SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2013

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon I Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

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

FOURTH REPORT OF 2013

The committee presents its *Fourth Report of 2013* 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:

Australian Education Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Education, Employment and Workplace Relations

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the committee's comments in a letter dated 19 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill sets out a legislative framework for the development of the National Plan for School Improvement. The bill commits the Commonwealth to work collaboratively with states, territories, the non-government sector and other partners to meet these goals through developing and implementing a national plan for school improvement and needs-based funding arrangements.

Delayed Commencement

This bill does not commence until 1 January 2014. 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. While it is possible that affected parties may need time to prepare for the commencement of the bill, no justification for the delay is provided in the explanatory memorandum. **The committee therefore seeks the Minister's advice about the justification for the delayed commencement.**

> *Pending the Minister's reply, 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*

Minister's response - extract

The Explanatory Memorandum for the Bill states the Australian Government's intention to introduce subsequent amendments following the conclusion of negotiations with states, territories and the non-government school sector. This two stage approach allows the Commonwealth to set the broad framework, while continuing to negotiate the detail of the final funding model and the associated education reform requirements. Amendments will be moved through 2013 with the intention that new funding arrangements are established as of 1 January 2014.

Current arrangements for recurrent funding for the non-government school sector, under the *Schools Assistance Act 2008*, expire at the end of 2013; The Bill is intended to commence on 1 January 2014 to allow for the operation of the new needs-based funding model.

The Bill has been introduced, and it is intended that it will be passed with the appropriate amendments as agreement is reached through negotiations. It is intended this will be six months in advance of commencement, to ensure that all schools, systems and states and territories are clearly aware of the operation of this new funding model and the associated administration. As mentioned in the Explanatory Memorandum to the Bill, these amendments will occur after the current negotiations on the particulars of the funding model and an agreed ambition to improve our schools are finalised. It is the Government's expectation that final agreement on these matters will be reached at the Council of Australian Governments meeting in April 2013.

The Bill provides for a commencement date of 1 January 2014 to allow time for amendments to be made to the Bill and because that is the date the new funding arrangements are intended to commence, with the current funding arrangements remaining in place until then.

In this way the Government will deliver certainty and transparency regarding the proposed future arrangements.

Your comments in respect of Clause 10 are noted.

I thank the Committee for the opportunity to respond.

Committee Response

The committee thanks the Minister for this response and **requests that the key information outlined above be included in the explanatory memorandum.**

Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012

Introduced into the Senate on 27 November 2012
By: Senator Abetz

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2013*. The Senator responded to the committee's comments in a letter dated 12 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill amends the *Fair Work (Registered Organisations) Act 2009* to increase penalties for officers of registered organisations who misuse members' funds.

Trespass on personal rights and liberties—penalties
Item 3, Schedule 1

This item will insert a new section 288A into the *Fair Work (Registered Organisations) Act*. The provision introduces new offences in relation to officers of registered organisations who do not act in good faith or misuse their position. The offences attract penalties of 5 years imprisonment or 2000 penalty units or both.

The explanatory memorandum argues that these penalties are (1) similar to an 'existing provision in the Corporations Act' (it would have been useful for the explanatory memorandum to identify the provision in the Corporations Act that is said to be similar), and (2) required to serve as an appropriate deterrent for officers who, in some cases handle millions of dollars of members' money. The committee notes that offences related to corruption and abuse of public office in the *Criminal Code* (sections 142.1 and 142.2) attract a penalty of 5 years penalty units and these offences may in some respects be considered similar to those introduced by this item.

Although further the explanation of the severity of the penalties would be welcome, in light of the information that has been provided the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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.

Senator's response - extract

The proposed amendments are closely modelled on those appearing at section 184(1)-(4) of the *Corporations Act* 2001. The proposed penalties are also in line with those set out in Schedule 3 of the *Corporations Act* 2001 for those analogous offences.

I note that the Committee also raised concerns in relation to some human rights and liberties that could be trespassed by this Bill, in particular some International Labour Organisation conventions.

The intent of this Bill is only to enhance existing penalties that have been proven inadequate due to a high number of offences under this Act in recent times and to create additional requirements under the *Fair Work (Registered Organisations) Act 2009* similar to those under the *Corporations Act 2009* requiring officers or registered organisations to act in good faith.

The provisions of this Bill do not seek to impose additional regulation or red tape on registered organisations but do make it clear that if officers of registered organisations do the wrong thing, there will be very severe penalties, something that appears to be supported in the ACTU's submission to the Senate Committee:

> *'... we recognise that the conduct that would amount to breaches of the proposed duties are sufficiently serious to attract criminal sanctions ...'*

I trust this correspondence is of some assistance to the Committee and I would be happy to provide further submissions should the Committee have further concerns.

