SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2010

17 November 2010

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator G Marshall
Senator L Pratt
Senator R Siewert
Senator the Hon J Troeth

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

NINTH REPORT OF 2010

The Committee presents its *Ninth Report of 2010* 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:

- Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Bill 2010
- Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010
- Corporations Amendment (No.1) Bill 2010
- Crimes Legislation Amendment Bill 2010
- Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010
- Paid Parental Leave Bill 2010
- Sex and Age Discrimination Legislation Amendment Bill 2010
- Telecommunication Interception and Intelligence Services Legislation Amendment Bill 2010

Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Minister responded to the Committee's comments in a letter dated 10 November 2010. A copy of the letter is attached to this report. The bill received Royal Assent on 28 June 2010.

Extract from Alert Digest No. 6 of 2010

Background

This bill provides for several measures to amend the child support legislation and the family assistance law. These measures include:

- amendments to the income estimate provisions in the child support legislation to align estimate periods with financial years rather than with child support periods;
- align care determinations made under the family assistance law and the child support legislation. This will allow parents or carers who are entitled to family tax benefit and are also child support payers or payees to have the same care determinations made for a child where the care of the child involves more than one carer.
- minor amendments to the family assistance law to exclude two circumstances from the provisions that prevent payment of family tax benefit on the basis of an income estimate if relevant tax returns have not been lodged; and
- make minor amendments to the *A New Tax System (Family Assistance) Act 1999* and the *Child Support (Registration and Collection) Act 1988*.

Wide discretion
Schedule 1, item 51

Item 51 of Schedule 1 sets out transitional arrangements for income elections made for the period 1 April 2008 to 30 June 2010. Subitem 51(4) provides that that the existing section 64 of the *Child Support (Assessment) Act* will not apply in relation to election decisions made in this period unless the Registrar determines that it should. Subitems 51(5) and (6)

have the effect that even if a parent requests the Registrar to determine that the existing section 64 of the *Child Support (Assessment) Act* applies in relation to an election made for the period 1 April 2008 to 30 June 2010, the Registrar has a discretion to determine the question. The explanatory memorandum states at page 17 that these provisions ensure the Registrar is able to prioritise resources according to cases of most need. While the Committee notes this explanation, the Committee is concerned to ensure that the discretion is appropriate and **seeks the Minister's advice** as to whether the exercise of this discretion may be detrimental to any parent who made an income election in the period 1 April 2008 to 30 June 2010 under the existing provisions of the legislation.

Pending the advice of the Minister, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee seeks advice on whether the exercise of the discretion in item 51 of Schedule 1 is appropriate and whether this discretion may be detrimental to any parent who made an income election in the period 1 April 2008 to 30 June 2010 under the existing provisions of the legislation.

The transitional provisions referred to by the Committee seek to strike a balance between accuracy of child support payments and managing the reconciliation of income estimates during this transition period (1 April 2008 to 30 June 2010).

By way of background, previous income estimate provisions were extremely complex and difficult to administer and, as a result, more resource intensive.

These more complex provisions are amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010.* The new provisions are simpler for customers and, among other improvements, the changes enable automated reconciliation of income estimates lodged after 1 July 2010, rather than manual reconciliation processes.

In this context, the changes the Committee refer to remove the requirement to reconcile estimates during this transition period (1 April 2008 to 30 June 2010). Reconciliation is not required where the parent over-estimated their income. Additionally, in some cases, conducting reconciliation would result in no further adjustment to the child support payable. For these cases neither parent will be disadvantaged where the estimate is not reconciled.

Reconciliation would normally occur where a customer estimated less than their actual earnings and the other parent would receive less, or pay more, child support than they otherwise would if actual adjusted taxable income were used. In these situations reconciliation would result in payments being based on actual and not estimated adjusted taxable income.

The transitional provisions provide a balance between the resource intensive need to reconcile all customers that may have underestimated their income and targeting customers whose income estimates are more likely to be incorrect (eg. customers who have previously estimated inaccurately) by giving the Registrar a discretion to reconcile using a person's actual adjusted taxable income. Where the Registrar decides not to reconcile, subitem 51 (5) also enables any customer, or their former partner, to request reconciliation.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Committee Response

The Committee thanks the Minister for this response.

Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010

Introduced into the House of Representatives on 12 March 2009 and reintroduced on 20 October 2010
Portfolio: Special Minister of State

Introduction

The Committee dealt with this bill previously in *Alert Digest No. 4 of 2009*. The Minister responded to the Committee's comments in a letter dated 7 April 2009 which was published in the Committee's *Fourth Report 2009.*

This bill is substantially similar to a bill introduced in the previous Parliament. The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Special Minister of State responded to the Committee's comments in a letter dated 10 November 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2010

Background

This bill contains provisions that will:

- reduce the disclosure threshold from 'more than $10,000' (indexed to the Consumer Price Index annually) to $1,000 (non-indexed);

- require people who make gifts at or above the threshold to candidates and members of groups during the election disclosure period to furnish a return within 8 weeks after polling day. Agents of candidates and groups have a similar timeframe to furnish a return in relation to gifts received during the disclosure period;

- require people who make gifts, agents of registered political parties, the financial controller of an associated entity, or people if they fall within the relevant provision, who have incurred political expenditure to furnish a return within 8 weeks after 31 December and 30 June each year;

- prevent 'donation splitting' by ensuring that for the purposes of the $1,000 disclosure threshold, related political parties are treated as the one entity;

- make unlawful the receipt of a gift of foreign property by political parties, candidates and members of a Senate group. It will also be unlawful in some situations for

associated entities and people incurring political expenditure to receive a gift of foreign property;

- extend the ban on anonymous gifts to encompass all anonymous gifts except where the gift is $50 or less and received at a ‘general public activity’ or a ‘private event’ as defined;

- tie public election funding to reported and verified electoral expenditure. In other words, unendorsed candidates, registered political parties and unendorsed Senate groups, who receive at least four percent of formal first preference votes in an election, will receive the lesser amount of either:

  i. the ‘electoral expenditure’ that was actually incurred in an election period; or
  ii. the amount of $2.31191 (indexed to CPI every 6 months) per formal first preference vote received;

- provide for the recovery of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and

- introduce new offences and penalties related to the new measures and increase the penalties for existing offence provisions.

Commencement
Clause 2

Clause 2 provides that 'This Act commences on 1 July 2011.' Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

If the bill is passed during this sitting period then commencement of the bill will be delayed by longer than six months. The Committee understands that the proposed approach may be justifiable, but in this case no information about the rationale of the commencement provision is included in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** about the reason for the proposed commencement date.

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

At Clause 2, the Bill provides that Schedule 1 of the Act is to commence on 1 July 2011.

I intend that the provisions set out in Schedule 1 commence on 1 July 2011 to coincide with the beginning of the next financial year. To commence these provisions during the current financial year may cause confusion for, and an undue administrative burden on, participants lodging disclosure claims, as different thresholds would apply to different periods within the financial year.

The proposed commencement date of 1 July 2011 is also advantageous as it allows participants adequate time to update administrative systems. Further, it provides time to promote awareness of the proposed arrangements.

That said, if the Bill is passed during the present sitting period, then the commencement of Schedule 1 of the Act would occur longer than six months following Royal Assent.

I am grateful to your Committee for pointing out that, in future, the reasons for such timing could be described in the explanatory memorandum.

I trust the information I have provided is of use to the Committee.

Committee Response

The Committee thanks the Minister for this response, which addresses its concerns.

Corporations Amendment (No.1) Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 29 September 2010
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter received on 12 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends various acts to change the way people access information kept on company registers. The measures will:

- require persons seeking a copy of a register of members to apply to the company, stating the purpose for which they will use the register;
- provide that where a register is maintained on a computer that it should be able to be inspected on a computer; and
- provide for the regulations to prescribe the formats in which a copy of the register can be provided.

The bill also amends the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and *Telecommunications (Interception and Access) Act 1979* in relation to market offences and the Australian Securities and Investment Commission's (ASIC) powers to investigate offences. These measures:

- increase the magnitude of criminal penalties that can be imposed for breaches of the insider trading and the market manipulation provisions in Part 7.10 of the Corporations Act;

- enable an interception agency, such as the Australian Federal Police (AFP) to apply for telecommunications interception warrants in the course of a joint investigation into these offences; and

- enhance ASIC's search warrant power, to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.

The bill will also clarify the criminal liability under section 1041B of the Corporations Act in accordance with the requirements of the *Criminal Code Act 1995* (Criminal Code).

Trespass on personal rights and liberties
Items 1 to 3

These items seek to amend the foundation on which ASIC can apply for the issue of a search warrant in relation to the production of books for the purposes of inspection and audit. The current search warrant power requires that before a search warrant can be issued, ASIC must first have formally sought the production of the books (subsection 35(1) of the *Australian Securities and Investments Commission Act 2001*). These amendments would remove the requirement to formally request the production of the books under Division 3 before a search warrant to locate them could be issued.

The explanatory memorandum does not explain the reasons for these provisions. The Committee is concerned to understand why new powers are needed, whether the proposed power is too broad, what safeguards are in place to ensure that their use would be for a proper purpose and proportionate to the circumstances, and whether they are consistent with other similar powers. The Committee therefore **seeks the Treasurer's advice** about these matters.

> *Pending the Treasurer'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

Search warrants

The Bill repeals the existing provision in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) relating to the application for a search warrant and inserts a new provision which does not contain the requirement that a notice to produce the material sought must be issued and not complied with before ASIC can apply for a search warrant.

The replacement Explanatory Memorandum will explain the government's rationale for seeking this amendment. It will also explain how section 28 of the ASIC Act will restrict the purposes for which a warrant may be sought; the matters that must be provided for in a warrant; the life of a warrant; the procedural restrictions imposed regarding the execution of a warrant; and role of the Court in assessing and determining whether the issue of a warrant is proportionate and appropriate.

The document will also make reference to how the amendments are consistent with similar search warrant provisions in the *Trade Practices Act 1974.*

Committee Response

The Committee thanks the Minister for this comprehensive response and will consider the content of the replacement Explanatory Memorandum when it becomes available.

Extract from Alert Digest No. 8 of 2010

No or poor explanatory memorandum
Various

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

The Committee is extremely concerned about the poor quality of the explanatory memorandum to this bill, in which a number of the items are not explained or are inadequately explained, and the index is incorrect in many ways. Particular care should be taken to ensure that explanatory memoranda which adopt a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) still adequately address and cross-reference each provision in a bill.

