SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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

EIGHTH REPORT OF 2011

The Committee presents its Eighth Report of 2011 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 (Registration and Collection) Amendment Bill 2011

Introduced into the House of Representatives on 12 May 2011
Portfolio: Human Services

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2011* and the *Fifth Report of 2011*. The Minister responded to the Committee's comments in the *Alert Digest* in a letter dated on 25 May 2011. Subsequently, the Minister responded when the Committee sought further comment in a letter dated 7 July 2011. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2011 - extract

Background

This bill amends the *Child Support (Registration and Collection) Act 1988* to:

- broaden the powers of the Child Support Registrar to delegate powers to perform his or her duties to persons outside the Department to enable more efficient service delivery; and

- amend a number of criminal penalty provisions to ensure that the offences contained therein can be successfully prosecuted, protecting the integrity of the Child Support Scheme.

Delegation of legislative power
Schedule 1, item 1

One purpose of the Bill is achieved through item 1 of Schedule 1 of the bill, which broadens the powers of the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act*. The proposed subsection 15(1B) enables delegation of all or any of the Registrar's powers or functions to a person engaged, 'whether as an employee or otherwise', by the Registrar, an Agency, another authority of the Commonwealth, or an organisation that performs services for the Commonwealth. The text of the provision is said to be based upon paragraph 234(7)(c) of the *Social Security (Administration) Act 1999* and subsection 303(1) of the *Paid Parental Leave Act 2010*.

The explanatory memorandum states at paragraph 6 that 'as the Department of Human Services moves towards an integrated service model, it is appropriate to align the scope of

the delegation powers to ensure consistency of delivery in service'. However, the Committee remains concerned about the breadth of the provision, which goes much further than enabling a response to the particular problem of allowing for the outsourcing of debt collection services. The provision enables the delegation of all or any of the Registrar's powers or functions to a person who may be outside of the APS. Given that the Committee generally prefers to see powers to delegate limited to the holders of particular offices or members of the senior executive service or to people with specified skills, or expects that legislative guidance will be provided in the primary legislation about the regulations, in this case such as guidance as to the particular areas (such as debt collection) in which the delegation will be exercised. The Committee therefore **seeks the Minister's further explanation as to why such a broad power of delegation is required and about the extent to which any delegations to persons outside the public service may limit the application of administrative law review and complaint mechanisms.**

> *Pending the Minister's advice, 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.*

Fifth Report - extract

The Committee requested advice about the appropriateness of item 1 of Schedule 1 in the Bill which allows the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act 1988* to persons outside the Australian Public Service (APS). In particular, the Committee seeks advice about why such a broad power of delegation is required, and the extent to which delegation of powers outside of the APS may limit access to administrative review and complaint mechanisms.

As provided in the Explanatory Memorandum to the Bill, Item 1 is intended to amend the legislation to enable the Registrar to delegate powers, 'as necessary, to persons engaged by the Commonwealth...to enable outsourcing of powers and functions currently performed exclusively by the Registrar and the Department'. The Explanatory Memorandum provides debt collection services as an example of a function that may be outsourced and thus requires the expanded delegation power to enable that. It is not envisaged that debt collection be the only function that may be outsourced, however debt collection is currently the only function currently being considered by CSP for outsourcing. The changes to the legislation will also enable the CSP to engage staff on a contract basis where they have a particular specialist skill set e.g. a forensic accountant that may be required for a short period.

As provided in the Explanatory Memorandum to the Bill, as the Department of Human Services moves towards an integrated service delivery model, it is appropriate to align the scope of delegation powers to ensure consistency of service delivery options. In a practical

sense, this means the Department will be able to exercise similar powers in a similar manner across the Portfolio. Using the example of debt collection, it is appropriate that the Department is able to collect any debts owing to the Commonwealth in the most efficient and effective manner available. Currently, Centrelink has arrangements for outsourcing debt collection functions. The amended child support provisions will allow the CSP to have the same powers as Centrelink so that external service providers can concurrently pursue debts relating to mutual customers of the CSP and Centrelink.

With regard to administrative review, delegation of the powers does not change the nature of the powers exercised - in that they remain decisions under an enactment subject to administrative review. Those decisions currently capable of review under the internal review (Objections) or review by the Social Security Appeals Tribunal (Parts VI and VI of the Act) will remain subject to those review processes. Those powers not currently subject to the review mechanisms provided by the Act would remain subject to judicial review mechanisms. Further, the Registrar retains a power to review and alter decisions of a delegate.

With respect to complaints, the Registrar will remain responsible for the outcomes of the outsourced functions. Complaints about a service provider would be made to the Registrar, subject to any contractual complaint mechanism that may be in addition to the ability to complain to the Registrar. As with similar outsourcing arrangements, contractors would be contractually bound to perform their functions in a manner and to a standard similar to those that apply to the Registrar under the law.

Committee First Response

The Committee thanks the Minister for this response. The Committee understands the position outlined in relation to internal and tribunal review, but retains significant concern about the general extent and scope of the delegation (both within the context of delegations to public servants and to persons outside it) and the extent to which decisions taken by service providers under outsourcing arrangements remain subject to judicial review. As a result, the Committee believes it would be consistent with Standing Order 24(i)(iv) for the legislation to contain more specific delegations of the Registrar's power indicating which of the powers or functions of the Registrar are able to be delegated and to whom, including those which can be delegated to legal persons outside the Executive Government. **The Committee therefore seeks the Minister's further advice as to whether consideration can be given to the provision of more specific delegation powers. The Committee would also welcome more information about the capacity for the Registrar to engage staff with specialist skills on a contract basis without the need for delegating the Registrar's power and the basis upon which, for example, Centrelink outsources debt collection.**

Minister's response - extract

I acknowledge your concern that the delegation of powers should be clearly prescribed and limited to particular officers, members of senior executive service or people with specified skills. The intention of the legislation is to consider the use of staff from a contracted service provider for specific and limited services.

When delegating powers the Child Support Registrar (the Registrar) is required to execute an Instrument of Delegation that specifies what powers and functions are delegated to identified persons. The Registrar would also provide the contracted service provider with clear guidelines that the contractor would be required to comply with in the terms of the contract.

It is not the Government's intention that the power to delegate some powers to contractors would result in a significant amount of work currently performed by the Registrar being contracted out. The core work of the Child Support Program (CSP) requires application of specialised knowledge of child support which cannot be feasibly outsourced. Further, much of the administrative work could not be performed as effectively or efficiently as it is 'in house'. External service providers are able to provide specialised skills that are not feasible to provide 'in house'. This would generally be limited to activities such as debt collection in circumstances where the CSP has exhausted all its normal efforts, forensic accounting and similar services that require specific knowledge and expertise not generally provided within the CSP.

I note your comments that decisions made by staff under contractual powers may not be subject to judicial review. I have sought advice from the Department of Human Services (DHS) and it advised me that decisions made under a delegated power remain subject to the internal and external review mechanisms (Objections, SSAT then Court). Those decisions made under Child Support legislation that are not subject to administrative review through Objections, SSAT and then Court, are subject to judicial review under the *Administrative Decisions Judicial Review) Act 1988* (ADJR Act). Sections of the ADJR Act provide rights for judicial review of decisions of an administrative character made under an enactment.

Decisions of the Child Support Registrar that are not subject to merits review are subject to the ADJR Act to the extent those decisions are made under an enactment. This can apply to contractors performing Commonwealth functions.

It is also likely that section 75(v) of the *Commonwealth of Australia Constitution* and section 39B of the *Judiciary Act 1903* provides an avenue for judicial review of decisions made by contractors performing Commonwealth functions. Although, there is not definitive case law on the scope of these provisions, DHS advises that due to the nature of those provisions being beneficial to the complainant, it is likely a court would consider

persons exercising statutory powers under delegation to fall within the scope of a 'Commonwealth Officer' under section 75(v).

