology such as 'serious' and 'simple' offences is used. In relation to each type of offence the only further distinction that is made is as to the magnitude of the penalty applicable to each offence. I contend that it is not appropriate for the bill to attempt introduce to the statute book a further, inevitably subjective, categorisation for the purposes of aged care legislation alone.

The Committee suggests that, by way of a possible "list of offences ... the commission of which by a person may better reflect his or her suitability to provide aged care services", those "involving physical or emotional violence or cruelty, or fraud or dishonesty" might be appropriate. I strongly disagree, for a number of reasons.

Such a list would inevitably be subject to interpretation. For example, it could be argued that apparently relevant offences for matters such as false imprisonment, or obstructing public officers would not fall within the list. It is unacceptable that such an additional raft of complexity should be allowed to cloud this important issue.

Further, by way of comparison, no such distinction is made in laws concerning a variety of other situations across the social spectrum. For example similar restrictions apply equally to Members of Parliament (who are ineligible for election under the Constitution if "convicted ... for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer"—i.e. equivalent to the Crimes Act reference to indictable offences cited by the Committee) and to applicants for vocational licences (who in various jurisdictions are precluded from becoming licensed on the basis of conviction for indictable offences without qualification).

I am firmly of the opinion that, if the result of legislative intent and judicial process is such that a person's actions can be considered to amount to a serious crime, then that person should not be held out to the public as an appropriate person to have a position of substantial influence in relation to frail, vulnerable older Australians.

I believe that the same argument applies in relation to the distinction the Committee seeks to draw between the maximum penalty for a given indictable offence and the actual penalty. On this point I also note that the Committee has focussed only on the 'definition' of indictable offence in one enactment (the Commonwealth *Crimes Act 1914*), whereas the provision in the bill referring to indictable offences does so by reference to such an offence "against a law of the Commonwealth or of a State or Territory". As definitions of the term may vary from one jurisdiction to another, I consider that it would be unwise to attempt to qualify the matter in a generic way in the bill.

The Committee's suggestion that apparently 'relevant' offences may not be taken into account is also flawed to the extent that it fails to consider existing provisions of the Act. Measures concerning the suitability of approved providers and their key personnel generally are contained in s. 8-3 of the Act, with further measures for revocation of approval in the event of unsuitability in terms of that section being contained in s. 10-3. The bill specifically provides (in Item 6 of Schedule 2) that the proposed amendments do not limit the operation of s. 8-3, with the effect that regard can still be had to the effect of conviction of key personnel for relevant non-indictable offences on the ongoing suitability of approved providers under the Act.

Convictions prior to commencement

When examining the range of indictable offences, the Committee mentions that "[a] person convicted of any of these offences at any time would be permanently disqualified as a member of the key personnel of a provider...". The Committee further suggests that it may be appropriate to limit consideration of 'old' offences to those committed within the previous ten years.

In making these statements it appears that the Committee may have overlooked the specific preservation by the bill (in the proposed sub-clause 10A-1(6)) of the operation of the spent convictions scheme in the Crimes Act. This provision is intended to ensure that only the most serious of convictions should be matters which preclude individuals from taking up

responsible positions in the community in the long term after they have served the appropriate waiting time.

Other matters

While the Committee has referred to action that may be taken in relation to approved providers that are corporate entities, I note that the Committee has not referred to another important issue for all approved providers in relation to disqualified individuals. The bill places an additional responsibility on all approved providers to take reasonable steps to ensure that none of their key personnel is a disqualified individual.

This measure complements offence and other provisions of the bill in providing the Department of Health and Aged Care with greater powers over providers who do not comply with their responsibilities under the Act. Specifically, it will enable consideration to be given to the imposition of sanctions on approved providers for non-compliance with the additional responsibility.

I would be grateful if you would include my response in any report the Committee makes to the Senate in relation to matters raised in the Alert Digest comments.

Yours sincerely

Bronwyn Bishop

BRONWYN BISHOP

25 OCT 2000

THE HON LARRY ANTHONY MP
MINISTER FOR COMMUNITY SERVICES
FEDERAL MEMBER FOR RICHMOND

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

22 SEP 2000

Dear Senator

I am writing in response to comments made by the Committee in its Alert Digest No. 12 of 2000 in relation to the Child Support Legislation Amendment Bill (No. 2) 2000 (the Bill).