Examples of the Committee's concern about inadequate explanation are found in relation to items 1 to 3 of this bill. These items contain important amendments to provisions of the *Australian Securities and Investments Commission Act 2001* relating to search warrants, but there is no explanation of these provisions in the explanatory memorandum. The index states that paragraph 2.6 explains items 1 to 3, but 2.6 is in fact a very brief paragraph that relates to an amendment to section 1019G of the Corporations Act.

Indeed, the index to the explanatory memorandum has 15 entries and at least 10 of these contain significant errors. In the Committee's view particular care should also be taken to ensure the accuracy of the index in an explanatory memorandum that adopts a narrative style. Flaws in the index can significantly (or sometimes totally) undermine the usefulness of the whole explanatory memorandum. Examples of the incorrect indexing the Committee identified in this case are:

Index

Schedule 1 — Amendments

Bill reference	*Paragraph number*	Scrutiny comment
Items 1 to 3	2.6	2.6 doesn't refer to items 1 to 3
Item 4	1.17	agree
Items 5 to 6 and 8	1.8 to 1.12	None of these paragraphs (or any other paragraph) seems to refer to item 5. 1.8 does not refer to any of these paragraphs.
Item 7	1.16	agree
Item 9	1.13	agree
Item 10	1.18 to 1.20	These paragraphs relate to subsection 177(1), but do not seem to address the effect of item 10, which appears to be a consequential provision.
Item 11	2.12	2.12 appears to relate to item 12, not item 11. No reference could be found for item 11.
Items 12 to 14	4.9 to 4.12	Paragraphs 4.9 to 4.12 do not exist. Other paragraphs do refer to items 13 and 14, but they have not been indexed. No reference could be found for item 12.
Item 15	2.14	Paragraph 2.14 does not relate to this item.
Items 16 to 17	2.12	2.12 appears to relate to item 12, not item 11. No reference could be found for items 16 and 17.
Item 18	1.22 and 4.13	1.22 is correct, but 4.13 does not exist.
Item 19	1.18 to 1.20	agree
Item 20	2.11 to 2.12	These paragraphs do not appear to relate to item 20. Paragraph 2.13 is cross-referenced to item 20, but also does not appear to relate to it. Paragraphs 3.11 and

		3.12 do appear to detail the effect of item 20, but they are not indexed (perhaps this error was a typo).
Item 21	3.6 to 3.7	These paragraphs do not refer. Paragraphs 4.6 and 4.7 do refer, but they are not indexed.
Item 22	2.16	This paragraph does not refer to item 22, but 3.16 does refer, but it is not indexed.

In the Committee's view it remains essential that explanatory memoranda comprehensively explain the effect of each provision in a legislative proposal. The Committee therefore **requests that the Treasurer** corrects the explanatory memorandum to include comprehensive information about all provisions in the bill and ensures that this information is accurately referenced in the index. The Committee **also seeks the Treasurer's advice** as to providing appropriate training to staff members about the importance of explanatory memoranda, and the necessity for them to be comprehensive, accurate and contain a complete index .

Pending the advice of the Treasurer, 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

Other

While the current version of the Explanatory Memorandum did contain explanations of the effects of each provision in the Bill the narrative style of the document together with errors in the index restricted the usefulness of the Explanatory Memorandum as a tool for gaining an understanding of the operation of individual provisions in the Bill.

The indexing of the Bill has been corrected. Explanatory paragraphs will now be cross-referenced against all items in the Bill.

I note the Committee's request for advice as to providing appropriate training to staff members about the importance of explanatory memoranda and the necessity for them to be comprehensive, accurate and contain a complete index. This issue has been raised with Treasury and is being dealt with appropriately. I am in agreement with the Committee's views on the importance of comprehensive and accurate Explanatory Memoranda.

I trust the above satisfactorily answers the Committee's issues and concerns about the Explanatory Memorandum to the Bill.

Committee Response

The Committee thanks the Minister for this comprehensive response and will consider the content of the replacement Explanatory Memorandum when it becomes available.

Crimes Legislation Amendment Bill 2010

Introduced into the Senate on 23 June 2010 and reintroduced on 29 September 2010
Portfolio: Home Affairs

Introduction

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions. The Minister responded to the Committee's comments in a letter dated 16 November 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2010

Background

This bill seeks to improve the ability of the Australian Crime Commission (ACC) to deal with serious misconduct by staff and make a range of amendments to strengthen law enforcement agencies' powers to gather, examine and use evidence to investigate and prevent the commission of criminal offences. This Bill will amend the *Australian Crime Commission Act 2002* (ACC Act), the *Australian Federal Police Act 1979* (AFP Act), the *Crimes Act 1914* (Crimes Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

The bill will:

- align the dismissal powers of the Chief Executive Officer of the ACC to deal with serious misconduct and corruption with those of the Australian Federal Police (AFP) Commissioner;
- provide for more flexible arrangements for appointing ACC examiners;
- extend the application of certain search-related provisions in the Crimes Act that currently only apply to searches conducted under warrants in relation to premises so they also apply to searches conducted under a warrant in relation to a person;
- insert rules to govern when documents produced under Division 4B, Part IAA of the Crimes Act must be returned;
- streamline and extend provisions governing applications for, and determination of, orders in relation to things seized and documents produced under Part IAA of the Crimes Act;

- allow the AFP Commissioner to delegate responsibility for dealing with things seized and documents produced under Part IAA of the Crimes Act to Commonwealth officers legitimately in possession of such items.

- introduce a new standing power for the AFP to take fingerprints and photographs of arrested persons when taking them in to custody in relation to a Commonwealth offence, and

- amend the AFP Act to enable the Commissioner to authorise a payment in special circumstances that arise out of, or relate to, the person's engagement as an AFP appointee.

Possible undue trespass on personal rights and liberties
Item 43

Item 43 of Schedule 3 inserts a new paragraph 3ZJ(3)(ba) into the *Crimes Act*. The effect of this provision is to extend police powers relating to the taking of identification material (finger prints and photographic records). Currently such material may only be taken in limited circumstances, including: with written consent and if an authorised police officer believes on reasonable grounds that it is necessary to do so to establish the identity of the person, identify the person as the person who has committed the offence or to provide evidence in relation to the offence. The amendment introduced by this item will empower the taking of identification material 'purely as an adjunct to an arrest' (see the explanatory memorandum at page 37) for offences punishable by 12 months imprisonment or more. The purpose of the amendment is 'to provide police with a fast and practical way to establish the identity of arrested persons which will in turn assist police to prove matters relating to identity in court proceedings and maintain accurate records of arrest' (see the explanatory memorandum at page 37).

This is a significant extension of coercive police powers. The existing powers are said to be inadequate as the absence of identification material may 'be problematic if the person escapes from custody or if there is a question about who was arrested' (see the explanatory memorandum at page 37). The explanatory memorandum at page 38 also emphasises that the normal provisions in the *Crimes Act* requiring the destruction of identification material, if a person is acquitted or no conviction recorded, continue to apply.

The Committee is concerned that the extent of the expansion of these powers has not been fully justified and therefore **seeks the Minister's advice** about whether the practical problems identified with the existing provisions could be dealt with through means which are less restrictive of the rights of an arrested person or whether additional safeguards can be implemented such as restricting the circumstances in which the power is authorised (for example to situations in which police have reasonable grounds to suspect that a false name has been given) or as to the use to which information collected routinely on the arrest of a person could be used.

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 Committee has expressed concern that item 43 of Schedule 3 of the Bill may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Senate Scrutiny of Bills Committee's terms of reference. This item would amend the *Crimes Act* 1914 to provide police with a standing power to take fingerprints and photographs of persons under lawful custody in relation to offences punishable by imprisonment for a term of 12 months or more.

The Committee has asked whether it would be possible for the problems identified with the existing provisions to be dealt with through means which are less restrictive on the rights of the arrested person.

Under the existing provisions, police may take identification material from persons in lawful custody where the person consents, or where the taking of the material is necessary to identify the person or provide evidence in relation to the offence for which the person has been arrested or another offence. The existing provisions do not permit police to take identification material as part of the process of dealing with an arrested person. The absence of an identifying record of an arrest may be problematic if, for example, the person escapes from custody or if there is a question about who was arrested.

As identity is a key element of many criminal proceedings, it is important that police are provided with appropriate power to establish and prove matters relating to identity in court. The difficulties with the existing provisions were illustrated in a case involving identical twins who had previously provided each other's names to arresting officers. In this case, the court refused to take into account one twin's criminal record in sentencing due to the absence of fingerprint evidence confirming which twin had previously been charged. The enactment of this provision would ensure that offenders could not successfully avoid charges solely on the basis of the absence of an identifying record connecting them with the commission of the offence. It would also protect innocent members of the community from having their identities used by criminals in an attempt to avoid liability.

The Bill has been drafted to ensure that the expanded police powers are exercised in a way that is minimally invasive of the rights of arrested persons. The power in the Bill will only apply to the taking of fingerprints and photographs (including video recordings). These forms of identification material have been deliberately selected to provide police with a reliable way to confirm identity without resorting to more invasive or lengthy procedures such as the taking of DNA, handwriting samples or voice recordings.

The proposed amendments would bring the Commonwealth's legislation into line with legislation in most Australian States and Territories, by providing a standing power to take fingerprints and photographs of arrested persons. However, the power at the Commonwealth level will only apply in relation to offences punishable by imprisonment for 12 months or more. This will ensure that fingerprints and photographs can only be taken in relation to offences which are generally considered to be serious or indictable offences, and not in relation to minor offences.

A range of other existing safeguards in the Crimes Act relating to the taking of identification material would also apply. Section 3ZK of the Crimes Act requires police to destroy identification material taken under this section after 12 months if proceedings have not been instituted or have been discontinued. The identification material must also be destroyed as soon as possible if a person is acquitted or is found to have committed an offence but no conviction is recorded. This provision protects defendants by ensuring that any identification material taken at the time of arrest is not kept indefinitely and is destroyed if a person is not charged with an offence.

The Committee also asked whether additional safeguards could be implemented along with the reforms, such as restricting the circumstances in which the use of the power is authorised (for example, to situations in which police have reasonable grounds to suspect that a false name has been given).

Restricting the use of the power in such a way would greatly reduce the utility of the provision in dealing with the practical problems identified above. In many circumstances, the difficulties associated with the absence of an identifying record will not become apparent until after the arrest. For example, a person may challenge the admissibility of their criminal record during sentencing by disputing evidence as to whom the previous charges and convictions relate, or calling into question whether police had a reasonable basis for taking that material.

The Committee has also proposed that the Bill be amended to include additional safeguards as to restrict the purposes for which information collected routinely on the arrest of the person could be used.