The delegation of powers by the Registrar is usually subject to a reserved power of the Registrar to review and alter any delegate's decision if the Registrar is of the view that the decision is inappropriate in the circumstances. That power will be expressly included in any Instrument of Delegation.

It is anticipated that any contract with an external service provider would be terminated if the contractor was exercising powers in a manner inconsistent with the expectations of the Commonwealth. This is a further safeguard to protect the rights of persons subject to the actions of the Commonwealth and its external service providers.

Committee Response

The Committee thanks the Minister for this comprehensive response. The Committee welcomes the clear statement of legislative intention that the exercise of any powers and functions that are delegated to a contracted service provider would retain their character as decisions taken 'under an enactment'. However, the Committee continues to have concerns about the breadth of the delegation. Given that it is envisaged that delegation to external service providers would only be necessary in limited circumstances it seems that the provision may be substantially broader than is necessary. **The Committee leaves the consideration of the question of the appropriateness of the breadth of the provision to the Senate as a whole.**

Family Assistance Legislation Amendment (Child Care Financial Viability) Bill 2011

Introduced into the House of Representatives on 26 May 2011
Portfolio: Employment Participation and Childcare

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2011*. The Minister responded to the Committee's comments in a letter dated 30 June 2011. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2011 - extract

Background

This bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999* to provide for the assessment and monitoring of the financial viability of large long day care centre operators of approved child care services in the context of the approval and continued approval of such services for the purposes of the family assistance law and to authorise the Secretary to engage an expert to carry out an independent audit of such an operator where there are concerns about its ongoing financial viability.

'Henry VIII' clause
Schedule 1, item 7

This bill is intended to promote the ongoing stability of the child care industry by more closely monitoring the financial viability of large long day care centre operators.

Schedule 1, item 7, is a *Henry VIII* clause which means that its effect is to enable regulations to override primary legislation. The Committee has long drawn attention to such clauses as they may inappropriately delegate legislative power. In this case item 7 enables the Minister to alter the definition of 'large long day care centre operator' by varying the number of 'approved centre based long day care services' which are specified in the definition contained in the bill.

It is difficult to assess the appropriateness of the delegation of legislative power as the explanatory memorandum is silent on the justification for the approach taken. **The Committee therefore seeks the Minister's advice as to the necessity for this provision.**

Pending the Minister's reply, 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.

Minister's response - extract

The Committee seeks my advice as to the necessity of this provision.

The Bill amends the A *New Tax System (Family Assistance) (Administration) Act 1999* to provide for the assessment and monitoring of the financial viability of large long day care centre operators. The Bill also authorises the Secretary to engage an expert to carry out an independent audit of such an operator where there are concerns about its ongoing financial viability.

Item 7 of Schedule 1 to the Bill provides that for the purposes of the definition of large long day care centre operator, the Minister may, by legislative instrument, vary the number of approved centre based long day care services specified in paragraph (a) or (b) of the definition (the definition is in item 5 of Schedule 1 to the Bill). That number is 25, in both paragraphs (a) and (b) of the definition.

There are currently six operators which satisfy the definition of a large long day care centre operator in the Bill. The number of 25 was chosen on the basis that if an operator of 25 or more approved centre based long day care services was to cease to operate at short notice, the impact on families and on other services and the cost to government may be significant in relation of providing alternative care arrangements for the children using the long day care centre operator's centre based long day care services.

While this number is set at 25 in the definition in the Bill, the child care market remains in a process of settling in the aftermath of the collapse of ABC Centres Limited. The financial viability measures in the Bill are for the purpose of supporting the stability of the child care sector.

Generally the number of children that are cared for by a large operator is proportional to the number of services that it operates. This, however, may not remain the case. It would be possible in the future for a large operator to operate a relatively small number of services which care for a very large number of children. This could put the stability of the child care sector at risk if there was not an ability to respond to this situation and reduce the number of services in the definition of large long day care centre operator, to ensure such large operators are subject to the measures in the Bill.

Conversely, if future market fluctuations mean that too many operators are being unnecessarily required to provide financial information under the measures in the Bill, the

number in the definition of large long day care centre operator could be increased, to respond to this situation.

Accordingly, the Government considers that a flexible approach, using the provision in item 7 of Schedule 1 to the Bill is required.

The financial viability assessment process has been developed in consultation with the child care sector, including with those services that will be affected by its implementation and the major peak bodies representing the sector.

A commitment to review the financial viability measures has been made for 2012-13 in the Regulation Impact Statement for the Bill. I do not anticipate that there would be a need to consider a variation to the number in the definition of a large long day care centre operator until after that review has taken place.

I also note that this number can only be varied by a disallowable legislative instrument. I believe that the disallowance process provides the Parliament with an appropriate opportunity to scrutinise any proposal to vary the number.

For these reasons, I consider that the provision in item 7 of Schedule 1 to the Bill is not an inappropriate delegation of power.

I trust that this addresses the Committee's concerns.

Committee Response

The Committee thanks the Minister for this comprehensive response and **requests that the key elements of this information be included in the explanatory memorandum.**

Intellectual Property Laws Amendment (Raising the Bar) Bill 2011

Introduced into the House of Representatives on 22 June 2011
Portfolio: Innovation, Industry, Science and Research

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2011*. The Minister responded to the Committee's comments in a letter dated 10 August 2011. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2011 - extract

Background

This bill makes a number of amendments relating to intellectual property.

Schedule 1 amends the *Patents Act 1990* to:

- remove restrictions on the information and background taken into account when assessing whether an application is sufficiently inventive to justify a patent;
- prevent the grant of patents for speculative inventions that require too much further work before they can be put into practice;
- address circumstances in which the information disclosed in a patent specification is not sufficient to make the invention across the full scope of each claim; and
- apply a consistent standard of proof across all grounds, so that the Commissioner is not obliged to grant patents which would not pass scrutiny in a court challenge.

Schedule 2 amends the *Patents Act 1990* to:

- clarify that research and experimental activities relating to patented inventions are exempt from infringement; and
- exempt research activities necessary for gaining pre-market or pre-manufacturing regulatory approval from infringement.

Schedule 3 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- refine opposition proceedings so that disputes can be settled quickly and inexpensively; and

- shorten timeframes within which divisional applications can be filed.

Schedule 4 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- permit a company to act and describe itself as a patent attorney; and

- extend to client-attorney communications the same privilege as currently exists for communications between a lawyer and their client.

Schedule 5 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- increase penalties for trademark infringement; and

- allow Australian Customs and Border Protection Service to intercept counterfeit goods at the border.

Schedule 6 amends *Patents Act 1990*, *Trade Marks Act 1995*, *Designs Act 2003* and *Plant Breeder's Rights Act 1994* to make a number of changes described as improving the flexibility of the IP rights system for users.

Possible inappropriate delegation of legislative power
Schedule 3, item 15

Item 15 of Schedule 3 introduces a new section 210A into the *Patents Act*. This provision replaces existing criminal sanctions for non-compliance with the exercise of the Commissioner's powers (to summons witnesses, receive evidence or require the production of documents) with non-criminal sanctions. Paragraph 210A(2)(c) allows the Commissioner to take 'actions of a kind that are prescribed by the regulations', in addition to the sanctions specified in the paragraphs 210A(2)(a) and (b). Unfortunately the explanatory memorandum does not address the need to provide for additional sanctions to those specified in the primary legislation. The sanctions are not criminal, but the Committee prefers that important matters are included in primary legislation whenever possible. **The Committee therefore seeks the Minister's advice as to what further sanctions are envisage and whether it is possible to include these in the primary legislation.**

> *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.*

Minister's response - extract

The Committee has commented on item 15 of Schedule 3. This item introduces a new section 210A into the *Patents Act 1990* to replace existing criminal sanctions for non-compliance with the Commissioner of Patent's requirement that a person appears as a witness or produces a document or article with non-criminal sanctions. Paragraph 210A (2) (c) allows the Commissioner to take 'actions of a kind that are prescribed by regulation'. The Committee has sought advice as to what further sanctions are envisaged under paragraph (c) and whether it is possible to include these in the primary legislation.