Use of tax file numbers

The first substantial group of comments concerns the changes made by Schedule 5 to the Bill relating to tax file numbers (TFNs). In particular, you seek the Minister's advice as to whether the "newly created Child Support Registrar" will have the same information gathering, enforcement and other powers as the Commissioner of Taxation has under the existing legislation. You also seek advice as to why the TFN system should be applied to the child support scheme when this is neither a matter involving taxation nor the administration of taxation. The Committee has expressed concern that these changes 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.

I suggest that it is not correct to refer to the Child Support Registrar as "newly created". The office of Registrar has existed in its own right since the commencement of the ***Child Support (Registration and Collection) Act 1988*** (the Registration and Collection Act), section 10 of which sets up the office. Section 10 also currently provides that the Commissioner of Taxation shall be the Registrar. This is because the current Commonwealth child support function was attached to the Australian Taxation Office (the ATO) from its inception until the 1998 portfolio changes. It was natural at the time that the head of the agency should hold both statutory offices.

Telephone: (02) 6277 7240 Parliament House Canberra ACT 2600 Facsimile: (02) 6273 4152

However, I stress that the two offices are legislatively separate. The Registrar holds powers and performs functions, in the name of the Registrar, under the Registration and Collection Act and the ***Child Support (Assessment) Act 1989***. The Commissioner, on the other hand, holds powers and performs functions, in the name of the Commissioner, under the various taxation Acts. The fact that one person "wears two hats" does not alter the fact that the two offices are (and will remain) legally distinct, with distinct powers and functions.

In 1998, it was decided to align the child support function with the appropriate *policy* responsibility, and it was relocated to the Department of Family and Community Services. This was in contrast to the past alignment with the *operational* function within the Australian Taxation Office. Therefore, the main change made by the Bill is merely to omit the current link between the two separate statutory offices and to provide for the office of Registrar to be fulfilled by the General Manager of the Child Support Agency (the CSA). This is a reflection of the way the function has operated in practical terms all along.

The changes made by the Bill do *not* give the Registrar the same information gathering, enforcement and other powers as the Commissioner. The Registrar's powers in these respects are essentially the same as they always were, under the two child support Acts. The Commissioner's powers also remain the same, under the various taxation Acts.

The new provisions that have attracted your attention (allowing the Registrar to request people to provide TFNs, providing in some cases for the effect of not providing the number, and allowing the Registrar to require the Commissioner to provide information, including TFNs) are, in a real sense, merely technical. This is because their purpose is to allow the child support system to continue to operate basically as it has done to date, despite the relocation of the CSA.

The child support scheme relies heavily on taxation information in relation to making administrative assessments of child support and enforcing child support debts. This has been a significant factor in the CSA's success.

Firstly, administrative assessments of child support are based on the taxable income of both parents. The most efficient way for the CSA to obtain this information is to have it automatically provided through the ATO's systems. This requires the CSA to have access to the person's TFN. The alternative would be for the CSA to request the information in relation to each of its clients, and for the ATO to provide it, on an individual basis. This would be a costly and resource intensive process. As child support assessments may have to be made at any time, it would be impractical to undertake data-matching exercises since this would need to be done on a daily basis. The CSA currently issues in excess of 500,000 child support assessments each year.

Secondly, the CSA has the power to collect child support debts by intercepting tax refunds. This is effected by the CSA placing an indicator on the person's tax record to ensure that the refund is not released before the CSA has considered whether or not to intercept the refund. This also requires access to the person's TFN to make the process efficient. This represents approximately 10% of collections each year.

Thirdly, the CSA can investigate individual cases to initiate a change of assessment process if a parent's child support liability does not reflect their actual capacity to pay. This process requires the CSA to have access to the parent's tax records to establish the basis on which they have currently been assessed.

An important fact to note is that *86%* of the child support liability that should have been paid to the CSA since the start of the child support scheme has, in fact, been paid. In comparison with overseas jurisdictions, this is a remarkable collection rate. A significant part of this success is attributable to the CSA having full access to ATO data. This is only possible if the CSA has access to and can use TFNs.