While the Bill would extend the circumstances in which identification material could be taken by police, it would not extend the purposes for which identification material could be used. As noted above, the Crimes Act contains a range of safeguards to protect arrested persons against the inappropriate use of their identification material by police. I consider that these safeguards, in conjunction with the additional requirement in the Bill restricting the use of the proposed new power to offences punishable by imprisonment for 12 months are sufficient to guard against the inappropriate use of this power.

Committee Response

The Committee thanks the Minister for this comprehensive response, but **leaves it to the consideration of the Senate as a whole** whether the proposed approach trespasses unduly on personal rights and liberties.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010

Introduced into the House of Representatives on 20 October 2010
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated on 15 November 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2010

Background

This bill provides for the following measures:

- Special disability trusts provisions in the social security and veterans' entitlements legislation to widen the appeal of the provisions. The amendments relax the purpose and work capacity tests in relation to these trusts, and give trustees greater flexibility to meet costs relating to the beneficiary's health, wellbeing, recreation, independence and social inclusion.

- Eligibility to disability support pension will require ongoing residency in Australia.

- Adds further parcels of land to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Amendment Act 1976* to enable the land to be granted to relevant Aboriginal Land Trusts.

- Amends the *Aboriginal and Torres Strait Islander Act 2005* to include a power for the Minister to make guidelines that would apply to the Indigenous Land Corporation when it performs its functions to support native title settlement.

- Amendments to ensure that students studying overseas full-time are treated for family tax benefit purposes in the same way as full-time students undertaking Australian study.

- Amendments to address two minor anomalies arising from the pension reform legislation enacted in 2009.

- Minor amendments to reinsert an unintentionally omitted reference in the social security confidentiality provisions, and make two technical corrections.

Possible retrospective commencement
Clause 2

The table in clause 2 provides that schedules 1 and 2 of the bill will commence on 1 January 2011. If this bill passes after 1 January 2011 then the provisions in schedules 1 and 2 will commence retrospectively. As a matter of practice, the Committee draws attention to any bill that could have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Schedule 1 seeks to relax the purpose and work capacity tests in relation to special disability trusts and to increase flexibility for trustees in some areas. The schedule contains provisions with a beneficial effect, so a retroactive commencement is not of concern to the Committee.

However, the provisions of Schedule 2 seek to tighten the residence requirements for eligibility for the disability support pension. The substance of the policy is not of concern to the Committee, but the provisions are designed to be detrimental to some people and their possible retrospective commencement therefore attracts the Committee's attention.

The introduction of new arrangements in reliance on Ministerial announcements, and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. Whereas the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

The Committee therefore **seeks the Minister's advice** about whether, if the bill is not passed this year, the provisions in Schedule 2 can commence 'the day after this Act receives the Royal Assent' rather than on 1 January 2011.

> *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 Committee has sought my advice on the possible retrospective commencement of Schedule 2 to the Bill.

As the Committee notes, clause 2 of the Bill provides that Schedules 1 and 2 are to commence on 1 January 2011. If the Bill were to pass after that date, this would amount to a retrospective commencement provision.

While not concerned with this commencement for Schedule 1 on Special Disability Trusts (which has a purely beneficial impact for customers), the Committee has sought my advice on whether, if the Bill is not passed in 2010, Schedule 2 could commence on the day after Royal Assent, rather than on 1 January 2011.

Schedule 2 aims to tighten the residence requirement for Disability Support Pension, and it is true that this would have a detrimental effect for some people.

In introducing an ongoing requirement for residence in Australia for Disability Support Pension, the pension would be brought into line with other workforce age payments. The amendments would close a loophole that has allowed continued payment of Disability Support Pension to people who live permanently overseas but return to Australia every 13 weeks in order to retain their pension.

A busy legislative program and the 2010 election have, unfortunately, delayed the finalisation of this legislation. I am still hopeful that the Bill will achieve passage in the 2010 Spring sittings. If passage in 2010 does happen, the commencement would not be retrospective.

Despite the public announcement of the measure on 28 March 2010, I would not intend the measure to apply retrospectively (with adverse effect) should passage be delayed. In that event, I would intend to move an amendment delaying commencement of the measure to the day after Royal Assent.

Committee Response

The Committee thanks the Minister for this response and notes that there is no intention for the provision to apply retrospectively with adverse effect, which addresses its concerns.

Paid Parental Leave Bill 2010

Introduced into the House of Representatives on 12 May 2010
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Minister responded to the Committee's comments in a letter dated 10 November 2010. A copy of the letter is attached to this report. The bill received Royal Assent on 14 July 2010.

Extract from Alert Digest No. 6 of 2010

Background

This bill introduces a paid parental leave scheme (PPL) from 1 January 2011. Parental leave pay of up to 18 weeks at the national minimum wage will be paid to eligible primary carers who have or adopt a child on or after 1 January 2011 and who can satisfy work, income and residency tests. In most cases, the mother will be the primary carer, but allowance is also made for transfers of all or part of the payment to the other parent, or to another carer, in exceptional circumstances.

Determination of important matters by regulation
Proposed section 80

Proposed section 80 requires an employer to give information prescribed in the PPL rules in the form (if any) prescribed in the PPL rules. The sort of information to be given relates to an instalment paid to a person and breach of the obligation will result in a civil penalty. The explanatory memorandum states at page 38 that the sort of information relates to matters such as the 'amount of the instalment, any PAYG withholdings and other deductions…and other matters relating to the instalment'. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to whether the required information can be outlined in the primary legislation and whether this explanation can be included in the explanatory memorandum.

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

Relevant extract from the response from the Minister

Determination of important matters by regulation
Section 80

The Committee seeks advice as to whether the information required to be given by an employer to a person upon paying an instalment to the person could be outlined in the primary legislation, rather than being left to subordinate legislation.

The type of information intended to be prescribed by the Paid Parental Leave (PPL) rules will be of an administrative nature, requiring the flexibility to add to or subtract from that information, or vary it, if the need arises. It is intended that the type of information required will be similar to that required to be given by an employer to their employee in the form of a pay slip under the *Fair Work Act 2009.* The information required, and the form prescribed, is intended to cause minimal disruption to employers and match their existing practices to the largest extent possible. Prescription or the required matters in the primary legislation would limit this flexibility.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Henry VIII
Proposed section 98

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit

subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Subsection 98(1) states that parental leave pay is not to be taken into account for the purposes of Commonwealth, State and Territory laws dealing with workers' and accident compensation. Subsection 98(2) enables the PPL rules to provide that subsection 98(1) of the Act does not apply in relation to a prescribed provision of a law of the Commonwealth, a State or a Territory. As such it operates as a Henry VIII clause and the Committee considers that it may inappropriately delegate legislative power. The explanatory memorandum notes the effect of subsection 98(2), but does not give examples or an explanation of the circumstances in which it may be invoked. The Committee therefore **seeks the Minister's advice** as to the intended operation of this section and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

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

Relevant extract from the response from the Minister

Henry VIlI
Section 98

The Committee seeks advice as to the intended operation of this section, which empowers the PPL rules to provide that subsection 98(1), which excludes parental leave pay from being taken into account for the purposes of laws relating to workers or accident compensation, does not apply in relation to a prescribed provision of a law of the Commonwealth, a State or Territory.

The intention of this provision is to enable the Government to respond quickly to unintended practical or legal anomalies that may arise as a result of excluding parental leave pay from the laws in subsection 98(1). Any rules made under subsection 98(2) would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to the scrutiny of the Regulations and Ordinances Committee.

State and Territory officials were consulted during the development of this provision.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Broad discretion
Subsections 101(4)(e), 108(3), 111(1)

A number of provisions in the Act empower the Secretary to make certain decisions (such as to make or revoke an 'employer determination') if satisfied of one of a number of things, including whether an employer is not a fit and proper person. In each case reference is made to subsection 101(5) which sets out a number of matters which the Secretary may take into account in making such a determination, including, in paragraph (f) 'any other matter the Secretary considers relevant'.

It is unclear to the Committee why the permissible considerations in making such determinations need to be cast so broadly, and the Committee notes that no explanation for this approach is given in the explanatory memorandum. The Committee is aware that a court would be likely to read subsection 101(5)(f) in light of the general purposes of the Act, so as to confine its possible meanings, however, the Committee remains concerned about the breadth of the terms of paragraph 101(5)(f) and **seeks the Minister's advice** as to the justification for its inclusion in the bill.

> *Pending the advice of the Minister, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

Insufficiently defined administrative power
Proposed section 193

Section 193 of the Act sets out the circumstances when the Secretary can write off debts. Subsection 193(7) states that 'nothing in this section prevents anything being done at any time to recover a debt that has been written off under this section.' Although there are some circumstances in which the Secretary may determine that it is more appropriate to waive a debt rather than write off the debt, the explanatory memorandum does not explain or give examples of when that might be so, nor does it indicate what circumstances would justify the recovery of a debt that had been written off. The Committee is therefore concerned that the provision may subject affected persons to an insufficiently defined

administrative power and **seeks the advice of the Minister** about the justification for this approach.

Pending the advice of the Minister, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Insufficiently defined administrative powers
Subsections 101(4)(e), 108(3), 111(1), referring to 101(5)(1), 193

The Committee seeks advice as to the inclusion of a broad discretion to decide not to make an employer determination upon the basis that the employer was not a fit and proper person, taking into account matters set out in the primary legislation, as well as any other matter the Secretary considers relevant. The Committee is concerned that the provision may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

The broad discretion has been included to allow for the possibility that, for some other reason not explicitly set out in subsection 101(5), an employer may not be considered to be a fit and proper person to receive PPL funding amounts from the Government and should not be entrusted with the obligation to provide parental leave pay to their employee. The discretion relates only to the manner in which the employee will be paid their parental leave pay. Where the discretion is exercised, the employee will receive their parental leave pay directly from the Family Assistance Office and, as such, their rights will not be adversely affected. The effect on the employer would be that they were not to be required to act as paymaster in relation to PPL. This would not adversely affect the employer.

The Committee also seeks advice on the inclusion of a broad discretion to write off a debt under section 193. This provision is modelled closely on existing provisions in the *A New Tax System (Family Assistance)(Administration) Act* 1999 (section 95) and the *Social Security Act 1991* (section 1236) and is consistent with the write-off provisions of the *Audit Act 1901* and the *Financial Management and Accountability Act 1997*. The operation of these provisions is well established and generally beneficial. It is intended that section 193 will apply in the same way within the same framework as these existing provisions.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Possible inconsistent treatment and retrospective application
Proposed subsection 108(1)

Subsection 108(1) sets outs the circumstances where an employer determination must be revoked by the Secretary. Under the terms of subsection 108(1) revocation generally comes into force on the day of the revocation. However, where revocation is due to a decision that parental leave pay is not payable the revocation comes into force on the day of the decision.