On review, I am satisfied that paragraphs (a) and (b) of the provision adequately cover the range of sanctions that the Commissioner would seek to apply for non-compliance with a requirement to appear as a witness or produce a document or article.

I trust that this will be sufficient to address the Committee's comments in the Alert Digest.

Committee Response

The Committee thanks the Minister for this response and has sought the Minister's confirmation about whether he intends to arrange for subsection 2(c) to be removed.

Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

Introduced into the House of Representatives on 11 May 2011
Portfolio: Immigration and Citizenship

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2011*. The Minister responded to the Committee's comments in a letter received on 12 July 2011. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2011 - extract

Background

This bill amends the *Migration Act 1958* to:

- enable the Minister to refuse to grant, or to cancel, a visa where a person fails the character test because the person has been convicted of any offence committed while they are in immigration detention; and
- increase the penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years imprisonment.

The first purpose of the bill is to enable the question of whether a visa applicant or holder fails the character test to be determined by reference to whether they have been convicted of any offence committed while they are in immigration detention (including during or after an escape from immigration detention).

The second purpose is that the bill increases the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from 3 years to 5 years imprisonment. The explanatory memorandum at page 1 states that the bill is a response to criminal behaviour during recent disturbances in immigration detention centres and is intended to 'provide a more significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour' and to allow for those who engage in criminal activity while in detention to be dealt with appropriately.

Undue trespass on personal rights and liberties
Schedule 1, item 1

The second purpose of the bill is achieved through item 1 of schedule 1, through the proposed introduction of subsection 197B(1) into the *Migration Act*. The provision increases the maximum penalty for the manufacture, possession, use or distribution of a 'weapon' from 3 to 5 years imprisonment. A weapon is defined to include 'a thing made or adapted for use for inflicting bodily injury' or 'a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury'. It is noted that the definition of a weapon is framed very broadly. For example, one may threaten to use a thing to inflict bodily injury without there being any real or significant risk that injury may in fact result.

The justification provided for this amendment in the explanatory memorandum is as follows: (1) the expectations of the Australian community; (2) the alignment of the penalty for this offence with that provided in relation to section 197A, which prohibits detainees from escaping, and (3) the fact that the increase is 'not inconsistent' with other penalties provided in Commonwealth legislation, for example, section 49 of the *Aviation Transport Security Act 2004*' which has a penalty of 7 years for the offence of carrying or possession of a weapon on board an aircraft.

In terms of Standing Order 24 (1)(a)(i), the first two reasons for the increase do not of themselves substantively address the question of whether the increase for this offence may be considered proportionate. In the Committee's view it is also relevant that the legislation gives a very broad definition given to 'weapon'. On this issue it is notable that the definition of 'weapon' in the *Aviation Transport Security Act 2004* is more circumscribed and determinate in its operation: it refers specifically to 'firearms' or things which are prescribed by the regulations to be a weapon. By contrast, whether or not a person commits an offence in relation to a weapon under the *Migration Act* may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon). **The Committee therefore seeks the Minister's advice as to whether the proposed increase in penalty is proportionate given the breadth of the definition of 'weapon' in this context.**

> *Pending the Minister's reply, 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.*

Minister's response - extract

Response in relation to the question regarding the undue trespass on personal rights and liberties by increasing the penalty under section 197B

The proposed amendment of subsection 197B(1) of the *Migration Act 1958* (the Act) increases the maximum penalty for the manufacture, possession, use or distribution of a weapon from three to five years imprisonment.

Under subsection 197B(2) of the Act, a weapon is defined as including:
- a thing made or adapted for use for inflicting bodily injury; or
- a thing where the detainee who has the thing intends or threatens to use the thing,
or intends that the thing be used, to inflict bodily injury.

The Committee has expressed its concern that the Explanatory Memorandum does not substantively address the question of whether the increase in penalty is proportionate. The Explanatory Memorandum states that the increase in penalty for this offence is not inconsistent with other penalties provided in Commonwealth legislation, for example, section 49 of the *Aviation Transport Security Act 2004* which provides a penalty of seven years imprisonment for the offence of carrying or possession of a weapon on board an aircraft. The Committee has further indicated that the Aviation Transport Security Act 2004 is more circumscribed and determinate in its operation as it refers specifically to firearms or things which are prescribed by the regulations to be a weapon.

The definition of 'weapon' in the *Aviation Transport Security Act 2004* is not in fact limited to 'firearms' or things which are prescribed by the regulations to be a weapon but includes a device that is reasonably capable of being converted into a firearm or a thing prescribed to be a weapon. Moreover, the list of things prescribed by the regulations to be a weapon is extensive.

The Committee expresses the view that by contrast with section 49 of the *Aviation Transport Security Act 2004*, 'whether or not a person commits an offence in relation to a weapon under the Migration Act may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon)'.

In fact, whether or not a person commits an offence against section 49 of the *Aviation Transport Security Act 2004* also depends upon 'subjective intentions' in that intention is the fault element for the conduct constituting the offence.

Although it is possible under section 197B for a person to be convicted solely for possessing a weapon (which is comparable to the offence in section 49 of the *Aviation Transport Security Act 2004* for possessing a weapon), section 197B of the Act also

contains what is arguably a more serious offence of manufacturing or using a thing made or adapted for use for inflicting bodily injury or *manufacturing or using* a thing where the person who has the thing intends or threatens to use it, or intends that it be used, to inflict bodily injury.

At the time of creating the offence in section 197B of the Act in July 2001, the Parliament clearly intended to create a more serious offence for the possession of a weapon in immigration detention. For example in NSW, a maximum penalty of two years imprisonment applies for the possession of a knife in a public place and is provided for under subsection 11C(1) of the *Summary Offences Act 1998* (NSW). This provision was in effect before section 197B came into effect in July 2001. The Commonwealth has already therefore, prescribed a more serious offence where the offence is committed within a place of immigration detention. The proposed amendment is to increase the penalty for the current provision, sending a clear message to persons in immigration detention and strengthening the deterrent effect of the law.

The Committee has noted that the offence could be applied in circumstances where 'one may threaten to inflict bodily injury without there being any real or significant risk that injury may in fact result'. This is a misconstruction of the criminal law offence of threatening to inflict bodily injury. For example, the *Criminal Code Act 1995* (Cth) provides for an offence of threatening to cause harm to a Commonwealth official. Section 147.2 of the Schedule – The Criminal Code – of the *Criminal Code Act 1995* (Cth) provides that where a person makes a threat to cause harm to a person, the prosecution must prove that the offender intended the other person to fear that a threat will be carried out or that the offender was reckless as to causing the other person to fear that the threat will be carried out. It is therefore irrelevant as to whether the offender could have carried out the threat if the intention of the offender was for another person to fear that the threat would be carried out. This is consistent with the general approach of the criminal law that an offence is more serious where the intention is to cause or threaten to cause harm to another person.

In my opinion, the increased penalty under section 197B is consistent with penalties for comparable offence provisions and is proportionate having regard to the conduct involved.

Committee Response

The Committee thanks the Minister for this response, and notes that the bill has already been passed by both Houses of Parliament.

Alert Digest No. 5 of 2011 - extract

Possible trespass on personal rights and liberties
Schedule 1, items 2 and 4

The first purpose of the bill relating to the character test is achieved through items 2 and 4, which would insert into the Act new subsections 500A(3) and 501(6)(a). The effect of both of these proposed subsections is to provide additional grounds upon which the Minister or his or her delegate may decide to refuse to grant, or to cancel, a visa on character grounds. New paragraph 500A(3)(d) of the Act provides that the Minister may refuse to grant to a person a temporary safe haven visa, or may cancel a person's temporary safe have visa if the person has been convicted of any offence which was committed while the person was in immigration detention, during an escape from immigration detention, or after an escape from immigration detention. New paragraph 501(6)(aa) provides that a person who is convicted of any offence in these same circumstances does not pass the character test for the purposes of section 501.

