



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2006

8 November 2006

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
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

TENTH REPORT OF 2006

The Committee presents its Tenth Report of 2006 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:

Families, Community Services and Indigenous Affairs and Veterans'
Affairs Legislation Amendment (2006 Budget Measures) Bill 2006

Law and Justice Legislation Amendment (Marking of Plastic Explosives)
Bill 2006 *

- * Although this bill has not yet been introduced into the Senate, the Committee may report on its proceedings in relation to the bills, under standing order 24(9).

Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2006*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 7 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2006

Introduced into the House of Representatives on 14 September 2006
Portfolio: Families, Community Services and Indigenous Affairs

Background

Schedule 1 of this bill amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to increase the maximum amount of land that is exempt from the age pension assets test to encompass all land on the same title as the principal home.

Schedule 2 amends the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973* to provide new entry, search, and seizure powers to authorised officers.

Schedule 3 amends the *Social Security Act 1991* to provide for a one-off crisis payment to persons receiving a social security income support payment who have been subjected to domestic or family violence and who choose to stay in their own home.

Schedule 4 amends the *Aged Care Act 1997*, the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* to allow for the exchange of information between agencies for compliance purposes.

The bill also contains application and transitional provisions.

Legislative Instruments Act—declarations
Schedule 1, items 6 and 30

Proposed new subsection 11A(12) of the *Social Security Act 1991*, to be inserted by item 6 of Schedule 1, and proposed new subsection 5LA(12) of the *Veterans' Entitlements Act 1986*, to be inserted by item 30 of Schedule 1, declare that determinations made under proposed new subsection (2) and paragraph (6)(b) of each of the above new sections are not legislative instruments. While it appears that the determinations referred to are not legislative in character, and that both of the new subsections are merely declaratory of the law, the Committee notes that the explanatory memorandum does not clarify the intention of either proposed new subsection. The Committee **seeks the Minister's advice** whether these proposed new subsections are no more than declaratory of the law.

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

Relevant extract from the response from the Minister

You have noted that proposed new provisions to be inserted into the *Social Security Act 1991* (the Act) and the *Veterans' Entitlements Act 1986* declare that determinations made under proposed new sections in those Acts are not legislative instruments. You have asked for advice on whether these proposed new provisions are no more than declaratory of the law. I will restrict my advice to consideration of the amendments to the Act, but I consider that the same advice would apply in relation to amendments made to the *Veterans' Entitlements Act 1986*.

Under new subsection 11A(2) of the Act, the Secretary may determine that, in working out what constitutes the principal home of a person for the purposes of the Act, land may be treated in certain circumstances as if it were held on the same title document as the land on which the person's dwelling-house is located. Under new paragraph 11A(6)(b), the Secretary may determine that, taking into account the circumstances of a person to whom the new extended land use test applies, the person is making effective use of the land. In each case, the determination of the Secretary is made with a view to calculating the rate of the relevant social security payment of the person (or their spouse, if any). The determination has no effect on any other person.

As suggested in your letter, the determination in each case is administrative, rather than legislative, in character. Accordingly, proposed new subsection 11A(12) is no more than declaratory of the law. I am advised that, in the course of the drafting of

the Bill, the Office of Parliamentary Counsel confirmed with the Office of Legislative Drafting and Publishing that the insertion on proposed new subsection 11A(12) was appropriate.

The Committee thanks the Minister for this response and for clarifying that the subsections are merely declaratory of the law. The Committee would normally expect this clarification to be set out in the explanatory memorandum.

Search and entry

Schedule 2

Schedule 2 of the bill introduces entry, search and seizure powers for authorised officers under the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973*. While not explicitly stated in the explanatory memorandum, the Committee notes that, for the most part, the provisions appear to be consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) and the model search warrant provisions of Part 1AA of the Crimes Act.

In its *Fourth Report of 2000: Entry Search and Seizure Provisions in Commonwealth Legislation*, the Committee stated that '[i]n exercising a power of entry, an officer should be required to show the occupier an identity card which incorporates a recent photograph of that officer.' The committee notes that the Guide also states, on page 70, that '[t]here should be a requirement that an authorised officer who enters premises be in possession of an identity card, issued for that purpose, which incorporates a recent photograph of the person. The officer should be required to show the occupier this card before entry.'

The Committee notes that proposed section 221B(3), to be inserted by item 10, proposed section 190ZD(4)(a), to be inserted by item 14, and proposed section 88(4)(a), to be inserted by Item 33, each provide for an authorised officer to produce his or her identity card for inspection upon the request of the occupier. While the Committee notes that the proposed provisions require an authorised officer to identify himself or herself (proposed sections 103K, 190J and 69(2)), the Committee **seeks the Minister's advice** whether it might not be clearer to require an authorised person to produce his or her identity card prior to entering the premises.