The explanatory memorandum does not explain this difference, and also does not address whether the possible retrospective operation of the decision (which will occur when the day of revocation of the employer determination is later than the day of the decision referred to in subsection 108(1) table item 3) will have any detrimental affect on any person.

The Committee therefore **seeks the Minister's advice** as to the justification for the different approaches to the day the revocation comes into force in subsection 108(1), whether the terms of subsection 108(1) table item 3 in are likely to have a retrospective effect and if so, whether this will have any detrimental affect on any person.

> *Pending the advice of the Minister, 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

Possible inconsistent treatment and retrospective application
Subsection 108(1)

The Committee seeks advice as to the justification for the different approaches in subsection 108(1) to the day the revocation of an employer determination comes into force, whether the terms of subsection 108(1) table item 3 are likely to have a retrospective effect and, if so, whether this will have any detrimental effect on any person.

The revocation of an employer determination, with effect from the day a payability determination is made that parental leave pay is not payable to the person (table item 3),

may potentially result in the revocation of the employer determination taking effect from a day in the past.

However, this will not adversely affect any person. The employer may still be required to pay parental leave pay to the claimant for days which fall within the instalment period prior to the not-payable determination, and this residual obligation will continue.

A decision by the Secretary under paragraph 215(2)(b) is excluded from review by the SSAT because it relates to the obligation upon the Secretary to make deductions if sought by the Child Support Registrar. The response by the Secretary to the Registrar's request is not discretionary, and so no different decision could be substituted upon review. Paragraph 215(2)(c) (relating to gathering information) covers a step in the decision-making process, rather than a substantive decision in its own right, such that merit review of this in itself is inappropriate. Paragraph 215(2)(d) (relating to the power to settle proceedings before the AAT) would similarly be an inappropriate power to give to the SSAT, given the SSAT's decision is being challenged before the AAT. There is precedent for the exclusion of such decisions from the jurisdiction of the SSAT, for example, see paragraphs 111(2)(d) and (e) of the *A New Tax System (Family Assistance)(Administration) Act 1999.*

Committee Response

The Committee thanks the Minister for this response, noting the Minister's advice that the provision will not adversely affect any person.

Extract from Alert Digest No. 6 of 2010

Possible inconsistency
Possible undue trespass on personal rights and liberties
Proposed sections 117, 119 and paragraph 156(3)(b)

Sections 117 and 119 both authorise the Secretary to require persons to give information or produce documents. Section 122 makes it an offence to fail to comply with requirements under sections 117 and 119. In section 117 the power is enlivened if:

> …the Secretary considers that the information or document may be relevant [emphasis added].

In section 119 the power is enlivened if:

> …the Secretary believes that a person may have information or a document' that (a) 'would help … locate another person who owes a debt…under or because of this Act' or (b) 'that is relevant to the debtor's financial situation' [emphasis added].

The explanatory memorandum does not explain why the different language ('considers' and 'believes') is used to enliven the powers to require the giving of information or the production of documents in each section. In addition, the Committee's view is that it is preferable (so as to avoid undue interference with rights) to condition coercive powers such as these on *reasonable grounds to believe* a particular state of affairs exists or other wording which makes it clear that there is an objective element in test for determining whether the power is enlivened. An objective approach is consistent with *George v Rockett* (1990) 170 CLR 104 and page 97 of the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* published by the Minister for Home Affairs in December 2007.

The Committee notes that a similar problem arises in relation to proposed subsection 156(3)(b) in which the power to request a person to assist in applications for a civil penalty order is enlivened if:

> …the Secretary suspects or believes that the person can give information relevant to the application.

The Committee therefore **seeks the Minister's advice** about whether the condition in these provisions can be drafted consistently with each other and whether the requirement relating to the Secretary's knowledge can include an objective element such as that the Secretary has *reasonable grounds to believe* a particular state of affairs exists.

> *Pending the advice of the Minister, 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

Possible inconsistency
Possible undue trespass on personal rights and liberties
Sections 117,119 and paragraph 156(3)(h)

The Committee seeks advice as to whether the above provisions, which deal with the circumstances in which the Secretary can gather information, can be drafted consistently with each other, and whether the requirement relating to the Secretary's knowledge can include an objective element.

I am grateful to the Committee for drawing my attention to this inconsistency. However, each of these provisions is modelled on existing provisions in the A *New Tax System (Family Assistance)(Administration) Act* 1999, including mirroring the terminology used to express the preconditions to enlivening the power (see sections 154, 156 and 219TSGF). The operation of these provisions is well established, and so no changes were made to the terminology used to avoid unintended differences in interpretation.

The provisions were drafted in close consultation with the Attorney-General's Department, which has responsibility for *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* ('the Guide'). Both my Department and the Attorney-General's Department were of the view that the drafting was consistent with the Guide.

Committee Response

The Committee thanks the Minister for this response and notes that these provisions were drafted for consistency with existing provisions in the *New Tax System (Family Assistance)(Administration) Act* 1999.

Extract from Alert Digest No. 6 of 2010

Insufficiently defined defence
Proposed subsection 122(2)

Subsection 122(1) imposes a penalty of 6 months imprisonment for failing to comply with a requirement to give information or produce documents under this subdivision. Subsection 122(2) makes it a defence that a person has a 'reasonable excuse'. *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 28 cautions against using language such as 'without reasonable excuse' to define defences on the ground that such words are 'too open-ended' and 'uncertain'. Given that the defendant bears an evidential burden in relation to this defence (see the Note to subsection 122(2)) the Committee is concerned that this provision may unduly trespass on personal rights and liberties. The Committee also notes that neither the bill nor the explanatory memorandum indicate whether common law privileges in relation to self-incrimination and legal professional privilege are intended to be preserved. The Committee therefore **seeks the Minister's advice** about these concerns.

Pending the advice of the Minister, 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.

Possible undue trespass on personal rights and liberties
Strict liability
Availability of privilege and immunities
Proposed section 289

There are a number of issues arising in relation to section 289, which makes it an offence (30 penalty units) for a 'nominee' to fail to comply with a notice issued by the secretary requiring them to give a statement about a matter relating to the disposal by the nominee of an instalment paid to the nominee on behalf of a person receiving paid parental leave.

First, subsection 289(7) makes it a defence that a person has a 'reasonable excuse'. *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 28 cautions against using language such as 'without reasonable excuse' to define defences on the ground that such words are 'too open-ended' and 'uncertain'. The defendant bears an evidential burden in relation to this defence (see the Note to subsection) and the explanatory memorandum (at page 122) simply notes the effect of the subsection, but does not explain the justification for the approach. The Committee is concerned that this provision may unduly trespass on personal rights and liberties and **seeks the Minister's advice** as to whether the defence can be drafted with specificity.

Pending the advice of the Minister, 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.

Secondly, subsection 289(8) makes the offence one of strict liability. At page 122 the explanatory memorandum states that the existence of the reasonable excuse defence 'softens' the impact of strict liability and argues that strict liability is appropriate because:

> …nominees are receiving parental leave pay on behalf of a third party and, if they do not comply, the third party could be disadvantaged'.

The Committee remains concerned about the use of strict liability in these circumstances, but notes, however, that the bill is seeking to formalise in legislation what is a clear policy decision. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it unduly trespasses on personal rights and liberties.

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.

Finally, although this provision requires the giving of information, neither the bill nor the explanatory memorandum indicates whether it is intended that common law privileges and immunities are intended to be preserved. The Committee **seeks the Minister's advice** about this and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

> *Pending the advice of the Minister, 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

Insufficiently defined defence
Subsection 122(2) and 289(7)

The Committee seeks advice as to whether the defences to the civil penalty provision created by subsection 122(2) (which has been incorrectly referenced as subsection 112(2) and subsection 289(7) are adequately defined.

Subsections 122(2) and 289(7) are modelled on an existing provisions in the *A New Tax System (Family Assistance)(Administration) Act 1*999 (see section 159 and subsection 219TK(8)) modified to the extent required to meet the requirements of the Guide. The provision (and all provisions of a nature relating to information gathering or imposing a penalty) was developed in close consultation with the Attorney-General's Department. The defences are adequately defined to meet these requirements.

Committee Response

The Committee thanks the Minister for this response and notes that these provisions were drafted for consistency with existing provisions in the *New Tax System (Family Assistance)(Administration) Act* 1999.

Extract from Alert Digest No. 6 of 2010

Possible severe penalty
Proposed section 125

Proposed section 125 requires that a person notify the Secretary of certain things concerning their eligibility for parental leave pay. Breach of this provision is an offence and carries a penalty of 6 months imprisonment. The explanatory memorandum does not justify the severity of the penalty. The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, published by the Minister for Home Affairs, notes at page 11 that imprisonment 'is the most onerous penalty that can be imposed on an individual'.

Given the general life circumstances in which claimants for parental leave pay will find themselves (which often include significant new responsibilities and a considerable lack of sleep for some time), along with the fact that subsection 125(3) does not specify the timeframe for notification with specificity (it is required 'as soon as practicable'), the Committee is concerned that this provision will trespass unduly on personal rights and liberties. The Committee therefore **seeks the Minister's advice** as to why it is considered that a custodial penalty is required to adequately enforce these obligations.

> *Pending the advice of the Minister, 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.*

Possible severe penalty
Proposed sections 187 and 233

Section 187 imposes a penalty of 12 months imprisonment for the offence of not complying with a garnishee notice. The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, approved by the Minister for Home Affairs, notes at page 11 that imprisonment 'is the most onerous penalty that can be imposed on an individual' yet the explanatory memorandum does not explain why this penalty is considered proportionate to the offence.

A similar issue arises in section 233 of the Act which provides that a person commits an offence and is subject to a maximum penalty of imprisonment for 2 years if he or she contravenes a direction of the Social Security Appeals Tribunal. Again, the explanatory memorandum (at page 99) describes the terms of the section, but does not explain it.

In these circumstances the Committee **seeks the Minister's advice** as to whether, in both instances, the penalty is proportionate and is consistent with other similar penalties in Commonwealth legislation.

> *Pending the advice of the Minister, 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

Possible severe penalty
Section 125, 187 and 233

The Committee seeks advice as to why a custodial penalty is required to adequately enforce the obligations to notify change of circumstances (section 125), to comply with a garnishee notice (section 187) and to comply with a direction by the Principal Member of the SSAT to a party to a review to not disclose information (section 233).