New paragraph 500A(3)(e) provides that the Minister may refuse to grant to a person a temporary safe haven visa, or may cancel a person's temporary safe haven visa if the person has been convicted of an offence against section 197A of the Act which prohibits detainees from escaping. New paragraph 501(6)(ab) provides that a person who is convicted of an offence against section 197A does not pass the character test for the purposes of section 501.

These amendments supplement the existing powers of the Minister under the Act to take into account criminal conduct. The explanatory memorandum states at page 5 that the purpose of the provisions is to strengthen the consequences of criminal behaviour by persons in immigration detention and (at page 2 of the explanatory memorandum) to send 'a strong and clear message that the kind of behaviour seen recently in immigration detention centres will not be tolerated'. On the other hand, the legislation already enables the Minister or delegate to consider past and present criminal conduct in determining whether to exercise the discretionary powers under the existing 'character test' outlined in sections 501 and 500A. Further, the Committee is very concerned that the application of the new provisions could mean that criminal behaviour which may be relatively minor can, of itself, justify the exercise of these powers (without the need for any assessment of the circumstances and details of the offence) and this outcome may be thought to be disproportionate in some cases. **The Committee seeks the Minister's advice as to why the existing powers are thought inadequate to respond to criminal acts by those whom are or should be lawfully detained under the Act and whether, if new powers are considered necessary, it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences.**

Pending the Minister's reply, 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.

Minister's response - extract

Response in relation to why the existing powers are inadequate to respond to criminal acts of those lawfully detained under the Act and whether the new powers are necessary

Currently, the commission of a criminal offence by a person in immigration detention, which does not receive a sentence of at least 12 months imprisonment, may result in that person not passing the character test. This is only if the decision-maker concludes that that person is not of good character on the basis of past and present criminal conduct and/or past and present general conduct within the meaning of paragraph 501(6)(c) of the Act, taking into account the factors set out in the Ministerial Directions made under section 499 of the Act.

The courts have held that the consideration of past and present criminal conduct and/or past and present general conduct provide indicia as to the presence or absence of good character, but do not themselves answer the question. It is necessary to look at the totality of the circumstances and to the character of the person over the continuum of a period of time.

Given the relevant case law on the past and present criminal and/or past and present general conduct ground, there is a real risk of a court finding that a person who was convicted of an offence committed while in immigration detention, but who otherwise had no criminal record, still passed the character test (assuming of course that the conviction did not result in a sentence of imprisonment of 12 months or more which would trigger the 'substantial criminal record' ground). This could be on the basis that the offence was a 'one off' act in relation to which there were 'mitigating' circumstances and that it was not indicative of a lack of 'enduring moral qualities', that is, that the person was not of good character.

The amendments in the Bill will ensure that a person, who commits a criminal offence while in immigration detention and is convicted by a court for the offence concerned, will automatically not pass the character test. Under the existing provisions, however, a decision-maker will retain the discretion whether to refuse to grant or to cancel a visa despite the person failing the character test. In other words, a determination that a person does not pass the character test on this new ground would enliven the discretion to refuse or cancel but would not dictate the outcome of the exercise of the discretion.

Once that discretion is available, a decision-maker needs to consider the relevant matters relating to the particular circumstances of the case in accordance with Ministerial Direction No. 41.

Response in relation to whether it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences

I have assumed for the purposes of this question that the mechanism the Committee is envisioning is a prescription of offences in the *Migration Regulations 1994* (the Regulations) rather than attempting to define this in the Act.

Prescribing offences in the Regulations presents a number of difficulties. Significantly, prescribing offences risks omitting serious offences and/or may not be all encompassing of the types of offences for which a person may be convicted while they are in immigration detention. For example, if offences relating to potential riots in detention were 'prescribed' such as criminal damage and arson, then conviction of serious offences involving personal violence against another detainee that were not prescribed, which do not attract a sentence upon conviction of more than 12 months imprisonment, would not result in failure of the character test. This would lead to inconsistent and arguably unfair results for persons in immigration detention.

Given that people in immigration detention can be subject to both Commonwealth and State/Territory offence provisions, ensuring that all relevant offences were covered in a prescribed list would be problematic. It is for these reasons that the current amendments are broad in scope so as to encompass conviction of any offence committed in immigration detention, during an escape from immigration detention, or during a period where a person has escaped from immigration detention.

Further, at any time a Commonwealth or State/Territory offence provision was repealed, amended or even renumbered, the Regulations would need to be updated to reflect the relevant change. Therefore, prescribing specific offences in the Regulations risks the list of prescribed offences losing currency and diluting the effectiveness of the proposed amendment.

Alternatively, if the Regulations were to prescribe classes of offences, rather than specify particular offences, this carries the risk that some offences may not be captured by the description of the classes of offences. Further, such an approach is likely to lead to increased litigation by persons challenging that the offence for which they were convicted does not fall within one of the prescribed classes.

It is my view that it would be difficult to identify each and every offence that should be prescribed in the Regulations. The clearest and most effective way to deal with offences in immigration detention is to have a clear and objective law that any person who is convicted of committing an offence in immigration detention automatically fails the character test. It would then remain a matter for me or a delegate to consider factors in relation to the nature

of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501 of the Act to refuse or cancel a visa. As advised above, a determination that the person does not pass the character test under the new ground would enliven the discretion whether to refuse or cancel a visa but would not dictate the outcome of the exercise of the discretion.

I am also of the view that it would not be appropriate to specify a term of imprisonment for the offences. As noted above, a range of both State/Territory and Commonwealth offences can be applied to criminal behaviour committed by persons in immigration detention. The particular length of sentence that can be imposed for offences varies between States/Territories and the Commonwealth.

The variations in sentences can be explained, to some extent, by the prevalence of particular offending in particular jurisdictions and attempts by the court to impose higher penalties in these circumstances as a deterrent against committing those offences. Therefore, an offence of arson, for example, may carry a maximum sentence of between 15 years and life imprisonment depending on the jurisdiction.

The variations in sentences across jurisdictions would lead to inconsistency in the application of the proposed amendments, if there were a minimum term of imprisonment for the offences.

I reiterate that this proposed amendment applies only to persons who have been convicted of an offence by a court. In other words, it applies to people who commit offences while in immigration detention that are of a calibre that attract a conviction by a court. The amendments would not apply to a person who is charged before a court with an offence or offences, and the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but that no conviction should be recorded on that charge, or any of those charges. Therefore, there must be at least one conviction for the amendments to apply.

Committee Response

The Committee thanks the Minister for this response, and notes that the bill has already been passed by both Houses of Parliament.

Alert Digest No. 5 of 2011 - extract

Retrospective commencement
Clause 2, table item 3

The amendments to section 500A and 501 will commence from 26 April 2011 (see Clause 2 of the Bill). The explanatory memorandum at page 1 indicates that the provisions will operate 'whether the conviction or offence occurred before, on or after' that date. Although the amendments do not retrospectively impose criminal liability, decisions which have very serious consequences for individuals will be made on the basis of legislative provisions which are given retrospective operation. One central element of the rule of law is that persons should be able to guide their actions by reference to the law and that the legal consequences of breaches of the law should be capable of being known with a tolerable level of clarity in advance. To this extent, the rule of law is sometimes said to promote personal liberty. As these amendments 'strengthen the [adverse] consequences of criminal behaviour' (see the explanatory memorandum at page 5) and do so with retrospective effect, there is a clear argument that they do unduly trespass on personal liberty.

The explanatory memorandum 'notes on individual clauses' for Clause 2 simply states that the items will commence on 26 April 2011, but provides no context or rationale for the approach. At page 2 the explanatory memorandum appears to suggest that the proposed approach is justified because on 26 April 2011 the Minister made a public announcement of the legislative changes proposed in this bill—thereby putting 'all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it.'