Committee Response

The committee thanks the Senator for his response and for the information provided in relation to the level of penalties. The committee notes that this information would have been useful in the explanatory memorandum. (The committee has referred the information that was provided in relation to the International Labour Organisation conventions to the Parliamentary Joint Committee on Human Rights, which raised these matters in its *First Report of 2013*.)

National Disability Insurance Scheme Bill 2012

Introduced into the House of Representatives on 29 November 2012
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2013*. The Minister responded to the committee's comments in a letter dated 18 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill establishes the framework for the National Disability Insurance Scheme and the National Disability Insurance Scheme Launch Transition Agency. This will enable the scheme to be launched, and the Agency to operate the launch, in five sites across Australia from July 2013.

Reversal of burden of proof—evidential burden
Subclauses 57(2); 84(7) and 189(2)

As a general principle the *Guide to Framing Commonwealth Offences* cautions against the use of 'reasonable excuse' defences, in part because it is unclear what needs to be established as the language used is 'too open-ended'. In this bill 'reasonable excuse' defences are included in three clauses with no explanation provided in the explanatory memorandum:

- Subclause 57(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under section 55 to give information or produce a document. The defence is where the person 'has a reasonable excuse'. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 25).

- Clause 84 provides for the CEO to require information from a plan nominee in relation to the disposal of money. A person will commit an offence if they refuse to comply with a notice requiring this information (subclause 84(6)) unless the person 'has a reasonable excuse' (subclause 84(7)). Again, as an offence-specific

defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 35).

- Subclause 189(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under subclause 189(1) to give information or produce a document as required under Division 3. The defence is where the person 'has a reasonable excuse'. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 70).

Although it may be considered that the existence of a reasonable excuse will normally relate to matters peculiarly within the knowledge of the defendant, the Committee expects that the explanatory memorandum specifically addresses the appropriateness of imposing an evidential burden on defendants—especially where the defence relates to a reasonable excuse exception. **The committee therefore seeks the Minister's advice as to the justification for the proposed inclusion of 'reasonable excuse' defences in relation to these clauses, with reference to the principles outlined in the *Guide to Framing Commonwealth 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

Reversal of burden of proof- evidential burden
Subclauses 57(2); 84(7) and 189(2)

What is the justification for the proposed inclusion of 'reasonable excuse' defences in relation to these clauses, with references to the principles outlined in the *Guide to Framing Commonwealth Offences*.

As noted by the Committee, certain offences contained are subject to defences of ' reasonable excuse' as set out in subclauses 57 (2); 84(7) and 189(2) of the Bill. The inclusion of 'reasonable excuse' defences means that a defendant who denies criminal responsibility may adduce or point to evidence that he or she had a reasonable excuse for refusing or failing to comply with a notice or a requirement under clauses 55, 84 or Division 3 of Part 2 of Chapter 7 (see subsection 13.3(3) of the *Criminal Code Act 1995*

(Cth) (Criminal Code)). The Committee seeks an explanation for the inclusion of these defences with reference to the principles outlined in the *Guide to Framing Commonwealth Offences.*

In the context of the NDIS Bill, it is not possible to anticipate the full range of circumstances in which a person - particularly an individual - might refuse or fail to comply with the requirements referred to above. Accordingly, it was considered that the usual Criminal Code defences would not be adequate to respond to all such circumstances. Moreover, it was considered that it would be impracticable to develop offence specific defences. As the existence of a reasonable excuse would be peculiarly within the knowledge of the person, it was considered appropriate to include some flexibility as to the range of excuses in respect of which a defendant could point to or adduce evidence.

In addition to the above, and in light of the Committee's comments and issues raised by the Joint Parliamentary Committee on Human Rights, I am pleased to advise the Committee that 1 have moved, and the House of Representatives has passed, amendments to the relevant clauses to expressly provide that the right to avoid self-incrimination is available in respect of these offences. The Bill as amended is currently before the Senate, and includes some additional explanatory material. Other examples of a 'reasonable excuse' would include an emergency or unavoidable delay.

Committee Response

The committee thanks the Minister for this response and notes that the key information above has been included in the explanatory memorandum. The committee also thanks the Minister for her action to explain in the legislation that the provision does not abrogate the privilege against self-incrimination.