The reforms introduced in this Bill do not provide the CSA with any additional access or powers in relation to TFNs than those it has currently. They are intended to preserve the existing arrangements in relation to access to taxation information and identification of child support clients. However, since the child support legislation will no longer be administered by the Commissioner, the amendments to the taxation legislation are necessary to articulate the purposes for which the CSA can seek and use TFNs – these purposes are the same as those currently in place. Therefore, they do not represent "function creep".

The new TFN provisions themselves are essentially replications of already established provisions in the social security and family assistance law, as set out in the Explanatory Memorandum.

I conclude by saying that the Privacy Commissioner was consulted fully during the drafting of the new TFN provisions, is aware of the circumstances and details of the changed administrative arrangements (as described above), and has agreed to the new provisions in this light.

Abrogation of the privilege against self-incrimination

The second substantial group of comments relates to proposed section 72V in the new provisions governing child support departure prohibition orders. The section provides an abrogation of the privilege against self-incrimination. However, it also provides that any information, document or thing obtained as a *direct* result of a person complying with a requirement to answer questions or produce documents may not generally be admitted in evidence. The Committee notes that current Commonwealth criminal law policy requires that the provision should refer to information, documents or things obtained as a direct *or indirect* result of the compliance, and seeks the Minister's advice as to the reason for the departure from settled policy. The Committee has expressed concern that these changes 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.

The Committee is correct in identifying this aspect of criminal law policy. The absence of a reference to the information, etc, being obtained as an indirect result of the compliance is an unintended drafting omission. I intend to move a Government amendment when the Bill is debated in the House of Representatives to rectify the omission.

Yours sincerely

LARRY ANTHONY

Minister for Justice and Customs
Senator the Hon Amanda Vanstone

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

13 MAR 2000

00/1320 CRL RG
99/196219 CL MC

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

Dear ~~Senator Cooney~~ Barney,

I am responding to your letter of 2 December 1999 concerning Scrutiny of Bills Alert Digest 19/1999 which raises issues relating to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill.

The digest raises concerns that certain provisions in the Bill may be considered to trespass unduly on personal rights and liberties.

Geographical jurisdiction - onus of proof

Item 12 of the Bill inserts into Chapter 2 of the Criminal Code (which contains the general principles of criminal responsibility) a new set of provisions which deal with the geographical reach of Commonwealth offences. These provisions on geographical reach are contained in new Part 2.7, which contains proposed sections 14.1, 15.1, 15.2, 15.3 and 15.4.

Proposed Part 2.7 provides a range of options for geographical jurisdiction which it is proposed should be used to determine this issue in relation to specific offences. Each time an offence is developed it will be possible to select the appropriate option for geographical reach. If the offence requires only a narrow territorial basis for jurisdiction then proposed section 14.1 would apply as the 'default provision' without the need for reference to the issue. Proposed section 14.1 provides for a basic but narrow geographical jurisdiction based on a territorial connection to Australia.

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7260 • Fax (02) 6273 7098

The options in proposed sections 15.1, 15.2, 15.3 and 15.4 provide for more extensive jurisdiction, increasing in reach by degrees from category A (section 15.1) through to an unrestricted jurisdiction in category D (section 15.4). (The latter might be appropriate for those offences which are regarded as matters of universal jurisdiction such as piracy and the like.) It will be for the Parliament to determine on a case by case basis which of the provisions is appropriate for a particular offence. The presentation of the options in Part 2.7 is not in itself going to make the geographical jurisdiction of the Code wider than current provisions. Indeed it is quite possible that section 3A of the *Crimes Act 1914* provides for much broader jurisdiction than some of these options - particularly when compared to proposed section 14.1. (Section 3A states rather baldly, and unhelpfully, that the *Crimes Act 1914* 'applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories'.)

Proposed subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) provide for a defence where there is no law of a corresponding kind in the other country where conduct constituting the offence occurs. The provisions are protective of the rights of the citizen in that there is currently no specified defence of this nature under the existing *Crimes Act 1914* equivalent (section 3A). The defence is included to ensure there is no undue trespass on personal rights and liberties in relation to offences where standard or category A, B or C geographical jurisdiction applies. (There is, of course, no similar defence in relation to category D – unrestricted jurisdiction.)