However, in the Committee's view this does not adequately respond to concerns about the retrospective operation of the legislation. Given the nature of the individual interests which may be affected by decisions made under sections 500A and 501 of the *Migration Act*, it is suggested that 'legislation by press release' is not appropriate. As discussed in its *Report on the 39th Parliament*, the Committee consistently draws attention to reliance on Ministerial announcements which contain an implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law. This approach undermines the principle that the law is made by Parliament, not by the Executive. The practice is of particular concern in the context of the application of laws which have the capacity to affect significant individual liberty interests. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach, taking into account the Committee's concern that they may unduly trespass on personal rights and liberties.**

Pending the Minister's reply, 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.

Minister's response - extract

Response in relation to whether the retrospective commencement may unduly trespass on personal rights and liberties

In providing that the amendments made to the character provisions apply whether the conviction or offence occurred before, on or after their commencement, the Bill is merely recognising that consideration of a person's character at a particular point in time will necessarily include consideration of what they have done in the past. In other words, a decision-maker will be able to apply the new ground in response to a conviction or offence that occurred in the past.

This is the case with the existing ground of the character test under which a person does not pass the character test if the person has a substantial criminal record. That ground was included in the amendments to section 501 of the Act made by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the 1998 Act) which commenced on 1 June 1999.

The 1998 Act specifically provided that the amendments to section 501, to the extent that they related to applications for visas, applied to applications that were made before, on or after their commencement. Further, to the extent that the amendments related to visas granted to a person, they applied to visas granted before, on or after their commencement. The effect of those provisions was that the amendments made to the character test, providing that a person does not pass the character test if they have a substantial criminal record, necessarily applied whether the criminal record related to a conviction or offence occurring before, on or after the commencement of the amendments.

I clearly articulated in a public announcement on 26 April 2011 that the legislative changes would take effect on that date, subject to passage of the legislation. Therefore all persons in immigration detention were put on notice as of that date of their liability to be considered under the proposed new arrangements. It is essential that anyone convicted of an offence in relation to the recent events at Australian immigration detention centres be covered by these new provisions and that the amended character test applies to them.

It remains the case that the Parliament, not the Executive, makes the law. The proposed amendments have no effect unless the Bill is passed by the Parliament in its current form.

Committee Response

The Committee thanks the Minister for this response, and notes that the bill has already been passed by both Houses of Parliament.

Tax Laws Amendment (2011 Measures No. 3) Bill 2011

Introduced into the House of Representatives on 12 May 2011
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2011*. The Minister responded to the Committee's comments in a letter received 6 July 2011. A copy of the letter is attached to this report.

Background

This bill amends the *A New Tax System (Goods and Services Tax) Act 1999* to allow supplies of particular types of new recreational boats to be GST-free if the boats are exported within a specified 12 month period. The bill also amends the *Income Tax (Transitional Provisions) Act 1997* to remove a technical deficiency that prevents the ongoing imposition of the general interest charge in some circumstances.

Retrospective commencement
Clause 2, table item 3

Schedule 2 of this bill makes amendments to the *Income Tax (Transitional Provisions) Act 1997* so as to remove a 'technical deficiency that prevents the ongoing imposition of the general interest charge ['GIC'] in some circumstances' (explanatory memorandum at 15). The amendments are a response to an unexpected result of the enactment of the *Tax Laws Amendment (Transfer of Provisions) Act 2010*. This Act rewrote and transferred the GIC imposition provisions from the *Income Tax Assessment Act 1936* to the *Income Tax Assessment Act 1997*. The unexpected result was that the general interest charge (payable in relation to overdue income tax) would not be payable in a number of limited instances (these are detailed on page 16 of the explanatory memorandum and relate to the year in which the liability arose or the date it becomes due for payment). The amendments in this bill impose the GIC on all income tax and shortfall interest charge liabilities irrespective of the year the liability relates to or the date when the liability becomes due for payment.

The amendments will operate from July 2010—the date the 'technical deficiency' was created. The law will clearly have an adverse impact on persons who become liable to pay the GIC in circumstances where, due to the technical deficiency created by the 2010 amendments, they would not have been liable to pay the charge.

In the explanatory memorandum, the following points are noted (see page 3 and pages 15-16):

- in the public consultations undertaken on the draft legislation that rewrote and transferred the GIC provisions, 'none of the six submissions … received identified this specific deficiency in the draft.

- the amendments in this bill restore the ongoing imposition of the GIC by removing a 'technical deficiency and 'ensure the equal treatment of unpaid amounts of income tax and shortfall interest charge under the law'.

- the amendments 'only affect some taxpayers that have unpaid income tax or shortfall interest charge liabilities'.

Given that persons affected by the 'technical deficiency' may have relied upon the fact that they were no longer liable to pay the GIC in relation to a particular tax liability, there is an argument that this bill may constitute an undue encroachment on personal rights and liberties. In general it is thought that those subject to the law are entitled to plan their affairs on the basis that it will not be changed retrospectively. There is no suggestion in the explanatory memorandum that it would have been unreasonable for affected taxpayers to rely upon the 2010 amendments which operated in their favour. **The Committee therefore seeks the Treasurer's advice as to the detriment this approach could cause and whether the retrospective operation of these amendments may unduly encroach upon personal rights.**

> *Pending the Treasurer's reply, 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.*

Minister's response - extract

Tax Laws Amendment (2011 Measures No.3) Bill 2011 - Schedule 2

The general interest charge (GIC) is payable by a taxpayer who has failed to pay an amount of tax on time.

The *Tax Laws Amendments (Transfer of Provisions) Act 2010* (the Transfer of Provisions Act) rewrote and transferred the GIC imposition provisions from the *Income Tax Assessment Act 1936* (ITAA 1936) to the *Income Tax Assessment Act* 1997 (ITAA 1997). The explanatory memorandum to the Bill noted at page 6 that:

> *The rewrites in this Bill involve no significant policy changes... In general, the rewrites aim to reproduce the ITAA 1936 material, in language as little changed as possible, and in the same order as the original material.*

However, there was a technical deficiency in the transitional arrangements contained in the *Transfer of Provisions Act 2010,* and the Commissioner of Taxation would be unable to collect GIC on some outstanding income tax or shortfall interest charge liabilities in the absence of the remedial amendments contained in *Tax Laws Amendment (2011 Measures No.3) Act 2011*. This was not an intended consequence of the rewrite, as stated at page 26 of the explanatory memorandum: 'the rewrite will have no effect on outstanding liabilities and accruing interest.'

These remedial amendments take effect from the time the original rewrite took effect. If they did not, some taxpayers who had not complied with their obligation to pay income tax or shortfall interest charge by the due date would not have been subject to GIC, when other taxpayers in comparable circumstances would have been subject to GIC.

I am advised that no taxpayers have sought to rely on the technical deficiency which these remedial amendments address.

Committee Response

The Committee thanks the Minister for this response, and notes his advice that no taxpayers have sought to rely on the error in the current Act.

Tax Laws Amendment (2011 Measures No. 5) Bill 2011

Introduced into the House of Representatives on 2 June 2011
Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2011*. The Minister responded to the Committee's comments in a letter received 6 July 2011. A copy of the letter is attached to this report.

Background

The bill amends various taxation laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to allow trust beneficiaries to continue to use the primary production averaging and farm management deposits provisions in a year where the trust has a loss for trust law purposes.

Schedule 2 amends *Income Tax Assessment Act 1997* to ensure that, where permitted by the trust deed, the capital gains and franked distributions (including any attached franking credits) of a trust can be effectively streamed for tax purposes to beneficiaries by making them 'specifically entitled' to those amounts.