In its *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, the Committee also stated that the occupier of premises which have been entered and searched should be given a copy of any relevant warrant and informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation. The Committee also stated that this requirement should be waived only where circumstances are critical, or where an official is threatened with violence, or where it is absolutely impractical to follow them. The Guide also states, on page 72, that '[p]rovisions allowing entry and search of premises without consent should require that the occupier be given a copy of any warrant and be informed, in writing if practicable, of his/her rights and responsibilities.' The Committee notes that proposed sections 103K, 190J, and 69(1) require an authorised officer to make a copy of the warrant available only if the occupier of the premises, or another person who apparently represents the occupier, is present at the premises. The Committee also notes that no provision appears to be made for the occupier to be advised of his or her rights under the legislation. The Committee **seeks the Minister's advice** regarding this apparent departure from accepted principle.

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

Relevant extract from the response from the Minister

As you have noted, Schedule 2 of the Bill introduces entry, search and seizure powers for authorised officers investigating offences under the social security and family assistance laws, together with the *Student Assistance Act 1973*. These provisions have been drafted in accordance with current drafting policy by the Office of Parliamentary Counsel, taking account of precedents in the *Crimes Act 1914* and other similar models such as *Medicare Australia Act 1973*.

Officers acting under a warrant issued under Schedule 2 of the Bill will be required to carry a photographic identity card with them at all times and the Bill specifically requires officers to produce this identity card if requested to do so. The changes to the family assistance law in regard to identity cards and, in particular, new section 221B of the *A New Tax System (Family Assistance) (Administration) Act 1999* ("the FA Admin Act"), are only a continuation of the law that has existed for a number of years (see, for example, subsection 219K(2)), which currently requires an identification card to be produced on request.

From a practical point of view officers acting under a warrant of this type, will produce their identity card to the occupier of premises in any event.

In regard to the actual warrant to enter the premises, as you have noted, proposed sections 103K, 190J and 69(1) provide that an authorised officer must make a copy of the warrant available to the occupier of the premises, or his or her representative. Where the occupier, or his or her representative, is not present at the premises at the time of the enforcement of the warrant, an officer of my Department would certainly attempt to provide the occupier a copy of the warrant as soon as practicable.

A warrant to enter premises and search for and seize evidence of offences provides a reasonably clear indication to an occupier of their rights and obligations in regard to that entry, search and seizure. From a practical point of view officers would certainly be instructed to provide sufficient advice to an occupier of premises in regard to their rights and obligations under the warrant to facilitate the execution of the warrant. I believe that the provision of a copy of the warrant to an occupier is a suitable way to provide that person with information in regard to their rights and obligations in regard to the execution of the warrant. Obviously, an occupier is always able to seek his or her own legal advice in regard to these issues.

Once again, thank you for the opportunity to address these issues in relation to the Bill.

The Committee thanks the Minister for this response and notes his expectations in relation to the practical implementation of the provisions. However, the Committee reiterates its expectation that legislative provision should be made for the production of identity cards prior to a search and for the occupier of the premises to be provided with a clear statement of his or her rights and obligations in relation to the exercise of the warrant, preferably in writing, together with a copy of the warrant.

Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2006*. The Attorney-General responded to the Committee's comments in a letter dated 16 October 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 10 of 2006

Introduced into the House of Representatives on 7 September 2006
Portfolio: Attorney-General

Background

This bill amends the *Criminal Code Act 1995*, the *Customs Act 1901* and the *Australian Federal Police Act 1979*, and makes consequential amendments to the *Australian Security Intelligence Organisation Act 1979*, the *Crimes Act 1914*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception) Act 1979*. The bill implements Australia's obligations under the United Nations' Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal 1991).

The bill makes it an offence to manufacture, import, export, traffic in, or possess plastic explosives which have not been marked with a detection agent as prescribed within the terms of the Technical Annex to the Convention.

The bill obliges State parties to take necessary action in relation to the manufacture, movement into or out of a territory, and the possession and transfer of unmarked plastic explosives. The bill is not intended to override any existing State or Territory legislation or offences dealing with plastic explosives.

Indeterminate commencement Schedules 1 to 3

Item 2 in the table to subclause 2(1) of this bill provides for the amendments proposed in Schedules 1 to 3 to commence on the later of the end of the period of 6 months after the date of Assent to the bill and the day on which the Convention on the Marking of Plastic Explosives for the Purposes of Detection, (Montreal 1991) (the Convention), comes into force for Australia. The item goes on to require the Minister for Justice and Customs to announce by *Gazette* notice the day on which the Convention comes into force.