Alert Digest No. 1 of 2013 - extract

Delegation of Legislative Power
Insufficiently defined administrative power
Paragraph 118(2)(a)

This clause provides that in performing its functions the Agency must use its best endeavours to ‘act in accordance with any relevant intergovernmental agreements’. Two scrutiny issues arise in relation to this paragraph. First, will this requirement have the effect of modifying any other obligation placed on the Agency? If so, it appears that this may be achieved by reference to documents (intergovernmental agreements) which are not subject to parliamentary scrutiny. **The committee seeks the Minister’s advice as to the expected**

impact of paragraph 118(2)(a). In particular, the committee seeks advice as to whether consideration has been given to requiring that any modifications to any Agency obligations arising from the operation of this paragraph be reflected in delegated legislation (and therefore subject to Parliamentary scrutiny, even if section 42 (disallowance) of the *Legislative Instruments Act* does not apply). If not, the committee seeks advice as to whether alternative mechanisms for ensuring parliamentary oversight of the impact of paragraph 118(2)(a) could be included in the bill.

The second issue arising is uncertainty over what is intended by requiring the agency to 'use its best endeavours' to 'act in accordance' with relevant intergovernmental agreements. **As the explanatory memorandum does not indicate what level of compliance with such agreements is required or what legal consequences may follow from a failure of the Agency to use its best endeavours to achieve compliance, the Committee seeks the Minister's advice as to the intended operation of the obligation imposed by this paragraph.**

> *Pending the Minister's reply, 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 and they may also 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

Delegation of Legislative Power
Paragraph 118(2)(a)

> **Has consideration been given to codifying in legislative instruments any modification to any Agency obligations arising from this provision (therefore subject to parliamentary scrutiny)? Or are there alternative mechanisms for ensuring parliamentary oversight?**

The intergovernmental agreements referred to in paragraph 118(2)(a) form the foundation for governments to work together to develop and implement the first stage of an NDIS and the framework for progressing to a full scheme. These documents are publicly available at www.coag.gov.au/node/485. The agreements are not intended to be legally binding (see paragraph 134 of the Intergovernmental Agreement for the NDIS Launch) or to modify any statutory obligation of the Agency. Therefore it is not intended that these documents be codified in legislative instruments.

What is the intended operation of the paragraph? Noting that there is no indication what level of compliance is required or legal consequences follow from a failure to use best endeavours.

As noted above, the NDIS intergovernmental agreements are not intended to be legally binding. The Act refers to the intergovernmental agreement to provide useful contextual information to the Agency about the intention of all governments. It is intended that the Agency would take account of the intergovernmental agreements in performing its statutory functions, but never so as to override these functions or to impose additional obligations on the Agency. Therefore, there are no legal consequences for the Agency if it fails to use its best endeavours.

Committee Response

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 1 of 2013 - extract

Delegation of legislative power – inappropriate delegation
Clause 209

If enacted, the Bill will be supplemented by the NDIS rules, to be made as disallowable legislative instruments. A number of the envisaged rules relate to 'significant policy matters' (explanatory memorandum, p.75). As a general proposition, the Committee is concerned to ensure that significant questions of policy be dealt with in primary legislation. The explanatory memorandum does not explain why 'significant policy matters' cannot appropriately be dealt with in primary legislation.

The committee is aware that the NDIS involves a cooperative venture between the Commonwealth and State and territory governments. Nevertheless, the committee is not persuaded that this, in and of itself, is sufficient to justify the use of delegated legislation for significant policy matters. Where the use of legislative instruments to achieve important policy outcomes is proposed, the committee expects that the provisions to this effect will be accompanied by a detailed explanation to assist consideration of the appropriateness of the approach. **The committee therefore seeks the Minister's advice as to the justification for the proposed use of delegated legislation for significant policy matters.**

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

Delegation of legislative power
Clause 209

The Committee seeks advice as to the justification for the proposed use of delegated legislation for significant policy matters.

The Bill sets out the framework for the NDIS, and the NDIS rules provide the detail necessary for administering the scheme. It is appropriate for the detail to be outlined in the NDIS rules given that the scheme will be rolled out over time and some flexibility will be needed to allow adjustments for the lessons learnt from the early launch sites.

Separating the rules from the NDIS Bill provides appropriate flexibility. The rules would be used to guide the experience each person has when they interact with the NDIS, as well as the effective management of the scheme, both now and into the future.

As the objectives and principles of the NDIS are unlikely to change significantly, it is appropriate that they be that codified in legislation. However, as the NDIS Launch Transition Agency gains experience in administering the NDIS, it is likely that aspects of the way in which the NDIS is implemented will need refining over time. It is appropriate that these aspects of the scheme be covered by rules that can be adapted and modified in a timely manner.

Committee Response

The committee thanks the Minister for this response and notes that the legislative instruments will be disallowable. **The committee leaves the question of whether the proposed approach is appropriate to the Senate as whole.**

Alert Digest No. 1 of 2013 - extract

Delegation of legislative power – incorporating material by reference
Insufficient parliamentary scrutiny
Clause 209

In addition to the clause 209 concern outlined above, subclause 209(2) provides that the rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in another instrument as in force or existing from time to time.