Schedule 2 also amends the *Income Tax Assessment Act 1936*, to include specific anti-avoidance rules to address the potential opportunities for tax manipulation that can result from the inappropriate use of exempt entities as beneficiaries.

Schedule 3 makes several technical amendments which have arisen from the interaction between the tax law and the *National Rental Affordability Scheme Act 2008* and associated regulations.

Schedule 4 amends the *Income Tax Assessment Act 1936* to phase out the dependent spouse tax offset.

Schedule 5 amends the *Fringe Benefits Tax Assessment Act 1986* to reform the current statutory formula method for determining the taxable value of car fringe benefits by replacing the current statutory rates with a single statutory rate of 20 per cent, regardless of kilometres travelled.

Retrospective effect
Clause 2, various

Schedule 2 of the bill contains provisions that will make interim changes to improve the taxation of trust income. The measures apply from the start of the 2010-11 income year. In relation to 'early balancers' and 'managed investment trusts', applying the amendments may be optional. The explanatory memorandum states at page 4 that the measures are 'generally beneficial to taxpayers'. It is unclear, however, whether there are other categories of taxpayers affected by the changes and for whom they may be detrimental. **The Committee therefore seeks the Treasurer's advice as to whether some tax payers may be detrimentally affected by these changes, and if so, the justification for the changes applying for the 2010-11 year (and having some retrospective operation).**

> *Pending the Treasurer's reply, 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.*

Minister's response - extract

Tax Laws Amendment (2011 Measures No.5) Bill 2011 - Schedule 2

Taxpayers and industry called for clarification of the trust tax laws following the High Court decision in *Commissioner of Taxation v Bamford* (Bamford). The amendments contained in Schedule 2, which were recommended by the Board of Taxation, provide certainty for trustees and beneficiaries about the effectiveness of the streaming of capital gains and franked distributions.

Without these changes, it is arguable as to whether the practice of streaming could continue to be effective for tax purposes and users of trusts would continue to face uncertainty about the trust tax laws following the Bamford decision.

The amendments apply for the 2010-11 income year, the first full income year following the Bamford decision, and later income years.

Trustees and beneficiaries that do not stream capital gains or franked distributions will largely be unaffected by these amendments.

I hope this information will assist the Committee.

Committee Response

The Committee thanks the Minister for this response, and notes that the proposed amendments have been recommended by the Board of Taxation to clarify trust laws following a High Court decision.

Senator Mitch Fifield
Chair

The Hon Tanya Plibersek MP
Minister for Human Services
Minister for Social Inclusion

C11/2745

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

Dear Senator Coonan

Thank you for your letter of 16 June 2011 on behalf of the Standing Committee for the Scrutiny of Bills, in response to my letter of 25 May 2011, about the *Child Support (Registration and Collection) Amendment Bill 2011*.

I acknowledge your concern that the delegation of powers should be clearly prescribed and limited to particular officers, members of senior executive service or people with specified skills. The intention of the legislation is to consider the use of staff from a contracted service provider for specific and limited services.

When delegating powers the Child Support Registrar (the Registrar) is required to execute an Instrument of Delegation that specifies what powers and functions are delegated to identified persons. The Registrar would also provide the contracted service provider with clear guidelines that the contractor would be required to comply with in the terms of the contract.

It is not the Government's intention that the power to delegate some powers to contractors would result in a significant amount of work currently performed by the Registrar being contracted out. The core work of the Child Support Program (CSP) requires application of specialised knowledge of child support which cannot be feasibly outsourced. Further, much of the administrative work could not be performed as effectively or efficiently as it is 'in house'. External service providers are able to provide specialised skills that are not feasible to provide 'in house'. This would generally be limited to activities such as debt collection in circumstances where the CSP has exhausted all its normal efforts, forensic accounting and similar services that require specific knowledge and expertise not generally provided within the CSP.

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I note your comments that decisions made by staff under contractual powers may not be subject to judicial review. I have sought advice from the Department of Human Services (DHS) and it advised me that decisions made under a delegated power remain subject to the internal and external review mechanisms (Objections, SSAT then Court). Those decisions made under Child Support legislation that are not subject to administrative review through Objections, SSAT and then Court, are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1988* (ADJR Act). Sections of the ADJR Act provide rights for judicial review of decisions of an administrative character made under an enactment.

Decisions of the Child Support Registrar that are not subject to merits review are subject to the ADJR Act to the extent those decisions are made under an enactment. This can apply to contractors performing Commonwealth functions.

It is also likely that section 75(v) of the *Commonwealth of Australia Constitution* and section 39B of the *Judiciary Act 1903* provides an avenue for judicial review of decisions made by contractors performing Commonwealth functions. Although, there is not definitive case law on the scope of these provisions, DHS advises that due to the nature of those provisions being beneficial to the complainant, it is likely a court would consider persons exercising statutory powers under delegation to fall within the scope of a 'Commonwealth Officer' under section 75(v).

The delegation of powers by the Registrar is usually subject to a reserved power of the Registrar to review and alter any delegate's decision if the Registrar is of the view that the decision is inappropriate in the circumstances. That power will be expressly included in any Instrument of Delegation.

It is anticipated that any contract with an external service provider would be terminated if the contractor was exercising powers in a manner inconsistent with the expectations of the Commonwealth. This is a further safeguard to protect the rights of persons subject to the actions of the Commonwealth and its external service providers.

Yours sincerely

Tanya Plibersek

Tanya Plibersek

7-7-11

The Hon Kate Ellis MP
Minister for Employment Participation and Child Care
Minister for the Status of Women

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

Dear Senator

I refer to the Scrutiny of Bills Committee's ('Committee') Alert Digest No. 5, of 15 June 2011, concerning a provision in item 7 of Schedule 1 to the Family Assistance Legislation Amendment (Child Care Financial Viability) Bill 2011 ('the Bill').

The Committee seeks my advice as to the necessity of this provision.

The Bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999* to provide for the assessment and monitoring of the financial viability of large long day care centre operators. The Bill also authorises the Secretary to engage an expert to carry out an independent audit of such an operator where there are concerns about its ongoing financial viability.

Item 7 of Schedule 1 to the Bill provides that for the purposes of the definition of large long day care centre operator, the Minister may, by legislative instrument, vary the number of approved centre based long day care services specified in paragraph (a) or (b) of the definition (the definition is in item 5 of Schedule 1 to the Bill). That number is 25, in both paragraphs (a) and (b) of the definition.

There are currently six operators which satisfy the definition of a large long day care centre operator in the Bill. The number of 25 was chosen on the basis that if an operator of 25 or more approved centre based long day care services was to cease to operate at short notice, the impact on families and on other services and the cost to government may be significant in relation of providing alternative care arrangements for the children using the long day care centre operator's centre based long day care services.

While this number is set at 25 in the definition in the Bill, the child care market remains in a process of settling in the aftermath of the collapse of ABC Centres Limited. The financial viability measures in the Bill are for the purpose of supporting the stability of the child care sector.

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Generally the number of children that are cared for by a large operator is proportional to the number of services that it operates. This, however, may not remain the case. It would be possible in the future for a large operator to operate a relatively small number of services which care for a very large number of children. This could put the stability of the child care sector at risk if there was not an ability to respond to this situation and reduce the number of services in the definition of large long day care centre operator, to ensure such large operators are subject to the measures in the Bill.

Conversely, if future market fluctuations mean that too many operators are being unnecessarily required to provide financial information under the measures in the Bill, the number in the definition of large long day care centre operator could be increased, to respond to this situation.

Accordingly, the Government considers that a flexible approach, using the provision in item 7 of Schedule 1 to the Bill is required.

The financial viability assessment process has been developed in consultation with the child care sector, including with those services that will be affected by its implementation and the major peak bodies representing the sector.