The provisions are modelled on existing provisions in the *A New Tax System (Family Assistance (Administration) Act* 1999 (see sections 25, 89(3) and 120 respectively) modified to the extent required to meet the current requirements of the Guide. The first two provisions protect the consolidated revenue in that they ensure that parental leave pay is not paid to persons who are no longer eligible, or provide a mechanism to recover a debt created where an amount is paid to someone who is not eligible. The last provision protects privacy in circumstances where information concerning a person or organisation is being released outside their control. Given their consistency with existing provisions of Commonwealth legislation, the prescription of a custodial penalty is not disproportionate.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Insufficiently defined offence
Proposed section 156

Section 156 of the proposed Act makes it an offence for a person to fail to comply with a request from the Secretary to give 'all reasonable assistance in connection with an application for a civil penalty order'. The offence attracts a penalty up to 10 penalty units. The Committee is concerned that the elements of the offence are not prescribed with sufficient clarity and may leave persons unsure as to the extent of their legal obligations.

The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, published by the Minister for Home Affairs, observes at page 11:

> In drafting a proposed offence, consideration should be given to both the fairness and the effectiveness of the offence…If it is clear when an offence is being drafted that there will be uncertainty about the scope of the meaning of the offence, or that it contains elements which may be unduly difficult for a prosecution to prove, consideration should be given to drafting the offence differently.

Although the provision does not seek to abrogate common law privileges or immunities, the Committee is concerned to ensure that this offence is both fair and effective and **seeks the Minister's advice** as to whether the elements of the offence could be expressed with greater specificity.

> *Pending the advice of the Minister, 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

Insufficiently defined offence
Section 156

The Committee seeks advice as to whether the offence created by section 156 could be expressed with greater specificity.

As noted above, section 156 is modelled upon existing provisions of Commonwealth legislation (section 219TSGF of the *A New Tax System (Family Assistance)(Administration) Act 1999)* with required changes to reflect the current form of the Guide, and was developed in close consultation with the Attorney-General's Department. Terminology changes were minimised as they would create the risk of unintended change in meaning from the formulation of existing provisions.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Non-reviewable decisions
Proposed section 157

Section 157 gives the Secretary or the Fair Work Ombudsman the discretion to issue compliance notices in relation to a contravention of a civil penalty. It does not appear that these decisions are subject to the merits review scheme (see section 206). The explanatory memorandum merely states (at page 88) which decisions under the proposed Act may be internally reviewed without explaining the exclusions. As a general rule, review by the Social Security Appeals Tribunal is only available in relation to decisions which have undergone internal review.

The Committee is aware that there may be legitimate grounds for excluding merits review, such as that the relevant decision is preliminary or relates to enforcement. However, the Committee considers that it is preferable that the explanatory memorandum deals with the exclusions explicitly and therefore **seeks the Minister's advice** about why these section 157 decisions are not reviewable and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

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

Excluding merits review
Proposed sections 215 and 260

Section 215 of the Act lists those decisions which are subject to review by the Social Security Appeals Tribunal. Subsections 215(2)(b), (c), and (d) exclude various decisions from merits review. No justification for this approach is provided in the explanatory memorandum and the Committee **seeks the Minister's advice** as to why reasons for these exclusions were not provided in the Explanatory Memorandum.

In addition, Part 5.4, Division 2 of the Act concerns the review of SSAT decisions by the AAT. Section 260 states that employers may not seek AAT review, though no reason is given for this in the explanatory memorandum. The Committee **seeks the Minister's advice** as to the justification for this approach.

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

Relevant extract from the response from the Minister

Non-reviewable decisions (and excluding merits review)
Section 157, 215 and 260

The Committee seeks justification for the exclusion from merits review of the giving of a compliance notice to an employer (section 157), the exclusion from SSAT review of various decisions under the Act (section 215) and preventing review by the AAT of an SSAT decision upon a review sought by an employer (section 260).

Giving a compliance notice to an employer allows the employer an opportunity to address the contravention as an alternative to having the matter brought before the courts. However, excluding the giving of this notice from merits review avoids undermining the integrity of the scheme and the desired degree of employer involvement. An employer's rights are not adversely affected because there is no immediate consequence of the issuing of a compliance notice. The alleged contravention of a civil penalty provision cannot be ultimately enforced otherwise than by proceedings being brought before the court for a civil penalty order.

Similarly, the fact an employer may seek review by the SSAT of the Secretary's decision to make an employer determination, but does not have an additional right of review to the AAT represents a balance between protection of employer rights and the protection of the integrity of the scheme. Employer involvement in the scheme could be frustrated by further merit review options.

A decision by the Secretary under paragraph 215(2)(b) is excluded from review by the SSAT because it relates to the obligation upon the Secretary to make deductions if sought by the Child Support Registrar. The response by the Secretary to the Registrar's request is not discretionary, and so no different decision could be substituted upon review. Paragraph 215(2)(c) (relating to gathering information) covers a step in the decision-making process, rather than a substantive decision in its own right, such that merit review of this in itself is inappropriate. Paragraph 215(2){d) (relating to the power to settle proceedings before the AAT) would similarly be an inappropriate power to give to the SSAT, given the SSAT's decision is being challenged before the AAT. There is precedent for the exclusion of such decisions from the jurisdiction of the SSAT, for example, see paragraphs 111(2)(d) and (e) of the *A New Tax System (Family Assistance)(Administration) Act 1999.*

Committee Response

The Committee thanks the Minister for this response, which addresses its concerns.

Extract from Alert Digest No. 6 of 2010

Possible undue trespass on personal rights and liberties
Proposed subsection 184(3)

Subsection 184(3) provides that for the purposes of issuing a garnishee notice under section 184, if money due or repayable to the original debtor is dependent on the fulfilment of a condition, that the money is taken to be due or repayable even if the condition has not been fulfilled. The explanatory memorandum (at page 79) simply restates the effect of the provision and does not provide any explanation about its intended operation. It seems possible that in practice this provision may have an adverse affect on the garnishee or third parties, and the Committee therefore **seeks the Minister's advice** as to whether or not this is a possibility and, if so, the justification for the approach.

> *Pending the advice of the Minister, 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

Possible undue trespass on personal rights and liberties
Subsection 184(3)

The Committee seeks advice as to whether it is possible the requirement to disregard whether the money is repayable upon demand by the garnishee may have an adverse affect upon the garnishee or third parties and, if so, the justification for the approach.

The provision mirrors the terms of existing Commonwealth legislation (see subsection 89(7) of the *A New Tax System (Family Assistance)(Administration) Act* 1999 and 1233(7) of the *Social Security Act 1991).* The provision is necessary to allow the attachment of a debt owed to the Commonwealth via a third party in the majority of cases, without the power to attach being frustrated by arrangements making the payment (by the third party to the person who owes the debt to the Commonwealth) subject to demand. The provision will not have an adverse effect upon the garnishee or third party because the time for making a payment in compliance with the notice cannot be a time before the money concerned becomes due or is held (paragraph 184(4)(a)).

Committee Response

The Committee thanks the Minister for this response, noting the Minister's advice that it will not have an adverse effect upon the garnishee or third party.

Extract from Alert Digest No. 6 of 2010

Henry VIII
Determination of important matters by delegated legislation
Proposed subsection 299(2)

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Section 299(2) is a Henry VIII clause which provides that the PPL rules may modify any provision in the Act relating to persons who are in a relationship that is similar to that between employer and employee. The explanatory memorandum notes at page 125 that this provision will enable greater flexibility to include other types of employees within the scheme as required and that there may be a need to amend provisions to extend the powers of a relevant regulator to undertake compliance of PPL as these employers will not be regulated by the Fair Work Ombudsman.

The Committee notes these arguments, however, given that the understanding of the employer and employee relationship in Part 3.5 of the Act is central to its operation, the Committee is concerned about the ability for it to be amended by delegated legislation. Therefore, the Committee **seeks the Minister's advice** as to the frequency with which it is envisaged that the PPL rules are likely to require adjustment under subclause 299(1) of the Act.

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

Relevant extract from the response from the Minister

Henry VIII
Determination of important matters by delegated legislation
Subsection 299(2)

The Committee seeks advice as to the frequency with which it is envisaged that the PPL rules are likely to require adjustment under this provision, which relates to the power provided for the Bill rules to allow the Secretary to make an employer determination for persons who are in a relationship that is similar to the relationship between an employer and an employee.

The intention is that the PPL rules would be drafted initially to allow for defence force members and those law enforcement officers not already covered by the Fair Work Act to be paid by their 'employers' rather than by the Family Assistance Office. Other changes are not anticipated at this time, but may become necessary if and when other states and territories refer their powers and come within the jurisdiction of the Fair Work Ombudsman.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Inappropriately delegated legislative powers
Proposed sections 298 and 308

Section 308 enables the Governor-General to make regulations prescribing various matters. The terms of this provision are effectively identical to the section 298 provision allowing for the making of legislative instruments to be known as the PPL rules, save that this section reposes the power in the Minister (not the Governor-General). No reason is offered for the inclusion of two separate heads of statutory power for the making of the regulations in identical terms (see pages 124 and 127). The Committee **seeks the Minister's advice** as to why it is appropriate to include both provisions in the proposed legislation.

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

Relevant extract from the response from the Minister

Inappropriately delegated legislative powers
Sections 298 and 308

The Committee seeks advice as to why it is appropriate to include both powers for the Governor-General to make regulations and for the Minister to make a legislative instrument providing for matters required or permitted by the Act to be provided or necessary or convenient to be provided in order to carry out or give effect to the Act.

The intention throughout the Act is that matters to be prescribed by subordinate legislation will be effected by the PPL rules, which is a legislative instrument. Most prescriptions will be made via legislative instrument. However, regulations are required for the purposes of section 299 which allows for the extension of the Act to persons who are not employees and employers. This is because it is likely that the Act will be extended to include defence force members and the Defence Force Ombudsman will be empowered to undertake the compliance role for these claimants. The functions of the Defence Force Ombudsman may be extended to functions conferred on him/her by another Act or Regulations, but may not be extended by legislative instrument (see section 19C of the *Ombudsman Act 1976).* Section 308 empowers the making of Regulations for the purposes of section 299.

Committee Response

The Committee thanks the Minister for this response.

Additional comments from the Minister

Explanatory memorandum

There are several references in the *Digest* where the Committee notes that the explanatory memorandum does not provide an explanation in relation to a particular matter. I note the Committee's comments and will endeavour to ensure that future explanatory memoranda provide fuller explanations on these types of matters, as appropriate.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Committee Response

The Committee thanks the Minister for this response and for her commitment to provide fuller explanations in explanatory memoranda as appropriate.

Sex and Age Discrimination Legislation Amendment Bill 2010

Introduced into the House of Representatives on 30 September 2010
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated 12 November 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2010

Background

This bill will amends the *Sex Discrimination Act 1984* to strengthen protections in the legislation and *Age Discrimination Act 2004* to establish an Age Discrimination Commissioner in the Australian Human Rights Commission.