The committee draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. **As there is no explanation or justification of this subclause the committee seeks the Minister's advice as to:**

- **why it is necessary to rely on material incorporated by reference to other instruments as in force from time-to-time; and**
- **if the approach is considered necessary, has consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how relevant changes will be notified to affected persons.**

> *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 and to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Minister's response - extract

Delegation of legislative power - incorporating material by reference
Clause 209

The Committee seeks advice as to:

- **why it is necessary to rely on material incorporated by reference to the instruments as in force from time-to-time; and**
- **If the approach is considered necessary, has consideration been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **How relevant changes will be notified to affected persons.**

The material incorporated by reference forms part of the rule itself and therefore is subject to all of the same processes that the rule is by way of parliamentary scrutiny. The reference material will be available either direct or via links on the Agency website. If there are changes to the reference material from time-to-time, the changes will be publicised on the Agency's website and in any regular news publication that the Agency may have. Where the changes directly affect individuals, these individuals will be notified by letter or equivalent.

Disallowable instruments have been chosen as the approach for developing the NDIS rules because of the flexibility that they provide to make amendments as experience with the launch and scheme develops. Many areas of social support have been legislated in this way, including the Carer Allowance and the extension of Carer Payment to carers of children, income management for income support recipients, and the impairment tables for the Disability Support Pension.

Experience has shown that the ability to amend these provisions quickly through drafting a new instrument where required has provided a robust way of ensuring flexibility and agility as new evidence becomes available or unintended consequences arise during implementation. Appropriately, the approach of using disallowable instruments would ensure that the instruments are subject to parliamentary oversight.

Committee Response

The committee thanks the Minister for this response and notes the information provided, particularly the advice that any changes to reference material will be widely publicised and that any individuals affected will be notified directly by letter. **The committee requests that a general requirement to this effect be included in the bill.**

The committee also notes that while parliamentary oversight of the content of a rule that incorporates material by reference will occur *at the time the rule is made*, the use of this mechanism means that no parliamentary oversight occurs when there are subsequent changes to the material that has been incorporated by reference – that is the nature of the scrutiny problem that arises with this approach. **The committee leaves the general question of whether the proposed approach is appropriate to the Senate as whole.**

Alert Digest No. 1 of 2013 - extract

Undue Trespass on personal rights and liberties—privacy
Various

The collection, use, storage and sharing of personal information pursuant to relevant provisions in the bill will engage the right to privacy (see chapter 4 of the bill). The Statement of Compatibility emphasises that the bill, if enacted, will create significant offences for unauthorised access or use, for soliciting disclosure and for offering to supply protected information. These provisions are said to apply standard penalties by Commonwealth legislation for breaches of privacy in relation to protected personal information (SOC, p.16).

It is also argued that the CEO's powers to compel the production of information from participants and other persons are designed to ensure the integrity of the NDIS and are thus 'necessary to achieve a legitimate aim, and are appropriately limited so as to ensure they are a proportionate means by which to achieve this aim' (SOC, p.16).

However, given the nature of the sensitive medical and personal information that is in issue, the committee seeks the Minister's advice as to whether consideration has been given to provisions clarifying the interaction of the legislation with the *Privacy Act,* and role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the *Privacy Act.* In this respect it is noted that such provisions exist in other Commonwealth legislation which deal with sensitive health information (see for example, sections 28 and 29 of the *Healthcare Identifiers Act 2010*).

> *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

Personal rights and liberties - privacy
Various

> **Given the nature of the sensitive medical and personal information that is in issue, the committee seeks my advice as to whether consideration has been given to the provisions clarifying the interaction of the legislation with the Privacy Act, and**

role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the Privacy Act. In this respect it is noted that such provisions exist in other Commonwealth legislation which deal with sensitive health information.

Careful consideration has been given to ensuring that any sensitive medical and personal information held by the Agency is given due and proper protection.

The approach taken to the NDIS Bill is comparable to that taken in legislation such as social security law and family assistance legislation, both of which require the collection of sensitive personal information. Much of the information held by the Agency would be similar in nature to that held by Departments responsible for administering the social security and family assistance laws. The NDIS Bill contains offence provisions (in Part 2 of Chapter 4) governing the disclosure of information that are consistent with similar offences in the *Social Security (Administration) Act 1999* (Cth) ('SSAA')(see section 202).

In the case of the NDIS Bill (if and when enacted), as for comparable legislation, the *Privacy Act 1988* (Cth) will operate concurrently with the relevant law, and a person would be subject to, and must observe, both laws. For example, any disclosure of sensitive medical and personal information authorised under the NDIS Bill, if and when enacted, would be authorised for the purpose of the Privacy Act (as it currently is for the SSAA). This authorisation occurs on the basis that it is 'a disclosure ... authorised by or under law' under paragraph 1(d) of Information Privacy Principle 11 (in section 14 of the Privacy Act).