The provisions impose an *evidential burden* upon the defendant in relation to these matters. The Criminal Code defines an *evidential burden* as the burden on the defendant to adduce or point to evidence that suggests a reasonable possibility that there is no corresponding foreign law, (sections 13.3(3) and (6) of the *Criminal Code*). If this occurs, then it is for the prosecution to prove beyond a reasonable doubt that there is a corresponding law. The burden of proof on the defendant is not a particularly onerous requirement. It would be unacceptably onerous on the prosecution to prove in every case beyond a reasonable doubt that there were laws of a corresponding kind, even where there was no evidence that this was an issue.

I turn now to your comment that the relationship between proposed subsections 14.1(2) and (3) is not clear. Proposed paragraph 14.1(2)(c) refers to ancillary offences, such as conspiracy or attempt or the like, which even under the most limited option for geographical jurisdiction may involve conduct constituting an offence which occurs wholly outside Australia. In those circumstances the defendant may have a defence under proposed subsection 14.1(3) if there is no corresponding offence in that country.

Absolute liability and knowledge about the Commonwealth entity element

The Committee's next comment concerns proposed subsections 135.1(6) and 135.4(6), which exclude any requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved in relation to the offences under proposed

subsections 135.1(5) and 135.4(5) respectively. The Committee sought advice as to the reason for applying absolute liability in relation to each of these provisions.

The essential reason for including this element (knowledge that a Commonwealth entity is involved) is to trigger Commonwealth jurisdiction. The element does not play any other role, eg in defining the gravity of the offence. Under the existing law the part of the offence which brings it within Commonwealth jurisdiction is not considered to be an element about which the prosecution must prove awareness on the part of the defendant.

Further it was recognised by the Gibbs Committee at p. 43 of its July 1990 report *Principles of Criminal Responsibility* as a principle which would need to be preserved under any new Criminal Code:

> One caveat should be made. If a circumstance of the offence adds something to its gravity the presumption that knowledge or intention is required should apply in respect of that circumstance, but if the circumstance is prescribed for jurisdictional reasons only the position would seem to be different. The matter may be illustrated by comparing sections 71 and 76 of the *Crimes Act 1914*. If the circumstance that the stolen property should be "property belonging to the Commonwealth" was introduced into section 71 for jurisdictional reasons only (as may well be the case) no fault should be required in respect of that element. The same would be true if the circumstance that the officer obstructed or resisted was a "Commonwealth officer" was introduced into section 76 for jurisdictional reasons, but if that circumstance is one of aggravation a fault element should be necessary. If our recommendation is adopted the general rule will be that the element of knowledge or intention is presumed to be required and it will be necessary for the draftsman to give attention to this question in all provisions such as sections 71 and 76.

The recommendation of the Gibbs Committee on this issue is correct in principle. If a person steals property he or she should face the consequences regardless of whether there was an awareness as to Commonwealth ownership of that property. To require proof that the person was also aware that it was Commonwealth property would seriously and unnecessarily inhibit the capacity of the prosecutors to use the new offences. This is because many defendants would be able to convincingly demonstrate that they did not even think about who owned the property. Further it is also true that many in the community have very little appreciation of the divisions between Commonwealth and State/Territory functions. Many defendants would be able to demonstrate that they had no idea whether the property was owned by the Commonwealth or the State. It would not be a just result if defendants were able to escape liability following proof of all the other elements of each offence if a technicality of this nature were available to them.

The same drafting technique is used in relation to a number of offences in the proposed Bill. Those responsible for preparing the legislation have been very careful to ensure that the use of absolute liability is limited to elements of offences which have no bearing on the true culpability of the defendant. The *Criminal Code* introduces an approach to the creation of offences which emphasises the principle that the prosecution must prove fault in relation to elements that amount to conduct, circumstances or results which when combined provide sufficient culpability to warrant the imposition of a criminal conviction and penalty. The use of absolute liability in these offences is one of the few occasions where it is justified and does not conflict with that principle.