The key amendments in the bill will:

- extend protections from discrimination on the grounds of family responsibilities to both women and men in all areas of work;
- provide greater protection from sexual harassment for students and workers;
- ensure that protections from sex discrimination apply equally to women and men; and
- establish breastfeeding as a separate ground of discrimination.

Trespass on personal rights and liberties
Item 9, subsection 4(1) and item 62, after subsection 40(4)

Item 9 seeks to insert a definition of *official record of a person's sex* into the *Sex Discrimination Act 1984* (SDA) and item 62 will amend existing section 40 of the SDA to include an exemption to preserve the operation of State and Territory laws regarding the official record of a person's sex. The Committee is concerned that, because of the inconsistent treatment of cardinal records of a person's sex relating to gender reassignment by States and Territories these items have the effect that people in similar circumstances will be treated differently when the official status of a person's sex is important. The

explanatory memorandum (at pages 5 and 15 respectively) does not address this issue. The Committee therefore seeks the **Attorney-General's advice** about these issues and the justification for the proposed approach.

> *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 Minister

The Committee has expressed concern about the proposed exemption in this Bill to preserve the operation of State and Territory laws regarding the changing of the official record of a person's sex where the person is married and the consequent potential for differential treatment at the State and Territory level.

Currently the Births, Deaths and Marriages (BDM) laws of each State and the Northern Territory require the Registrar of BDMs to refuse to register a change of sex if the person in question is married. The exemption has been included to maintain the existing policy position that the registration of change of gender is a matter for States and Territories.

The Government is currently committed to a broad review of federal anti-discrimination laws through its project to [consolidate] these laws into a single Act. This will facilitate consultation with the States and Territories on the interaction between Commonwealth, State and Territory laws.

As this exemption does not alter the existing law in any jurisdiction, I am of the view that it does not trespass on personal rights and liberties.

Committee Response

The Committee thanks the Attorney-General for this response and notes the opportunity for the Committee's concerns to be addressed in the future. However, the Committee remains concerned that the proposed provisions have the effect that people in similar circumstances will be treated differently when the official status of a person's sex is important. The Committee therefore **leaves to the Senate as a whole** consideration of whether the proposed approach trespasses unduly on personal rights and liberties.

Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 30 September 2010
Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2010*. The Minister responded to the Committee's comments in a letter dated 12 November 2010. A copy of the letter is attached to this report.

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Extract from Alert Digest No. 8 of 2010

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979*, the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001* to enable greater cooperation, assistance and information sharing within Australia's law enforcement and national security communities.

Reversal of onus
Note to schedule 3, item 5

A *Note* to the new subsection 182(2A) indicates that a defendant bears an evidential burden in relation to the establishing the existence of the circumstances which would authorise the disclosure of material that would, but for those circumstances, constitute an offence. An evidential burden means that the defendant must adduce evidence that suggests a reasonable possibility that an exception to an offence is made out (which the prosecution must then refute beyond reasonable doubt).

This provision is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, insofar as the circumstances justifying the exception to the offence relate to matters which are peculiarly within the defendant's knowledge. Nevertheless, the Committee has not in the past always accepted that the fact a matter is 'within the defendant's knowledge' is a sufficient justification for reversing the onus of proof. Given that the explanatory memorandum does not address the question of why the

defendant should bear the burden of proof, the Committee **seeks the Attorney-General's advice** on the justification for this approach.

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 Minister

The Government considers that the approach taken in item 5, schedule 3 of the Bill to reverse the onus of proof is appropriate and consistent with the approach taken in similar circumstances under the *Telecommunication (Interception and Access) Act 1979* (the TIA Act) and other legislation.

Item 5 of Schedule 3 of the Bill relates to circumstances where there is an allegation that a defendant, most likely a law enforcement officer, has secondarily disclosed information obtained about a missing person. Given the fact that such information is accessed through covert operations it is appropriate that it is an offence to secondarily disclose such information unless the action falls within limited exemptions.

On this basis, the Government considers that the relevant defendant will likely have detailed knowledge of the circumstances surrounding the missing person investigation along with an understanding of the methods used to obtain any disclosed information. This information will not be easily accessible to the plaintiff who is unlikely to have been involved in the missing person investigation. As a result, the Government considers that the defendant will be best placed to provide the justification for an exemption to the offence.

As the Committee noted in the Alert Digest, this reversal of onus is consistent with the *Guide to Framing Commonwealth Offences. Civil Penalties and Enforcement Powers* which provides that the onus should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The Government considers this approach upholds the integrity of the safeguards that underpin the TIA Act because it requires that information about a missing person which is covertly accessed is only disclosed to further the investigation. This not only protects the privacy of the person whose information is accessed but helps to ensure that the details about how law enforcement agencies actually access the information remain protected.

Committee Response

The Committee thanks the Attorney-General for this response, which satisfies its concerns.

Senator the Hon Helen Coonan
Chair

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

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

MN10-001739

10 NOV 2010

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

Thank you for raising for consideration an issue in the Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Bill 2010. This Bill has since passed into law.

The Committee seeks advice on whether the exercise of the discretion in item 51 of Schedule 1 is appropriate and whether this discretion may be detrimental to any parent who made an income election in the period 1 April 2008 to 30 June 2010 under the existing provisions of the legislation.

The transitional provisions referred to by the Committee seek to strike a balance between accuracy of child support payments and managing the reconciliation of income estimates during this transition period (1 April 2008 to 30 June 2010).

By way of background, previous income estimate provisions were extremely complex and difficult to administer and, as a result, more resource intensive.

These more complex provisions are amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010*. The new provisions are simpler for customers and, among other improvements, the changes enable automated reconciliation of income estimates lodged after 1 July 2010, rather than manual reconciliation processes.

In this context, the changes the Committee refer to remove the requirement to reconcile estimates during this transition period (1 April 2008 to 30 June 2010). Reconciliation is not required where the parent over-estimated their income. Additionally, in some cases, conducting reconciliation would result in no further adjustment to the child support payable. For these cases neither parent will be disadvantaged where the estimate is not reconciled.

Reconciliation would normally occur where a customer estimated less than their actual earnings and the other parent would receive less, or pay more, child support than they otherwise would if actual adjusted taxable income were used. In these situations reconciliation would result in payments being based on actual and not estimated adjusted taxable income.

The transitional provisions provide a balance between the resource intensive need to reconcile all customers that may have underestimated their income and targeting customers whose income estimates are more likely to be incorrect (eg. customers who have previously estimated inaccurately) by giving the Registrar a discretion to reconcile using a person's actual adjusted taxable income. Where the Registrar decides not to reconcile, subitem 51(5) also enables any customer, or their former partner, to request reconciliation.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

JENNY MACKLIN MP

HON GARY GRAY AO MP

Special Minister of State
Special Minister of State for the Public Service and Integrity

REF:C10/3019

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the letter sent to my office on 28 October 2010 from the Secretary to the Senate Scrutiny of Bills Committee (the Committee) drawing my attention to comments contained in *Alert Digest No.8 of 2010* (27 October 2010) concerning the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010* (the Bill). Specifically, page 16 of the Alert Digest raised the Committee's request for advice about the reason for the proposed commencement date contained in the Bill.

At Clause 2, the Bill provides that Schedule 1 of the Act is to commence on 1 July 2011.

I intend that the provisions set out in Schedule 1 commence on 1 July 2011 to coincide with the beginning of the next financial year. To commence these provisions during the current financial year may cause confusion for, and an undue administrative burden on, participants lodging disclosure claims, as different thresholds would apply to different periods within the financial year.

The proposed commencement date of 1 July 2011 is also advantageous as it allows participants adequate time to update administrative systems. Further, it provides time to promote awareness of the proposed arrangements.

That said, if the Bill is passed during the present sitting period, then the commencement of Schedule 1 of the Act would occur longer than six months following Royal Assent.

I am grateful to your Committee for pointing out that, in future, the reasons for such timing could be described in the explanatory memorandum.

The relevant contact officer on this matter is Mr Marc Mowbray-d'Arbela, Assistant Secretary, Legislative Review Branch, Department of Finance and Deregulation, who may be contacted on (02) 6215 3657.

Telephone: (02) 6277 7600 • Parliament House, Canberra ACT 2600 • Facsimile: (02) 6273 4541

I trust the information I have provided is of use to the Committee.

Yours sincerely

GARY GRAY
10 November 2010

The Hon David Bradbury MP
Parliamentary Secretary to the Treasurer

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

Dear Senator Coonan

I refer to the report of the Senate Scrutiny of Bills Committee (Committee) on the Corporations Amendment (No.1) Bill 2010 (Bill), in Alert Digest 8/10.

I thank the Committee for its report on the content of the Bill and its Explanatory Memorandum. In order to satisfy the issues and concerns in the report about the Explanatory Memorandum, I intend to lodge a replacement Explanatory Memorandum addressing these issues and concerns.

Search warrants

The Bill repeals the existing provision in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) relating to the application for a search warrant and inserts a new provision which does not contain the requirement that a notice to produce the material sought must be issued and not complied with before ASIC can apply for a search warrant.

The replacement Explanatory Memorandum will explain the government's rationale for seeking this amendment. It will also explain how section 28 of the ASIC Act will restrict the purposes for which a warrant may be sought; the matters that must be provided for in a warrant; the life of a warrant; the procedural restrictions imposed regarding the execution of a warrant; and role of the Court in assessing and determining whether the issue of a warrant is proportionate and appropriate.

The document will also make reference to how the amendments are consistent with similar search warrant provisions in the *Trade Practices Act 1974*.

Other

While the current version of the Explanatory Memorandum did contain explanations of the effects of each provision in the Bill, the narrative style of the document together with errors in the index restricted the usefulness of the Explanatory Memorandum as a tool for gaining an understanding of the operation of individual provisions in the Bill.

The indexing of the Bill has been corrected. Explanatory paragraphs will now be cross-referenced against all items in the Bill.

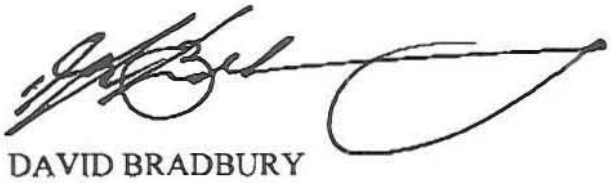
PO Box 6022
Parliament House
Canberra ACT 2600

Telephone: 02 6277 4199
Facsimile: 02 6277 8465
http://parlsec.treasurer.gov.au

I note the Committee's request for advice as to providing appropriate training to staff members about the importance of explanatory memoranda and the necessity for them to be comprehensive, accurate and contain a complete index. This issue has been raised with Treasury and is being dealt with appropriately. I am in agreement with the Committee's views on the importance of comprehensive and accurate Explanatory Memoranda.