Other methods of dealing with personal information were considered in the development of the NDIS Bill. The legislation identified by the Committee is not strictly comparable to the NDIS Bill. I understand that legislative clarification is generally included in a Bill where the proposed measures would expand the scope of the Privacy Act by means different to its normal operation. In such cases, a contravention of the new Act is essentially taken to be a contravention of the Privacy Act. This ensures that new privacy issues receive appropriate treatment. Such legislative clarification is not required in the context of the NDIS Bill.

On the basis of the information set out above, the approach taken was considered to be the most appropriate because it was unnecessary to add additional provisions to the NDIS Bill to further clarify the interaction of the Bill with the Privacy Act or the role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the Privacy Act.

Committee Response

The committee thanks the Minister for this comprehensive response and notes the justification provided for the proposed approach. **The committee leaves the question of whether the proposed approach is appropriate to the Senate as whole.**

Native Title Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No.1 of 2013*. The Attorney-General responded to the committee's comments in a letter dated 7 March 2013. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2013 - extract

Background

This bill amends the *Native Title Act 1993* to:

- clarify the meaning of good faith and make associated amendments to the right to negotiate provisions;
- enable parties to agree to disregard historical extinguishment of native title in areas set aside, or where an interest is vested for the purpose of preserving the natural environment such as parks and reserves; and
- amend processes for Indigenous Land Use Agreements.

Trespass on personal rights and liberties—retrospective application Schedule 2, item 11

This item provides that the amendments made by Schedule 2 of the bill commence on or after 1 January 2013 and are still on foot on the day this Act receives the Royal Assent. This means that the good faith negotiation requirements may apply to negotiations that commence prior to the commencement of the bill.

The Committee believes that the requirement that persons arrange their affairs in accordance with potential law, rather than in accordance with the law once it has been made, tends to undermine the principle that the law is made by Parliament, not by the Executive. The committee also has a long-standing concern about provisions which could have a retrospective and possibly detrimental effect on a person and usually requests an explanation of the justification for any such provisions. The explanatory memorandum merely repeats the effect of the provision with no explanation as to its justification. **In the circumstances the committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.**

Pending the Attorney-General'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

The Committee has raised concerns in *Alert Digest No.1 of 2013* about Item 11, Schedule 2 of the Bill which provides that the amendments made by Schedule 2 apply to negotiations that commence on or after 1 January 2013 and are still on foot on the day the Act receives the Royal Assent. This means that the good faith negotiation requirements may apply to negotiations that commence prior to the commencement of the Bill.

The Committee is concerned that this provision has retrospective application and may trespass on personal rights and liberties. I understand that the Committee is seeking my advice as to the justification for this approach.

The good faith amendments aim to encourage parties to focus on negotiated rather than arbitrated outcomes, improve the quality of negotiations and agreement-making and improve the balance of power between negotiating parties.

The transitional approach for the application of the good faith amendments was developed in response to stakeholder concerns that a pre-announced commencement date or an uncertain Royal Assent date could create a risk that some parties may deliberately begin negotiations before that date in order to circumvent the application of the new provisions to their negotiation processes. The proposed approach also provides clarity for parties engaged in negotiations when the Act commences about what requirements they are expected to comply with.

Providing that the amendments will apply to negotiations from 1 January 2013 will help to ensure that the amendments will have the intended effect of improving the conduct and behaviour of negotiation parties.

As you may be aware, the Bill was referred to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Senate Legal and Constitutional Affairs Legislation Committee for consideration. I note that stakeholders did not raise any concerns about this provision during the public consultation process for both Committees.

I trust that this advice addresses the Committee's query regarding justification for the proposed approach to the application of the good faith amendments. I understand that this response will be published in the next available *Report* of the Committee.

Committee Response

The committee thanks the Minister for this response **and requests that the key information outlined above be included in the explanatory memorandum.**

Senator the Hon Ian Macdonald
Chair

The Hon Peter Garrett AM MP

Minister for School Education, Early Childhood and Youth

BR13-000998

19 MAR 2013

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

Dear Senator

I refer to the Committee's Alert Digest No. 1 of 2013, and in particular comments on the Australian Education Bill 2012 (the Bill) and the request for advice on the justification for the delayed commencement of the Bill.

The Explanatory Memorandum for the Bill states the Australian Government's intention to introduce subsequent amendments following the conclusion of negotiations with states, territories and the non-government school sector. This two-stage approach allows the Commonwealth to set the broad framework, while continuing to negotiate the detail of the final funding model and the associated education reform requirements. Amendments will be moved through 2013 with the intention that new funding arrangements are established as of 1 January 2014.