Proposed new subsections 131.1(3), 132.4(8), 132.6(2), 134.1(2), 134.2(2), 135.1(6), 135.4(6), 141.1(2), 142.1(2), 144.1(2)(4)(6)(8) and 145.2(2)(4)(6)(8) are all examples of the drafter implementing this recommendation of the Gibbs Committee. Under the *Criminal Code* all physical elements of an offence automatically have a fault element by virtue of section 5.6. The 'Commonwealth entity' element is a physical element of the offence. Therefore the appropriate way of drafting the offence to implement the Gibbs Committee recommendation is to specify that a fault element is *not* to apply. This is done by stating that absolute liability applies to that element of the offence (as envisaged by section 6.2). In this way the Code ensures that there is both transparency and certainty about what is required.

Reversal of the Onus of Proof - Materiality

The next comment by the Committee concerns a series of provisions in sections 136.1 and 137.1. Proposed subsection 136.1 creates an offence of making a false and misleading statement. New subsection 136.1(2) states that the offence does not apply 'if the statement is not false or misleading in a material particular'. The defendant bears an evidential burden in relation to this matter. The Committee observes that it is not clear whether this provision (and a number of other similar provisions) simply restates the existing law, or whether they impose new burdens on the defendant.

Proposed new subsections 136.1(2)(3)(5)(6), 137.1(2)(3) and 137.2(2) are a collection of general offences with lower penalties that will replace scores of false and misleading statement type offences presently scattered throughout the Commonwealth statute book. During the development of the offences it was recognised that materiality of the statement may be an issue in some cases and that the offences should ensure there is some consideration of that issue in appropriate cases. However, it was also recognised that to require prosecutors to prove materiality in all these minor offences would be unduly onerous.

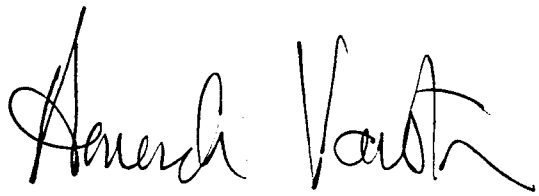
Subsection 13.1(2) of Chapter 2 of the *Criminal Code* makes it clear that the prosecution bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof. Subsection 13.3(3) of the Code states that a defendant who wishes to rely on any exemption bears the evidential

burden. The proposed subsections are exemptions - so the prosecutor is required to prove that the misstatement, etc was material once the defendant adduces or points to evidence it was not material. This should not be a difficult thing for a defendant to do. For example, if an application for an allowance indicated the person was 39 years of age when if fact the correct age was 42, the defendant could point out that the guidelines for the payment of the allowance show that the age difference would not have made any difference in relation to eligibility for the particular amount of allowance. It would then be for the prosecution to prove beyond reasonable doubt that knowing the exact age was material with respect to one of the criteria. For this type of offence it is not unreasonable to have a process of this nature.

It is also worth noting that the equivalent offence in the *Crimes Act 1914* (section 29C) and the replacement recommended by the Gibbs Committee contain no mention of materiality (see draft section 29C at p.24 of Part IX of their July, 1990 Interim Report). In other words, the prosecution would not have to prove that a misstatement is material in order to make out the offence. The offences in the Bill are much more considerate of personal rights and liberties.

I thank the Committee for its examination of the Bill and hope my responses provide sufficient clarification of the rationale behind these provisions.

Yours sincerely



AMANDA VANSTONE

The Hon Dr Michael Wooldridge
Minister for Health and Aged Care

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

Dear Senator Cooney

I am writing in response to a letter of 29 June 2000 from the Secretary of the Standing Committee for the Scrutiny of Bills, Mr J. Warmenhoven, drawing my Office's attention to the Committee's comments contained in the Scrutiny of Bills Alert Digest No 9. of 2000 (28 June 2000), concerning the *Gene Technology Bill 2000*. I sincerely apologise for the delay in responding to the Committee's concerns.

As you will be aware, the *Gene Technology Bill 2000* forms one component of a national scheme for the regulation of gene technology, and was developed with the involvement of all States and Territories and drafted in consultation with the national Parliamentary Counsels' Committee. Following consultation with all relevant parties, including the Attorney-General's Department, I have attached responses to the Committee's comments for your consideration.