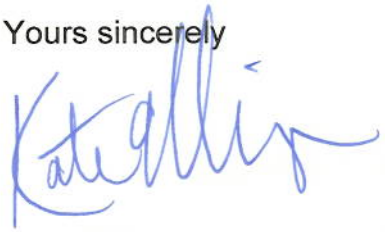
A commitment to review the financial viability measures has been made for 2012–13 in the Regulation Impact Statement for the Bill. I do not anticipate that there would be a need to consider a variation to the number in the definition of a large long day care centre operator until after that review has taken place.

I also note that this number can only be varied by a disallowable legislative instrument. I believe that the disallowance process provides the Parliament with an appropriate opportunity to scrutinise any proposal to vary the number.

For these reasons, I consider that the provision in item 7 of Schedule 1 to the Bill is not an inappropriate delegation of power.

I trust that this addresses the Committee's concerns.

Yours sincerely



Kate Ellis

30 JUN 2011

SENATOR THE HON KIM CARR

MINISTER FOR INNOVATION, INDUSTRY, SCIENCE AND RESEARCH

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

12 AUG 2011

Dear Senator Fifield

Intellectual Property Laws Amendment (Raising the Bar) Bill 2011

Thank you for your letter of 7 July 2011 on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) regarding the Committee's comments in *Alert Digest No. 7 of 2011* concerning the Intellectual Property Laws Amendment (Raising the Bar) Bill 2011.

The Committee has commented on item 15 of Schedule 3. This item introduces a new section 210A into the *Patents Act 1990* to replace existing criminal sanctions for non-compliance with the Commissioner of Patent's requirement that a person appears as a witness or produces a document or article with non-criminal sanctions. Paragraph 210A (2) (c) allows the Commissioner to take 'actions of a kind that are prescribed by regulation'. The Committee has sought advice as to what further sanctions are envisaged under paragraph (c) and whether it is possible to include these in the primary legislation.

On review, I am satisfied that paragraphs (a) and (b) of the provision adequately cover the range of sanctions that the Commissioner would seek to apply for non-compliance with a requirement to appear as a witness or produce a document or article.

I trust that this will be sufficient to address the Committee's comments in the Alert Digest.

Yours sincerely

Kim Carr

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The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Senator The Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
S1.111, Parliament House
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Dear Senator

Thank you for your letter of 16 June 2011 concerning the comments on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (the Bill) contained in the *Alert Digest No. 5 of 2011* (16 June 2011).

The Committee has sought my advice in relation to items 1, 2 and 4 of the Bill and about the retrospective commencements of items 2 to 6 (clause 2). The Committee has also expressed concerns that these items infringe on Standing Order 24(1)(a)(i) by trespassing unduly on personal rights and liberties.

Response in relation to the question regarding the undue trespass on personal rights and liberties by increasing the penalty under section 197B

The proposed amendment of subsection 197B(1) of the *Migration Act 1958* (the Act) increases the maximum penalty for the manufacture, possession, use or distribution of a weapon from three to five years imprisonment.

Under subsection 197B(2) of the Act, a weapon is defined as including:
- a thing made or adapted for use for inflicting bodily injury; or
- a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury.

The Committee has expressed its concern that the Explanatory Memorandum does not substantively address the question of whether the increase in penalty is proportionate. The Explanatory Memorandum states that the increase in penalty for this offence is not inconsistent with other penalties provided in Commonwealth legislation, for example, section 49 of the *Aviation Transport Security Act 2004* which provides a penalty of seven years imprisonment for the offence of carrying or possession of a weapon on board an aircraft. The Committee has further indicated that the *Aviation Transport Security Act 2004* is more circumscribed and determinate in its operation as it refers specifically to firearms or things which are prescribed by the regulations to be a weapon.

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The definition of 'weapon' in the *Aviation Transport Security Act 2004* is not in fact limited to 'firearms' or things which are prescribed by the regulations to be a weapon but includes a device that is reasonably capable of being converted into a firearm or a thing prescribed to be a weapon. Moreover, the list of things prescribed by the regulations to be a weapon is extensive.

The Committee expresses the view that by contrast with section 49 of the *Aviation Transport Security Act 2004*, 'whether or not a person commits an offence in relation to a weapon under the *Migration Act* may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon)'.

In fact, whether or not a person commits an offence against section 49 of the *Aviation Transport Security Act 2004* also depends upon 'subjective intentions' in that intention is the fault element for the conduct constituting the offence.

Although it is possible under section 197B for a person to be convicted solely for possessing a weapon (which is comparable to the offence in section 49 of the *Aviation Transport Security Act 2004* for possessing a weapon), section 197B of the Act also contains what is arguably a more serious offence of *manufacturing or using* a thing made or adapted for use for inflicting bodily injury or manufacturing or using a thing where the person who has the thing intends or threatens to use it, or intends that it be used, to inflict bodily injury.

At the time of creating the offence in section 197B of the Act in July 2001, the Parliament clearly intended to create a more serious offence for the possession of a weapon in immigration detention. For example in NSW, a maximum penalty of two years imprisonment applies for the possession of a knife in a public place and is provided for under subsection 11C(1) of the *Summary Offences Act 1998* (NSW). This provision was in effect before section 197B came into effect in July 2001. The Commonwealth has already therefore, prescribed a more serious offence where the offence is committed within a place of immigration detention. The proposed amendment is to increase the penalty for the current provision, sending a clear message to persons in immigration detention and strengthening the deterrent effect of the law.

The Committee has noted that the offence could be applied in circumstances where 'one may threaten to inflict bodily injury without there being any real or significant risk that injury may in fact result'. This is a misconstruction of the criminal law offence of threatening to inflict bodily injury. For example, the *Criminal Code Act 1995 (Cth)* provides for an offence of threatening to cause harm to a Commonwealth official. Section 147.2 of the Schedule – The Criminal Code – of the *Criminal Code Act 1995 (Cth)* provides that where a person makes a threat to cause harm to a person, the prosecution must prove that the offender intended the other person to fear that a threat will be carried out or that the offender was reckless as to causing the other person to fear that the threat will be carried out. It is therefore irrelevant as to whether the offender could have carried out the threat if the intention of the offender was for another person to fear that the threat would be carried out. This is consistent with the general approach of the criminal law that an offence is more serious where the intention is to cause or threaten to cause harm to another person.

In my opinion, the increased penalty under section 197B is consistent with penalties for comparable offence provisions and is proportionate having regard to the conduct involved.

Response in relation to why the existing powers are inadequate to respond to criminal acts of those lawfully detained under the Act and whether the new powers are necessary

Currently, the commission of a criminal offence by a person in immigration detention, which does not receive a sentence of at least 12 months imprisonment, may result in that person not passing the character test. This is only if the decision-maker concludes that that person is not of good character on the basis of past and present criminal conduct and/or past and present general conduct within the meaning of paragraph 501(6)(c) of the Act, taking into account the factors set out in the Ministerial Directions made under section 499 of the Act.

The courts have held that the consideration of past and present criminal conduct and/or past and present general conduct provide indicia as to the presence or absence of good character, but do not themselves answer the question. It is necessary to look at the totality of the circumstances and to the character of the person over the continuum of a period of time.

Given the relevant case law on the past and present criminal and/or past and present general conduct ground, there is a real risk of a court finding that a person who was convicted of an offence committed while in immigration detention, but who otherwise had no criminal record, still passed the character test (assuming of course that the conviction did not result in a sentence of imprisonment of 12 months or more which would trigger the 'substantial criminal record' ground). This could be on the basis that the offence was a 'one off' act in relation to which there were 'mitigating' circumstances and that it was not indicative of a lack of 'enduring moral qualities', that is, that the person was not of good character.

The amendments in the Bill will ensure that a person, who commits a criminal offence while in immigration detention and is convicted by a court for the offence concerned, will automatically not pass the character test. Under the existing provisions, however, a decision-maker will retain the discretion whether to refuse to grant or to cancel a visa despite the person failing the character test. In other words, a determination that a person does not pass the character test on this new ground would enliven the discretion to refuse or cancel but would not dictate the outcome of the exercise of the discretion.