Current arrangements for recurrent funding for the non-government school sector, under the *Schools Assistance Act 2008*, expire at the end of 2013. The Bill is intended to commence on 1 January 2014 to allow for the operation of the new needs-based funding model.

The Bill has been introduced, and it is intended that it will be passed with the appropriate amendments as agreement is reached through negotiations. It is intended this will be six months in advance of commencement, to ensure that all schools, systems and states and territories are clearly aware of the operation of this new funding model and the associated administration. As mentioned in the Explanatory Memorandum to the Bill, these amendments will occur after the current negotiations on the particulars of the funding model and an agreed ambition to improve our schools are finalised. It is the Government's expectation that final agreement on these matters will be reached at the Council of Australian Governments meeting in April 2013.

Parliament House, Canberra ACT 2600 Telephone: (02) 6277 7350 Fax: (02) 6273 4134

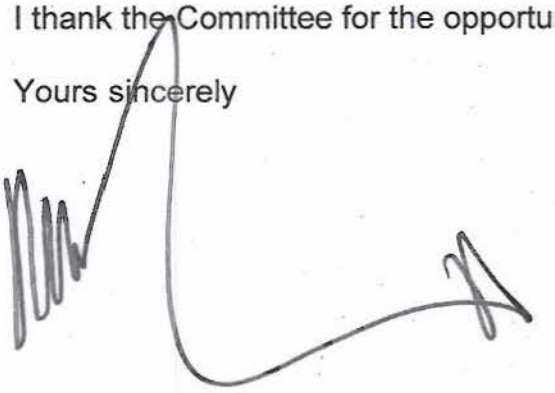
The Bill provides for a commencement date of 1 January 2014 to allow time for amendments to be made to the Bill and because that is the date the new funding arrangements are intended to commence, with the current funding arrangements remaining in place until then.

In this way the Government will deliver certainty and transparency regarding the proposed future arrangements.

Your comments in respect of Clause 10 are noted.

I thank the Committee for the opportunity to respond.

Yours sincerely



Peter Garrett

PARLIAMENT OF AUSTRALIA - **THE SENATE**

Senator the Hon
Eric Abetz
Leader of the Opposition in the Senate
Shadow Minister for Employment and Workplace Relations
Liberal Senator for Tasmania

Senator the Hon. Ian Macdonald
Chair,
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald Ian,

In the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 1 of 2013, the Committee made some observations about the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012.

The proposed amendments are closely modelled on those appearing at section 184(1)-(4) of the *Corporations Act* 2001. The proposed penalties are also in line with those set out in Schedule 3 of the *Corporations Act* 2001 for those analogous offences.

I note that the Committee also raised concerns in relation to some human rights and liberties that could be trespassed by this Bill, in particular some International Labour Organisation conventions.

The intent of this Bill is only to enhance existing penalties that have been proven inadequate due to a high number of offences under this Act in recent times and to create additional requirements under the *Fair Work (Registered Organisations) Act 2009* similar to those under the *Corporations Act 2009* requiring officers or registered organisations to act in good faith.

The provisions of this Bill do not seek to impose additional regulation or red tape on registered organisations but do make it clear that if officers of registered organisations do the wrong thing, there will be very severe penalties, something that appears to be supported in the ACTU's submission to the Senate Committee:

> *"...we recognise that the conduct that would amount to breaches of the proposed duties are sufficiently serious to attract criminal sanctions..."*[1]

[1] Page 4, ACTU submission

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I trust this correspondence is of some assistance to the Committee and I would be happy to provide further submissions should the Committee have further concerns.

Yours sincerely

Eric Abetz
Leader of the Opposition in the Senate
Shadow Minister for Employment and Workplace Relations
Liberal Senator for Tasmania

12 MAR 2013

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

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
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18 MAR 2013

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

Dear Senator Macdonald

Thank you for your correspondence of 6 February 2013 in which the Committee seeks clarification with regard to aspects of the National Disability Insurance Scheme Bill 2012.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find attached detailed responses to the specific issues the Committee has raised.

Yours sincerely

Jenny Macklin

JENNY MACKLIN MP

ATTACHMENT

DETAILED RESPONSES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE.

Delegation of legislative power – disallowance
Clause 10

I note that the Committee has no further comment on this clause, which provides the Minister with a power to specify, by legislative instrument, that a state or territory is a host jurisdiction, with the agreement of that state or territory.