I trust this addresses the Committee's concerns. If you have any further queries, please contact Dr Joanna Wriedt of my office on (02) 6277 7220.

Yours sincerely

MJWooldridge

Dr Michael Wooldridge

Enclosure

11 OCT 2000

Suite MG 48 Parliament House Canberra ACT 2600 Telephone (02) 6277 7220 Facsimile (02) 6273 4146

RESPONSE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
ALERT DIGEST NO. 9 OF 2000 (28 June 2000)

GENE TECHNOLOGY BILL 2000

Strict liability offences
Clauses 33,35,36 and 37

Question:

In setting out the background to these provisions, the Explanatory Memorandum fails to provide any reason for the imposition of strict liability in each of the relevant circumstances. The Committee, therefore, seeks the Minister's advice as to this issue.

> *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*

Response:

During consultations on the Gene Technology Bill 2000, stakeholders stressed the importance of the legislation having a range of offences, or "tiered offences", enabling appropriate responses to a range of possible infringements of the legislation, varying in significance and consequence.

The legislation therefore establishes various offences relating to unauthorised activities, including certain strict liability offences. Strict liability elements within offences offer a firm compliance model, which is necessary where issues of public health, safety and protection of the environment are at stake. The consequences of improper use of a GMO are considerable and, as such, in many cases substantial or 'best efforts' compliance is insufficient. For example, a person may be licensed to conduct experimentation with a live, genetically modified virus or vaccine within a laboratory and under strict conditions of physical containment. The requirement that the work be undertaken under conditions of physical containment is critical for managing the safety of the GMO. If the GMO were dealt with outside containment, this could cause significant risk to health and safety and to the environment. As such, strict compliance with the conditions applicable to the GMO dealing is essential.

It should be noted, however, that while the proposed legislation does prescribe strict liability offences for the reason described above, fault is still required to be demonstrated for key elements of these offences.

For example, to be found guilty of a strict liability offence for dealing with a GMO without a licence, the person must know that they are dealing with a GMO. This substantially limits the prospect of an inadvertent offence. If a person does not realise they are dealing with a GMO, they do not commit the offence. If a person does know they are dealing with a GMO, it is

reasonable to require them to deal with the GMO strictly in accordance with the legislation.

Parliament has traditionally shown a willingness to enact strict liability offences with reasonable penalties in legislation directed to protecting public health, safety and the environment. One key example is the numerous strict liability offences in Part 13 of the *Environment Protection and Biodiversity Conservation Act 1999* that carry 500 penalty unit maximum penalties.

Aggravated offences and "significant damage"
Clause 38

Question:

The Bill does not define, or seek to provide a meaning for the notion of, "significant" in relation to damage which has been, or may be, caused by the conduct of an accused. Given that aggravated offences are to attach much higher penalties, the Committee seeks the Minister's advice as to why an important term such as "significant damage" is not defined in the legislation.

> *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.*

Response:

Leaving the term 'significant damage' undefined allows for a court to decide, in any given case, whether the harm that has been caused by an offence in relation to a GMO justifies conviction and punishment as an aggravated offence. If the notion of 'significant damage' were defined in the legislation, there would be a risk that a person would come within or outside the definition on technical grounds. Leaving scope for the judiciary to exercise decision-making discretion, to do justice in a given case, has often been seen as an important safeguard of civil liberties.

The use of terms such as 'significant harm' and 'substantial damage' in serious offences, without those terms being further defined in the Act, has previously proven acceptable to the Parliament in relation to legislation dealing with health, safety and the environment. Examples include section 44 of the *Space Activities Act 1998* ('substantial harm to public health', 'substantial damage to property'); section 35 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* ('substantial damage to property') and a range of offences in Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* ('significant impact', which the Act does not define, although it does provide that it may be defined in regulation).

One of the key arguments for requiring certainty in offence provisions is to ensure that people can confidently organise their affairs while remaining within the law. In the case of proposed section 38, this argument is not applicable. Part 4, Division 2 of the Gene Technology Bill clearly prohibits improper conduct with respect to a GMO or GMO licence, and makes this improper conduct an offence regardless of whether the offender's conduct will cause

significant damage to health, safety or the environment. A person cannot legitimately claim that they thought an improper dealing in a GMO or breach of a GMO licence was lawful because it did not cause 'significant damage'. This concept only results in conduct that would already be an offence, being treated as an aggravated offence.