Once that discretion is available, a decision-maker needs to consider the relevant matters relating to the particular circumstances of the case in accordance with Ministerial Direction No. 41.

Response in relation to whether it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences

I have assumed for the purposes of this question that the mechanism the Committee is envisioning is a prescription of offences in the *Migration Regulations 1994* (the Regulations) rather than attempting to define this in the Act.

Prescribing offences in the Regulations presents a number of difficulties. Significantly, prescribing offences risks omitting serious offences and/or may not be all encompassing of the types of offences for which a person may be convicted while they are in immigration detention. For example, if offences relating to potential riots in detention were 'prescribed' such as criminal damage and arson, then conviction of serious offences involving personal violence against another detainee that were not prescribed, which do not attract a sentence upon conviction of more than 12 months imprisonment, would not result in failure of the character test. This would lead to inconsistent and arguably unfair results for persons in immigration detention.

Given that people in immigration detention can be subject to both Commonwealth and State/Territory offence provisions, ensuring that all relevant offences were covered in a prescribed list would be problematic. It is for these reasons that the current amendments are broad in scope so as to encompass conviction of any offence committed in immigration detention, during an escape from immigration detention, or during a period where a person has escaped from immigration detention.

Further, at any time a Commonwealth or State/Territory offence provision was repealed, amended or even renumbered, the Regulations would need to be updated to reflect the relevant change. Therefore, prescribing specific offences in the Regulations risks the list of prescribed offences losing currency and diluting the effectiveness of the proposed amendment.

Alternatively, if the Regulations were to prescribe classes of offences, rather than specify particular offences, this carries the risk that some offences may not be captured by the description of the classes of offences. Further, such an approach is likely to lead to increased litigation by persons challenging that the offence for which they were convicted does not fall within one of the prescribed classes.

It is my view that it would be difficult to identify each and every offence that should be prescribed in the Regulations. The clearest and most effective way to deal with offences in immigration detention is to have a clear and objective law that any person who is convicted of committing an offence in immigration detention automatically fails the character test. It would then remain a matter for me or a delegate to consider factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501 of the Act to refuse or cancel a visa. As advised above, a determination that the person does not pass the character test under the new ground would enliven the discretion whether to refuse or cancel a visa but would not dictate the outcome of the exercise of the discretion.

I am also of the view that it would not be appropriate to specify a term of imprisonment for the offences. As noted above, a range of both State/Territory and Commonwealth offences can be applied to criminal behaviour committed by persons in immigration detention. The particular length of sentence that can be imposed for offences varies between States/Territories and the Commonwealth.

The variations in sentences can be explained, to some extent, by the prevalence of particular offending in particular jurisdictions and attempts by the court to impose higher penalties in these circumstances as a deterrent against committing those offences. Therefore, an offence of arson, for example, may carry a maximum sentence of between 15 years and life imprisonment depending on the jurisdiction.

The variations in sentences across jurisdictions would lead to inconsistency in the application of the proposed amendments, if there were a minimum term of imprisonment for the offences.

I reiterate that this proposed amendment applies only to persons who have been convicted of an offence by a court. In other words, it applies to people who commit offences while in immigration detention that are of a calibre that attract a conviction by a court. The amendments would not apply to a person who is charged before a court with an offence or offences, and the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but that no conviction should be recorded on that charge, or any of those charges. Therefore, there must be at least one conviction for the amendments to apply.

Response in relation to whether the retrospective commencement may unduly trespass on personal rights and liberties

In providing that the amendments made to the character provisions apply whether the conviction or offence occurred before, on or after their commencement, the Bill is merely recognising that consideration of a person's character at a particular point in time will necessarily include consideration of what they have done in the past. In other words, a decision-maker will be able to apply the new ground in response to a conviction or offence that occurred in the past.

This is the case with the existing ground of the character test under which a person does not pass the character test if the person has a substantial criminal record. That ground was included in the amendments to section 501 of the Act made by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the 1998 Act) which commenced on 1 June 1999.

The 1998 Act specifically provided that the amendments to section 501, to the extent that they related to applications for visas, applied to applications that were made before, on or after their commencement. Further, to the extent that the amendments related to visas granted to a person, they applied to visas granted before, on or after their commencement. The effect of those provisions was that the amendments made to the character test, providing that a person does not pass the character test if they have a substantial criminal record, necessarily applied whether the criminal record related to a conviction or offence occurring before, on or after the commencement of the amendments.

I clearly articulated in a public announcement on 26 April 2011 that the legislative changes would take effect on that date, subject to passage of the legislation. Therefore all persons in immigration detention were put on notice as of that date of their liability to be considered under the proposed new arrangements. It is essential that anyone convicted of an offence in relation to the recent events at Australian immigration detention centres be covered by these new provisions and that the amended character test applies to them.

It remains the case that the Parliament, not the Executive, makes the law. The proposed amendments have no effect unless the Bill is passed by the Parliament in its current form.

Conclusion

It is the view of the Government that the proposed amendments are justified and do not unduly trespass on personal rights and liberties.

Thank you for bringing this matter to my attention.

Yours sincerely

CHRIS BOWEN

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

Helen
Dear Senator Coonan

I refer to the issues identified in the Scrutiny of Bills Committee's *Alert Digest No. 5 of 2011* in relation to Tax Laws Amendment (2011 Measures No. 3) Bill 2011 and Tax Laws Amendment (2011 Measures No. 5) Bill 2011.

The Committee requests advice as to whether there is any potential detriment to any person arising from the retrospective application of measures contained in these Bills.

Tax Laws Amendment (2011 Measures No. 3) Bill 2010 — Schedule 2

The general interest charge (GIC) is payable by a taxpayer who has failed to pay an amount of tax on time.

The *Tax Laws Amendments (Transfer of Provisions) Act 2010* (the Transfer of Provisions Act) rewrote and transferred the GIC imposition provisions from the *Income Tax Assessment Act 1936* (ITAA 1936) to the *Income Tax Assessment Act 1997* (ITAA 1997). The explanatory memorandum to the Bill noted at page 6 that:

> *The rewrites in this Bill involve no significant policy changes... In general, the rewrites aim to reproduce the ITAA 1936 material, in language as little changed as possible, and in the same order as the original material.*

However, there was a technical deficiency in the transitional arrangements contained in the *Transfer of Provisions Act 2010*, and the Commissioner of Taxation would be unable to collect GIC on some outstanding income tax or shortfall interest charge liabilities in the absence of the remedial amendments contained in *Tax Laws Amendment (2011 Measures No. 3) Act 2011*. This was not an intended consequence of the rewrite, as stated at page 26 of the explanatory memorandum: 'the rewrite will have no effect on outstanding liabilities and accruing interest.'

These remedial amendments take effect from the time the original rewrite took effect. If they did not, some taxpayers who had not complied with their obligation to pay income tax or shortfall interest charge by the due date would not have been subject to GIC, when other taxpayers in comparable circumstances would have been subject to GIC.

I am advised that no taxpayers have sought to rely on the technical deficiency which these remedial amendments address.

Tax Laws Amendment (2011 Measures No. 5) Bill 2011 — Schedule 2

Taxpayers and industry called for clarification of the trust tax laws following the High Court decision in *Commissioner of Taxation v Bamford* (Bamford). The amendments contained in Schedule 2, which were recommended by the Board of Taxation, provide certainty for trustees and beneficiaries about the effectiveness of the streaming of capital gains and franked distributions.

Without these changes, it is arguable as to whether the practice of streaming could continue to be effective for tax purposes and users of trusts would continue to face uncertainty about the trust tax laws following the Bamford decision.

The amendments apply for the 2010-11 income year, the first full income year following the Bamford decision, and later income years.

Trustees and beneficiaries that do not stream capital gains or franked distributions will largely be unaffected by these amendments.

I hope this information will assist the Committee.

Yours sincerely

BILL SHORTEN