Reversal of burden of proof – evidential burden
Subclauses 57(2); 84(7) and 189(2)

> **What is the justification for the proposed inclusion of 'reasonable excuse' defences in relation to these clauses, with references to the principles outlined in the *Guide to Framing Commonwealth Offences.***

As noted by the Committee, certain offences contained are subject to defences of 'reasonable excuse' as set out in subclauses 57(2); 84(7) and 189(2) of the Bill. The inclusion of 'reasonable excuse' defences means that a defendant who denies criminal responsibility may adduce or point to evidence that he or she had a reasonable excuse for refusing or failing to comply with a notice or a requirement under clauses 55, 84 or Division 3 of Part 2 of Chapter 7 (see subsection 13.3(3) of the *Criminal Code Act 1995* (Cth) (Criminal Code)). The Committee seeks an explanation for the inclusion of these defences with reference to the principles outlined in the *Guide to Framing Commonwealth Offences*.

In the context of the NDIS Bill, it is not possible to anticipate the full range of circumstances in which a person – particularly an individual – might refuse or fail to comply with the requirements referred to above. Accordingly, it was considered that the usual Criminal Code defences would not be adequate to respond to all such circumstances. Moreover, it was considered that it would be impracticable to develop offence specific defences. As the existence of a reasonable excuse would be peculiarly within the knowledge of the person, it was considered appropriate to include some flexibility as to the range of excuses in respect of which a defendant could point to or adduce evidence.

In addition to the above, and in light of the Committee's comments and issues raised by the Joint Parliamentary Committee on Human Rights, I am pleased to advise the Committee that I have moved, and the House of Representatives has passed, amendments to the relevant clauses to expressly provide that the right to avoid self-incrimination is available in respect of these offences. The Bill as amended is currently before the Senate, and includes some additional explanatory material. Other examples of a 'reasonable excuse' would include an emergency or unavoidable delay.

Delegation of Legislative Power
Paragraph 118(2)(a)

> **Has consideration been given to codifying in legislative instruments any modification to any Agency obligations arising from this provision (therefore**

subject to parliamentary scrutiny)? Or are there alternative mechanisms for ensuring parliamentary oversight?

The intergovernmental agreements referred to in paragraph 118(2)(a) form the foundation for governments to work together to develop and implement the first stage of an NDIS and the framework for progressing to a full scheme. These documents are publicly available at www.coag.gov.au/node/485. The agreements are not intended to be legally binding (see paragraph 134 of the Intergovernmental Agreement for the NDIS Launch) or to modify any statutory obligation of the Agency. Therefore it is not intended that these documents be codified in legislative instruments.

The Agency would be created as an independent statutory agency with its functions clearly set out in sub-clause 118(1). Under subclause 118(2), any consideration by the Agency of the intergovernmental agreements would need to occur within those stated statutory functions. The Agency would be subject to reporting requirements under the *Commonwealth Authorities and Companies Act 1997*. Annual reports, for example, are to be given to the responsible Minister for presentation to the Parliament.

What is the intended operation of the paragraph? Noting that there is no indication what level of compliance is required or legal consequences follow from a failure to use best endeavours.

As noted above, the NDIS intergovernmental agreements are not intended to be legally binding. The Act refers to the intergovernmental agreement to provide useful contextual information to the Agency about the intention of all governments. It is intended that the Agency would take account of the intergovernmental agreements in performing its statutory functions, but never so as to override these functions or to impose additional obligations on the Agency. Therefore, there are no legal consequences for the Agency if it fails to use its best endeavours.

Delegation of legislative power
Clause 209

The Committee seeks advice as to the justification for the proposed use of delegated legislation for significant policy matters.

The Bill sets out the framework for the NDIS, and the NDIS rules provide the detail necessary for administering the scheme. It is appropriate for the detail to be outlined in the NDIS rules given that the scheme will be rolled out over time and some flexibility will be needed to allow adjustments for the lessons learnt from the early launch sites.

Separating the rules from the NDIS Bill provides appropriate flexibility. The rules would be used to guide the experience each person has when they interact with the NDIS, as well as the effective management of the scheme, both now and into the future.

As the objectives and principles of the NDIS are unlikely to change significantly, it is appropriate that they be that codified in legislation. However, as the NDIS Launch Transition Agency gains experience in administering the NDIS, it is likely that aspects of the way in which the NDIS is implemented will need refining over time. It is appropriate that these aspects of the scheme be covered by rules that can be adapted and modified in a timely manner.

Delegation of legislative power – incorporating material by reference
Clause 209

The Committee seeks advice as to:

- **why it is necessary to rely on material incorporated by reference to the instruments as in force from time-to-time; and**
- **If the approach is considered necessary, has consideration been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **How relevant changes will be notified to affected persons.**

The material incorporated by reference forms part of the rule itself and therefore is subject to all of the same processes that the rule is by way of parliamentary scrutiny. The reference material will be available either direct or via links on the Agency website. If there are changes to the reference material from time-to-time, the changes will be publicised on the Agency's website and in any regular news publication that the Agency may have. Where the changes directly affect individuals, these individuals will be notified by letter or equivalent.