Old convictions, continuing consequences
Clause 58

Question:

There is a real possibility that such a provision may lead to a refusal to grant a licence in circumstances of apparent unfairness. The Committee, therefore seeks the Minister's advice as to the appropriateness of requiring such old convictions to be taken into account.

> *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.*

Response:

Clause 59 of the Gene Technology Bill 2000 provides that the Regulator must not issue a licence unless the Regulator is satisfied that the applicant is a suitable person to hold the licence. Clause 58 further describes a range of matters that the Regulator may take into account in determining the suitability of an applicant, including any relevant convictions.

These provisions are important, from a policy perspective, because the system of controls described in the Gene Technology Bill depends on effective management of any risks posed by GMOs. If the Regulator grants a licence for a person or persons to deal with a GMO (for example, to conduct experiments with a live or viable GMO), the Regulator must be satisfied that the person can manage the risks posed by the proposed dealing with the GMO. From a policy perspective, prior convictions are an important consideration because misuse of GMOs may have serious consequences, and it is necessary in the interests of community protection for the Regulator to take into account whether a person has a prior record of criminal misconduct.

With respect to the Committee's concerns regarding the appropriateness of considering old convictions, we note that under proposed subsection 58(4), the consideration of prior convictions is subject to the spent convictions scheme in Part VIIC of the *Crimes Act 1914*. This scheme provides an overall benchmark for the way in which prior convictions are to be treated by the Commonwealth.

Under this scheme, certain criminal convictions are taken to be 'spent' where:

- the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months; and
- a prescribed period of time has elapsed since the conviction (five years where the offence

was committed by a minor, ten years in all other cases); and
- no further offences have been committed during the period referred to in (ii) above.

Subject to certain exclusions, where a conviction for a Commonwealth or external Territory offence is spent, the person is not required to disclose to any person in any State or Territory the fact that they have been charged with or convicted of the offence. Further, the person is not required to disclose the conviction to any Commonwealth or State authority in a foreign country. Subject to the same exclusions, a person is not required to disclose a spent conviction for a State or foreign offence to any person in an external Territory or to any Commonwealth authority in a State or foreign country. Where a spent conviction need not be disclosed by the offender, it is not to be disclosed by a third party, or to be taken into account by a decision maker.

Clause 58 of the Bill, in combination with the operation of the spent convictions scheme (which is explicitly referenced in the Bill) strikes a balance between:

- the need for the Regulator to be satisfied that a person is suitable to hold a licence to deal with a GMO (that may potentially be dangerous to public health and safety or the environment if managed improperly); and
- the importance of protecting individual liberties and ensuring that there is no compulsion to disclose spent convictions.

Search and entry without a warrant
Clause 158

Question:

While the Committee is mindful of the need to minimise risks to health or to the environment, clause 158 appears to permit an entry (with no need to obtain any form of authorisation from anyone) where an inspector considers it "necessary" to avoid a risk to health "or to protect the environment". There is no requirement either for 'reasonable' necessity or for a 'significant' threat to the environment. The Committee, therefore, seeks the Minister's advice as to the appropriateness of an entry power expressed in such wide terms.

> *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.*

Response:

Subsection 158(3) of the Gene Technology Bill 2000 provides that:

> "The inspector may exercise the powers in subsection (2) only to the extent that it is necessary for the purpose of avoiding an imminent risk of death, serious illness, serious injury or serious damage to the environment."

The limitation on the general entry power which provides that an inspector can exercise powers 'only to the extent that is necessary for the purpose of avoiding an imminent risk...' is an objective requirement. It is not enough for the inspector to consider intervention necessary. For the exercise of powers to be valid, the exercise of entry and other powers must in fact be necessary in the terms described in subsection 158(3). This substantially limits the powers of the inspector and ensures that the entry powers are only used in circumstances that are objectively necessary to avoid imminent risk of death, serious illness, serious injury or serious damage to the environment.