The Committee notes that, while item 2 provides that the proposed amendments do not commence at all if the Convention does not come into force, there is no time limit specified within which the Schedules will be taken to be repealed in such circumstances. The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. This view is reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently Drafting Direction 1.3 at paragraphs 18 – 22). While the Committee notes the Minister’s statement, in his Second Reading speech, that in October 2004 ‘the Government announced in its *National Security Policy* its intention to accede to the Convention’, the Committee **seeks the Attorney-General’s advice** as to whether the commencement clause might not be subject to appropriate restrictions, as set out in the drafting direction.

Pending the Attorney-General’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 Attorney-General

In its report on the Marplex Bill, the Committee raised concerns with the commencement provisions at Schedules 1 to 3 of the Bill and referred to the Office of Parliamentary Drafting Direction 1.3 at paragraphs 18-22. These paragraphs relate to commencement by Proclamation. Schedules 1 to 3 of the Marplex Bill do not provide for commencement by Proclamation but provide for commencement contingent upon the coming into force of the Convention on the Marking of Plastic Explosives for the Purposes of Detection (the Convention).

Paragraphs 32-34 of the Drafting Direction 1.3 outline the procedure for commencement which is linked to certain events such as the entry into force of an international agreement. In this case the commencement of the Marplex Bill is linked with the day on which the Convention comes into force for Australia. Paragraph 33 of the Drafting Direction provides that in such a case, where commencement of the Marplex Bill is linked to the Convention's entry into force for Australia, it is necessary for formal notification of the commencement. The Marplex Bill provides for such formal notification by the Minister placing a notice in the *Gazette* on the day on which the Convention comes into force for Australia.

The use of the terms 'the later of' with respect to commencement provisions of Schedules 1 to 3, have followed the Drafting Directions outlined in paragraphs 32-34 of Drafting Direction 1.3. As outlined in the drafting directions, the commencement provision must also contain a clause stating that the Minister must announce in the *Gazette* the day on which the agreement (in this case the Convention) comes into force. Once the Convention comes into force for Australia, I will place the requisite notice in the *Gazette*.

I trust that this information clarifies the Committee's concerns regarding the commencement provisions in Schedules 1 to 3 of the Bill.

The Committee thanks the Attorney-General for this response, and hopes that he will report annually to Parliament on the status of the convention in his portfolio's Annual Report.

Robert Ray
Chair



The Hon Mal Brough MP
Minister for Families, Community Services and Indigenous Affairs
Minister Assisting the Prime Minister for Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

Ms Jeanette Redcliffe
Committee Secretary
Senate Scrutiny of Bills Committee
Department of the Senate
Parliament House
CANBERRA ACT 2601

7 - NOV 2006

RECEIVED

7 NOV 2006

Senate Standing C'ttee
for the Scrutiny of Bills

Dear Ms Redcliffe

Thank you for the opportunity to provide advice to the Committee in regard to certain aspects of the *Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006* (the Bill).

Schedule 1

You have noted that proposed new provisions to be inserted into the *Social Security Act 1991* (the Act) and the *Veterans' Entitlements Act 1986* declare that determinations made under proposed new sections in those Acts are not legislative instruments. You have asked for advice on whether these proposed new provisions are no more than declaratory of the law. I will restrict my advice to consideration of the amendments to the Act, but I consider that the same advice would apply in relation to amendments made to the *Veterans' Entitlements Act 1986*.

Under new subsection 11A(2) of the Act, the Secretary may determine that, in working out what constitutes the principal home of a person for the purposes of the Act, land may be treated in certain circumstances as if it were held on the same title document as the land on which the person's dwelling-house is located. Under new paragraph 11A(6)(b), the Secretary may determine that, taking into account the circumstances of a person to whom the new extended land use test applies, the person is making effective use of the land. In each case, the determination of the Secretary is made with a view to calculating the rate of the relevant social security payment of the person (or their spouse, if any). The determination has no effect on any other person.

As suggested in your letter, the determination in each case is administrative, rather than legislative, in character. Accordingly, proposed new subsection 11A(12) is no more than declaratory of the law. I am advised that, in the course of the drafting of the Bill, the Office of Parliamentary Counsel confirmed with the Office of Legislative Drafting and Publishing that the insertion on proposed new subsection 11A(12) was appropriate.

Schedule 2

As you have noted, Schedule 2 of the Bill introduces entry, search and seizure powers for authorised officers investigating offences under the social security and family assistance laws, together with the *Student Assistance Act 1973*. These provisions have been drafted in accordance with current drafting policy by the Office of Parliamentary Counsel, taking account of precedents in the *Crimes Act 1914* and other similar models such as *Medicare Australia Act 1973*.