I trust the above satisfactorily answers the Committee's issues and concerns about the Explanatory Memorandum to the Bill.

Yours sincerely



DAVID BRADBURY

THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs
Minister for Justice

10/5994-02, AG-MC10/13415

16 NOV 2010

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 28 October 2010 seeking my advice on matters raised by the Senate Scrutiny of Bills Committee in relation to the Crimes Legislation Amendment Bill 2010.

The Committee has expressed concern that item 43 of Schedule 3 of the Bill may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Senate Scrutiny of Bills Committee's terms of reference. This item would amend the *Crimes Act 1914* to provide police with a standing power to take fingerprints and photographs of persons under lawful custody in relation to offences punishable by imprisonment for a term of 12 months or more.

The Committee has asked whether it would be possible for the problems identified with the existing provisions to be dealt with through means which are less restrictive on the rights of the arrested person.

Under the existing provisions, police may take identification material from persons in lawful custody where the person consents, or where the taking of the material is necessary to identify the person or provide evidence in relation to the offence for which the person has been arrested or another offence. The existing provisions do not permit police to take identification material as part of the process of dealing with an arrested person. The absence of an identifying record of an arrest may be problematic if, for example, the person escapes from custody or if there is a question about who was arrested.

As identity is a key element of many criminal proceedings, it is important that police are provided with appropriate power to establish and prove matters relating to identity in court. The difficulties with the existing provisions were illustrated in a case involving identical twins who had previously provided each other's names to arresting officers. In this case, the court refused to take into account one twin's criminal record in sentencing due to the absence of fingerprint evidence confirming which twin had previously been charged. The enactment of this provision would ensure that offenders could not successfully avoid charges solely on the basis of the absence of an identifying record connecting them with the commission of the offence. It would also protect innocent members of the community from having their identities used by criminals in an attempt to avoid liability.

Telephone +61 2 6277 7290 | Parliament House, Canberra ACT 2600 Australia | Facsimile +61 2 6273 7098
mha@ag.gov.au

The Bill has been drafted to ensure that the expanded police powers are exercised in a way that is minimally invasive of the rights of arrested persons. The power in the Bill will only apply to the taking of fingerprints and photographs (including video recordings). These forms of identification material have been deliberately selected to provide police with a reliable way to confirm identity without resorting to more invasive or lengthy procedures such as the taking of DNA, handwriting samples or voice recordings.

The proposed amendments would bring the Commonwealth's legislation into line with legislation in most Australian States and Territories, by providing a standing power to take fingerprints and photographs of arrested persons. However, the power at the Commonwealth level will only apply in relation to offences punishable by imprisonment for 12 months or more. This will ensure that fingerprints and photographs can only be taken in relation to offences which are generally considered to be serious or indictable offences, and not in relation to minor offences.

A range of other existing safeguards in the Crimes Act relating to the taking of identification material would also apply. Section 3ZK of the Crimes Act requires police to destroy identification material taken under this section after 12 months if proceedings have not been instituted or have been discontinued. The identification material must also be destroyed as soon as possible if a person is acquitted or is found to have committed an offence but no conviction is recorded. This provision protects defendants by ensuring that any identification material taken at the time of arrest is not kept indefinitely and is destroyed if a person is not charged with an offence.

The Committee also asked whether additional safeguards could be implemented along with the reforms, such as restricting the circumstances in which the use of the power is authorised (for example, to situations in which police have reasonable grounds to suspect that a false name has been given).

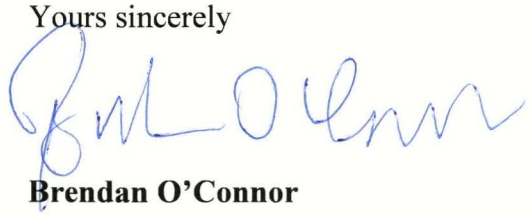
Restricting the use of the power in such a way would greatly reduce the utility of the provision in dealing with the practical problems identified above. In many circumstances, the difficulties associated with the absence of an identifying record will not become apparent until after the arrest. For example, a person may challenge the admissibility of their criminal record during sentencing by disputing evidence as to whom the previous charges and convictions relate, or calling into question whether police had a reasonable basis for taking that material.

The Committee has also proposed that the Bill be amended to include additional safeguards as to restrict the purposes for which information collected routinely on the arrest of the person could be used.

While the Bill would extend the circumstances in which identification material could be taken by police, it would not extend the purposes for which identification material could be used. As noted above, the Crimes Act contains a range of safeguards to protect arrested persons against the inappropriate use of their identification material by police. I consider that these safeguards, in conjunction with the additional requirement in the Bill restricting the use of the proposed new power to offences punishable by imprisonment for 12 months are sufficient to guard against the inappropriate use of this power.

The officer responsible for this matter in the Attorney-General's Department is Sarah Chidgey who can be contacted on (02) 6141 2800.

Yours sincerely



Brendan O'Connor

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

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

MN10-002222

15 NOV 2010

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Chair Helen

Thank you for the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills about comments made by the Committee in its *Alert Digest No. 8 of 2010* on the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010.

The Committee has sought my advice on the possible retrospective commencement of Schedule 2 to the Bill.

As the Committee notes, clause 2 of the Bill provides that Schedules 1 and 2 are to commence on 1 January 2011. If the Bill were to pass after that date, this would amount to a retrospective commencement provision.

While not concerned with this commencement for Schedule 1 on Special Disability Trusts (which has a purely beneficial impact for customers), the Committee has sought my advice on whether, if the Bill is not passed in 2010, Schedule 2 could commence on the day after Royal Assent, rather than on 1 January 2011.

Schedule 2 aims to tighten the residence requirement for Disability Support Pension, and it is true that this would have a detrimental effect for some people.

In introducing an ongoing requirement for residence in Australia for Disability Support Pension, the pension would be brought into line with other workforce age payments. The amendments would close a loophole that has allowed continued payment of Disability Support Pension to people who live permanently overseas but return to Australia every 13 weeks in order to retain their pension.

A busy legislative program and the 2010 election have, unfortunately, delayed the finalisation of this legislation. I am still hopeful that the Bill will achieve passage in the 2010 Spring sittings. If passage in 2010 does happen, the commencement would not be retrospective.

Despite the public announcement of the measure on 28 March 2010, I would not intend the measure to apply retrospectively (with adverse effect) should passage be delayed. In that event, I would intend to move an amendment delaying commencement of the measure to the day after Royal Assent.

Thank you for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely

JENNY MACKLIN MP

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

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

MN10-001791

10 NOV 2010

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan Helen

Thank you for the letter of 16 June 2010 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), about the Paid Parental Leave Bill 2010, which falls within my portfolio responsibility. This Bill has since passed both Houses of Parliament and received Royal Assent.

The Committee commented on a number of aspects in this legislation which I have addressed as follows:

Determination of important matters by regulation
Section 80

The Committee seeks advice as to whether the information required to be given by an employer to a person upon paying an instalment to the person could be outlined in the primary legislation, rather than being left to subordinate legislation.

The type of information intended to be prescribed by the Paid Parental Leave (PPL) rules will be of an administrative nature, requiring the flexibility to add to or subtract from that information, or vary it, if the need arises. It is intended that the type of information required will be similar to that required to be given by an employer to their employee in the form of a pay slip under the *Fair Work Act 2009*. The information required, and the form prescribed, is intended to cause minimal disruption to employers and match their existing practices to the largest extent possible. Prescription of the required matters in the primary legislation would limit this flexibility.

Henry VIII
Section 98

The Committee seeks advice as to the intended operation of this section, which empowers the PPL rules to provide that subsection 98(1), which excludes parental leave pay from being taken into account for the purposes of laws relating to workers or accident compensation, does not apply in relation to a prescribed provision of a law of the Commonwealth, a State or Territory.

The intention of this provision is to enable the Government to respond quickly to unintended practical or legal anomalies that may arise as a result of excluding parental leave pay from the laws in subsection 98(1). Any rules made under subsection 98(2) would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to the scrutiny of the Regulations and Ordinances Committee.

State and Territory officials were consulted during the development of this provision.

Insufficiently defined administrative powers
Subsections 101(4)(e), 108(3), 111(1), referring to 101(5)(f), 193

The Committee seeks advice as to the inclusion of a broad discretion to decide not to make an employer determination upon the basis that the employer was not a fit and proper person, taking into account matters set out in the primary legislation, as well as any other matter the Secretary considers relevant. The Committee is concerned that the provision may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

The broad discretion has been included to allow for the possibility that, for some other reason not explicitly set out in subsection 101(5), an employer may not be considered to be a fit and proper person to receive PPL funding amounts from the Government and should not be entrusted with the obligation to provide parental leave pay to their employee. The discretion relates only to the manner in which the employee will be paid their parental leave pay. Where the discretion is exercised, the employee will receive their parental leave pay directly from the Family Assistance Office and, as such, their rights will not be adversely affected. The effect on the employer would be that they were not to be required to act as paymaster in relation to PPL. This would not adversely affect the employer.

The Committee also seeks advice on the inclusion of a broad discretion to write off a debt under section 193. This provision is modelled closely on existing provisions in the *A New Tax System (Family Assistance)(Administration) Act 1999* (section 95) and the *Social Security Act 1991* (section 1236) and is consistent with the write-off provisions of the *Audit Act 1901* and the *Financial Management and Accountability Act 1997*. The operation of these provisions is well established and generally beneficial. It is intended that section 193 will apply in the same way within the same framework as these existing provisions.

Possible inconsistent treatment and retrospective application
Subsection 108(1)

The Committee seeks advice as to the justification for the different approaches in subsection 108(1) to the day the revocation of an employer determination comes into force, whether the terms of subsection 108(1) table item 3 are likely to have a retrospective effect and, if so, whether this will have any detrimental effect on any person.

The revocation of an employer determination, with effect from the day a payability determination is made that parental leave pay is not payable to the person (table item 3), may potentially result in the revocation of the employer determination taking effect from a day in the past.

However, this will not adversely affect any person. The employer may still be required to pay parental leave pay to the claimant for days which fall within the instalment period prior to the not-payable determination, and this residual obligation will continue.

If any PPL funding amounts have been paid to the employer for days in the instalment period after the day from which it is determined that parental leave pay is not payable, those amounts may be repaid by the employer to the Commonwealth, rather than paid to the claimant, given the claimant is not then eligible for the payments.

If the employer has already paid the claimant in respect of days after the day in respect of which the not-payable determination was made, these amounts become debts owed to the Commonwealth by the claimant.