Gene Technology (Licence Changes) Bill 2000

Setting a rate of levy by regulation
Subclause 4(2)

Question:

The Explanatory Memorandum, in its Financial Impact Statement, notes that the intention of the Bill is to ensure that the costs incurred by the Gene Technology Regulator, in fulfilling the functions set out in the Gene Technology Bill 2000, are to be recovered from those who use the service. However, this limitation is not expressed in the Bill itself. As it stands, the Bill would seem to permit taxes to be levied by delegated legislation, and may therefore be regarded as inappropriately delegating legislative power. The Committee seeks the advice of the minister on this issue.

> *Pending the minister's advice. The Committee draws the Senators' attention to this provision, as it may be considered to inappropriately delegate legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Response:

Sub-clause 4(1) of the Gene Technology (Licence Charges) Bill 2000, if enacted, would be the provision which operates to make persons liable to pay a charge. The Bill does not permit taxes or charges to be levied by delegated legislation, it is simply the amount of the charge or tax which is to be determined by delegated legislation.

The kind of formulation which is contained in clause 4 of the Gene Technology (Licence Charges) Bill 2000 (ie, 'the amount of the charge for a financial year is such amount as is prescribed by the regulations') is relatively common and has been included in a number of Acts including the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*. Indeed, Parliament has sometimes gives the power to determine the amount of a charge to a Commonwealth agency or body.

For example, in the recent case of Airservices Australia v Canadian Airlines International Limited, the High Court considered a number of issues related to charges imposed under the *Civil Aviation Act 1988*. That Act allowed the Civil Aviation Authority to make determinations fixing charges payable for the use of air route and airport services facilities.

Similarly, the *Copyright Act 1958* enabled the Copyright Tribunal to determine particular amounts to be factored into the determination of certain royalties.

In summary, it is the Bill which, if enacted, will operate to impose the charge. It is only the amount of the charge that will be left to be determined by regulation, which will also be subject to Parliamentary scrutiny.

ASSISTANT TREASURER
PARLIAMENT HOUSE
CANBERRA ACT 2600

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

31 OCT 2000

Dear Senator Cooney

In Alert Digest No. 14 of 2000 the Committee sought the Minister's advice about the effect of the *Taxation Laws Amendment (Superannuation Contributions) Bill 2000* on the superannuation entitlements of Australians working overseas for a period but intending to retire in Australia.

The issue raised by the Committee specifically relates to individuals who provide for their own retirement in self managed superannuation funds that later "become non-complying funds as a result of a period of non-residency by the main contributor (for example, through an overseas posting of more than six months)".

This issue, although unrelated to and not in any way changed by the new Bill, is now resolved.

The Government announced on 4 October 2000 that it would amend the relevant legislation to make it easier for the trustees of self managed superannuation funds to retain complying status. This announcement has generated strongly positive responses from a wide range of industry bodies.

I have attached a copy of the media release for you convenience.

I trust this has been of some assistance to you.

Yours sincerely

Rod Kemp

SENATOR
THE HON. ROD KEMP

ASSISTANT TREASURER

www.treasurer.gov.au/AssistantTreasurer

PRESS RELEASE

NO. 49

OVERSEAS EMPLOYMENT AND THE RESIDENCY STATUS OF SELF MANAGED SUPERANNUATION FUNDS (SMSF)

The Assistant Treasurer, Senator Rod Kemp, today announced that the Government would be amending the *Income Tax Assessment Act 1936* to make it easier for SMSF trustees to retain complying fund status.

The Government wants to ensure that a fund does not become non-complying, and suffer the tax consequences, where a member/trustee temporarily works overseas, Senator Kemp said.

Under the proposed changes, the central management and control test for residency will continue to be satisfied so long as the member/trustee's move overseas generally does not exceed two years.

In addition, it will no longer be necessary for a member to reside in Australia for all of a year of income in order for the 'active member' test to be met.

The amendments will take effect from date of Royal Assent.

The Government intends to introduce these amendments into Parliament as soon as possible. Further detail on these changes is available on the ATO website, www.ato.gov.au.

CANBERRA
4 October 2000

Media contacts: Richard Allsop — Assistant Treasurer's Office — (02) 6277 7360
Trevor Thomas — Australian Taxation Office — (02) 6216 8317