Officers acting under a warrant issued under Schedule 2 of the Bill will be required to carry a photographic identity card with them at all times and the Bill specifically requires officers to produce this identity card if requested to do so. The changes to the family assistance law in regard to identity cards and, in particular, new section 221B of the *A New Tax System (Family Assistance) (Administration) Act 1999* ("the FA Admin Act"), are only a continuation of the law that has existed for a number of years (see, for example, subsection 219K(2)), which currently requires an identification card to be produced on request.

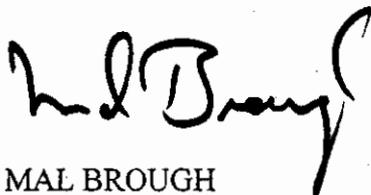
From a practical point of view officers acting under a warrant of this type, will produce their identity card to the occupier of premises in any event.

In regard to the actual warrant to enter the premises, as you have noted, proposed sections 103K, 190J and 69(1) provide that an authorised officer must make a copy of the warrant available to the occupier of the premises, or his or her representative. Where the occupier, or his or her representative, is not present at the premises at the time of the enforcement of the warrant, an officer of my Department would certainly attempt to provide the occupier a copy of the warrant as soon as practicable.

A warrant to enter premises and search for and seize evidence of offences provides a reasonably clear indication to an occupier of their rights and obligations in regard to that entry, search and seizure. From a practical point of view officers would certainly be instructed to provide sufficient advice to an occupier of premises in regard to their rights and obligations under the warrant to facilitate the execution of the warrant. I believe that the provision of a copy of the warrant to an occupier is a suitable way to provide that person with information in regard to their rights and obligations in regard to the execution of the warrant. Obviously, an occupier is always able to seek his or her own legal advice in regard to these issues.

Once again, thank you for the opportunity to address these issues in relation to the Bill.

Yours sincerely



MAL BROUGH



ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

RECEIVED

17 OCT 2006

Senate Standing Committee
for the Scrutiny of Bills

File: 06/15847
MC06/16641

16 OCT 2006

Senator R Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I acknowledge receipt of a letter dated 14 September 2006 from Ms Jeanette Radcliffe, Secretary of the Standing Committee for the Scrutiny of Bills (the Committee) providing a copy of the Scrutiny of Bills Alert Digest No. 10 of 2006, concerning the *Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006* (the Marplex Bill).

In its report on the Marplex Bill, the Committee raised concerns with the commencement provisions at Schedules 1 to 3 of the Bill and referred to the Office of Parliamentary Drafting Direction 1.3 at paragraphs 18-22. These paragraphs relate to commencement by Proclamation. Schedules 1 to 3 of the Marplex Bill do not provide for commencement by Proclamation but provide for commencement contingent upon the coming into force of the Convention on the Marking of Plastic Explosives for the Purposes of Detection (the Convention).

Paragraphs 32-34 of the Drafting Direction 1.3 outline the procedure for commencement which is linked to certain events such as the entry into force of an international agreement. In this case the commencement of the Marplex Bill is linked with the day on which the Convention comes into force for Australia. Paragraph 33 of the Drafting Direction provides that in such a case, where commencement of the Marplex Bill is linked to the Convention's entry into force for Australia, it is necessary for formal notification of the commencement. The Marplex Bill provides for such formal notification by the Minister placing a notice in the *Gazette* on the day on which the Convention comes into force for Australia.

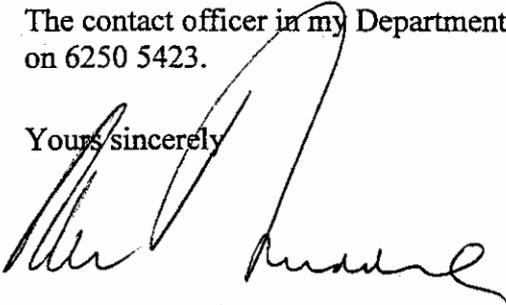
The use of the terms 'the later of' with respect to commencement provisions of Schedules 1 to 3, have followed the Drafting Directions outlined in paragraphs 32-34 of Drafting Direction 1.3. As outlined in the drafting directions, the commencement provision must also contain a clause stating that the Minister must announce in the *Gazette* the day on which the agreement

(in this case the Convention) comes into force. Once the Convention comes into force for Australia, I will place the requisite notice in the *Gazette*.

I trust that this information clarifies the Committee's concerns regarding the commencement provisions in Schedules 1 to 3 of the Bill.

The contact officer in my Department for this matter is Annabel Knott who may be contacted on 6250 5423.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Philip Ruddock', written in a cursive style.

Philip Ruddock