By contrast, even if the Secretary becomes satisfied of the matters under table items 1, 2 or 6, retrospective revocation is inappropriate because the claimant remains eligible for parental leave pay, and any PPL funding amounts provided to the employer should still be paid to the claimant.

Possible inconsistency
Possible undue trespass on personal rights and liberties
Sections 117, 119 and paragraph 156(3)(b)

The Committee seeks advice as to whether the above provisions, which deal with the circumstances in which the Secretary can gather information, can be drafted consistently with each other, and whether the requirement relating to the Secretary's knowledge can include an objective element.

I am grateful to the Committee for drawing my attention to this inconsistency. However, each of these provisions is modelled on existing provisions in the *A New Tax System (Family Assistance)(Administration) Act 1999*, including mirroring the terminology used to express the preconditions to enlivening the power (see sections 154, 156 and 219TSGF). The operation of these provisions is well established, and so no changes were made to the terminology used to avoid unintended differences in interpretation.

The provisions were drafted in close consultation with the Attorney-General's Department, which has responsibility for *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* ('the Guide'). Both my Department and the Attorney-General's Department were of the view that the drafting was consistent with the Guide.

Insufficiently defined defence
Subsection 122(2) and 289(7)

The Committee seeks advice as to whether the defences to the civil penalty provision created by subsection 122(2) (which has been incorrectly referenced as subsection 112(2)) and subsection 289(7) are adequately defined.

Subsections 122(2) and 289(7) are modelled on an existing provisions in the *A New Tax System (Family Assistance)(Administration) Act 1999* (see section 159 and subsection 219TK(8)) modified to the extent required to meet the requirements of the Guide. The provision (and all provisions of a nature relating to information gathering or imposing a penalty) was developed in close consultation with the Attorney-General's Department. The defences are adequately defined to meet these requirements.

Possible severe penalty
Section 125, 187 and 233

The Committee seeks advice as to why a custodial penalty is required to adequately enforce the obligations to notify change of circumstances (section 125), to comply with a garnishee notice (section 187) and to comply with a direction by the Principal Member of the SSAT to a party to a review to not disclose information (section 233).

The provisions are modelled on existing provisions in the *A New Tax System (Family Assistance)(Administration) Act 1999* (see sections 25, 89(3) and 120 respectively) modified to the extent required to meet the current requirements of the Guide. The first two provisions protect the consolidated revenue in that they ensure that parental leave pay is not paid to persons who are no longer eligible, or provide a mechanism to recover a debt created where an amount is paid to someone who is not eligible. The last provision protects privacy in circumstances where information concerning a person or organisation is being released outside their control. Given their consistency with existing provisions of Commonwealth legislation, the prescription of a custodial penalty is not disproportionate.

Insufficiently defined offence
Section 156

The Committee seeks advice as to whether the offence created by section 156 could be expressed with greater specificity.

As noted above, section 156 is modelled upon existing provisions of Commonwealth legislation (section 219TSGF of the *A New Tax System (Family Assistance)(Administration) Act 1999*) with required changes to reflect the current form of the Guide, and was developed in close consultation with the Attorney-General's Department. Terminology changes were minimised as they would create the risk of unintended change in meaning from the formulation of existing provisions.

Non-reviewable decisions (and excluding merits review)
Section 157, 215 and 260

The Committee seeks justification for the exclusion from merits review of the giving of a compliance notice to an employer (section 157), the exclusion from SSAT review of various decisions under the Act (section 215) and preventing review by the AAT of an SSAT decision upon a review sought by an employer (section 260).

Giving a compliance notice to an employer allows the employer an opportunity to address the contravention as an alternative to having the matter brought before the courts. However, excluding the giving of this notice from merits review avoids undermining the integrity of the scheme and the desired degree of employer involvement. An employer's rights are not adversely affected because there is no immediate consequence of the issuing of a compliance notice. The alleged contravention of a civil penalty provision cannot be ultimately enforced otherwise than by proceedings being brought before the court for a civil penalty order.

Similarly, the fact an employer may seek review by the SSAT of the Secretary's decision to make an employer determination, but does not have an additional right of review to the AAT represents a balance between protection of employer rights and the protection of the integrity of the scheme. Employer involvement in the scheme could be frustrated by further merit review options.

A decision by the Secretary under paragraph 215(2)(b) is excluded from review by the SSAT because it relates to the obligation upon the Secretary to make deductions if sought by the Child Support Registrar. The response by the Secretary to the Registrar's request is not discretionary, and so no different decision could be substituted upon review.
Paragraph 215(2)(c) (relating to gathering information) covers a step in the decision-making process, rather than a substantive decision in its own right, such that merit review of this in itself is inappropriate. Paragraph 215(2)(d) (relating to the power to settle proceedings before the AAT) would similarly be an inappropriate power to give to the SSAT, given the SSAT's decision is being challenged before the AAT. There is precedent for the exclusion of such decisions from the jurisdiction of the SSAT, for example, see paragraphs 111(2)(d) and (e) of the *A New Tax System (Family Assistance)(Administration) Act 1999*.

Possible undue trespass on personal rights and liberties
Subsection 184(3)

The Committee seeks advice as to whether it is possible the requirement to disregard whether the money is repayable upon demand by the garnishee may have an adverse affect upon the garnishee or third parties and, if so, the justification for the approach.

The provision mirrors the terms of existing Commonwealth legislation (see subsection 89(7) of the *A New Tax System (Family Assistance)(Administration) Act 1999* and 1233(7) of the *Social Security Act 1991*). The provision is necessary to allow the attachment of a debt owed to the Commonwealth via a third party in the majority of cases, without the power to attach being frustrated by arrangements making the payment (by the third party to the person who owes the debt to the Commonwealth) subject to demand. The provision will not have an adverse effect upon the garnishee or third party because the time for making a payment in compliance with the notice cannot be a time before the money concerned becomes due or is held (paragraph 184(4)(a)).

Henry VIII
Determination of important matters by delegated legislation
Subsection 299(2)

The Committee seeks advice as to the frequency with which it is envisaged that the PPL rules are likely to require adjustment under this provision, which relates to the power provided for the PPL rules to allow the Secretary to make an employer determination for persons who are in a relationship that is similar to the relationship between an employer and an employee.

The intention is that the PPL rules would be drafted initially to allow for defence force members and those law enforcement officers not already covered by the Fair Work Act to be paid by their 'employers' rather than by the Family Assistance Office. Other changes are not anticipated at this time, but may become necessary if and when other states and territories refer their powers and come within the jurisdiction of the Fair Work Ombudsman.

Inappropriately delegated legislative powers
Sections 298 and 308

The Committee seeks advice as to why it is appropriate to include both powers for the Governor-General to make regulations and for the Minister to make a legislative instrument providing for matters required or permitted by the Act to be provided or necessary or convenient to be provided in order to carry out or give effect to the Act.

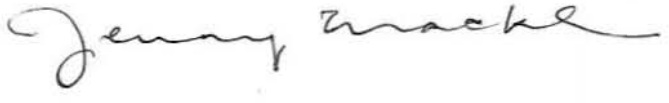
The intention throughout the Act is that matters to be prescribed by subordinate legislation will be effected by the PPL rules which is a legislative instrument. Most prescriptions will be made via legislative instrument. However, regulations are required for the purposes of section 299 which allows for the extension of the Act to persons who are not employees and employers. This is because it is likely that the Act will be extended to include defence force members and the Defence Force Ombudsman will be empowered to undertake the compliance role for these claimants. The functions of the Defence Force Ombudsman may be extended to functions conferred on him/her by another Act or Regulations, but may not be extended by legislative instrument (see section 19C of the *Ombudsman Act 1976*). Section 308 empowers the making of Regulations for the purposes of section 299.

Explanatory memorandum

There are several references in the *Digest* where the Committee notes that the explanatory memorandum does not provide an explanation in relation to a particular matter. I note the Committee's comments and will endeavour to ensure that future explanatory memoranda provide fuller explanations on these types of matters, as appropriate.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely



JENNY MACKLIN MP

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

10/19104, AG-MC10/13303

12 NOV 2010

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the letter of 28 October 2010 from the Committee Secretary to my office seeking my response to matters raised by the Senate Scrutiny of Bills Committee in relation to the Sex and Age Discrimination Legislation Amendment Bill 2010 and the Telecommunication Interception and Intelligence Services Legislation Amendment Bill 2010.

Sex and Age Discrimination Legislation Amendment Bill 2010

The Committee has expressed concern about the proposed exemption in this Bill to preserve the operation of State and Territory laws regarding the changing of the official record of a person's sex where the person is married and the consequent potential for differential treatment at the State and Territory level.

Currently the Births, Deaths and Marriages (BDM) laws of each State and the Northern Territory require the Registrar of BDMs to refuse to register a change of sex if the person in question is married. The exemption has been included to maintain the existing policy position that the registration of change of gender is a matter for States and Territories.

The Government is currently committed to a broad review of federal anti-discrimination laws through its project to consolidate these laws into a single Act. This will facilitate consultation with the States and Territories on the interaction between Commonwealth, State and Territory laws.

As this exemption does not alter the existing law in any jurisdiction, I am of the view that it does not trespass on personal rights and liberties.

The action officer in my Department responsible for this Bill is Paul Pfitzner who can be contacted on 6141 3424.

The Government considers that the approach taken in item 5, schedule 3 of the Bill to reverse the onus of proof is appropriate and consistent with the approach taken in similar circumstances under the *Telecommunication (Interception and Access) Act 1979* (the TIA Act) and other legislation.

Item 5 of Schedule 3 of the Bill relates to circumstances where there is an allegation that a defendant, most likely a law enforcement officer, has secondarily disclosed information obtained about a missing person. Given the fact that such information is accessed through covert operations it is appropriate that it is an offence to secondarily disclose such information unless the action falls within limited exemptions.

On this basis, the Government considers that the relevant defendant will likely have detailed knowledge of the circumstances surrounding the missing person investigation along with an understanding of the methods used to obtain any disclosed information. This information will not be easily accessible to the plaintiff who is unlikely to have been involved in the missing person investigation. As a result, the Government considers that the defendant will be best placed to provide the justification for an exemption to the offence.

As the Committee noted in the Alert Digest, this reversal of onus is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which provides that the onus should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The Government considers this approach upholds the integrity of the safeguards that underpin the TIA Act because it requires that information about a missing person which is covertly accessed is only disclosed to further the investigation. This not only protects the privacy of the person whose information is accessed but helps to ensure that the details about how law enforcement agencies actually access the information remain protected.

The action officer in my Department responsible for this Bill is Wendy Kelly who can be contacted on 6141 2906.

Yours sincerely

Robert McClelland