Disallowable instruments have been chosen as the approach for developing the NDIS rules because of the flexibility that they provide to make amendments as experience with the launch and scheme develops. Many areas of social support have been legislated in this way, including the Carer Allowance and the extension of Carer Payment to carers of children, income management for income support recipients, and the impairment tables for the Disability Support Pension.

Experience has shown that the ability to amend these provisions quickly through drafting a new instrument where required has provided a robust way of ensuring flexibility and agility as new evidence becomes available or unintended consequences arise during implementation. Appropriately, the approach of using disallowable instruments would ensure that the instruments are subject to parliamentary oversight.

Personal rights and liberties – privacy
Various

Given the nature of the sensitive medical and personal information that is in issue, the committee seeks my advice as to whether consideration has been given to the provisions clarifying the interaction of the legislation with the Privacy Act, and role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the Privacy Act. In this respect it is noted that such provisions exist in other Commonwealth legislation which deal with sensitive health information.

Careful consideration has been given to ensuring that any sensitive medical and personal information held by the Agency is given due and proper protection.

The approach taken to the NDIS Bill is comparable to that taken in legislation such as social security law and family assistance legislation, both of which require the collection of sensitive personal information. Much of the information held by the Agency would be similar in nature to that held by Departments responsible for administering the social security and family assistance laws. The NDIS Bill contains offence provisions (in Part 2 of Chapter 4) governing the disclosure of information that are consistent with similar offences in the *Social Security (Administration) Act 1999* (Cth) ('SSAA')(see section 202).

In the case of the NDIS Bill (if and when enacted), as for comparable legislation, the *Privacy Act 1988* (Cth) will operate concurrently with the relevant law, and a person would be subject to, and must observe, both laws. For example, any disclosure of sensitive medical and personal information authorised under the NDIS Bill, if and when enacted, would be authorised for the purpose of the Privacy Act (as it currently is for the SSAA). This authorisation occurs on the basis that it is 'a disclosure…authorised by or under law' under paragraph 1(d) of Information Privacy Principle 11 (in section 14 of the Privacy Act).

Other methods of dealing with personal information were considered in the development of the NDIS Bill. The legislation identified by the Committee is not strictly comparable to the NDIS Bill. I understand that legislative clarification is generally included in a Bill where the proposed measures would expand the scope of the Privacy Act by means different to its normal operation. In such cases, a contravention of the new Act is essentially taken to be a contravention of the Privacy Act. This ensures that new privacy issues receive appropriate treatment. Such legislative clarification is not required in the context of the NDIS Bill.

On the basis of the information set out above, the approach taken was considered to be the most appropriate because it was unnecessary to add additional provisions to the NDIS Bill to further clarify the interaction of the Bill with the Privacy Act or the role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the Privacy Act.

Attorney-General
Minister For Emergency Management

MC13/01736

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

Dear Senator Macdonald

I am writing in response to correspondence of 7 February 2013 from Ms Toni Dawes, Secretary of the Standing Committee for the Scrutiny of Bills about the Native Title Amendment Bill 2012 (the Bill).

The Committee has raised concerns in *Alert Digest No.1 of 2013* about Item 11, Schedule 2 of the Bill which provides that the amendments made by Schedule 2 apply to negotiations that commence on or after 1 January 2013 and are still on foot on the day the Act receives the Royal Assent. This means that the good faith negotiation requirements may apply to negotiations that commence prior to the commencement of the Bill.

The Committee is concerned that this provision has retrospective application and may trespass on personal rights and liberties. I understand that the Committee is seeking my advice as to the justification for this approach.

The good faith amendments aim to encourage parties to focus on negotiated rather than arbitrated outcomes, improve the quality of negotiations and agreement-making and improve the balance of power between negotiating parties.

The transitional approach for the application of the good faith amendments was developed in response to stakeholder concerns that a pre-announced commencement date or an uncertain Royal Assent date could create a risk that some parties may deliberately begin negotiations before that date in order to circumvent the application of the new provisions to their negotiation processes. The proposed approach also provides clarity for parties engaged in negotiations when the Act commences about what requirements they are expected to comply with.

Providing that the amendments will apply to negotiations from 1 January 2013 will help to ensure that the amendments will have the intended effect of improving the conduct and behaviour of negotiation parties.

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As you may be aware, the Bill was referred to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Senate Legal and Constitutional Affairs Legislation Committee for consideration. I note that stakeholders did not raise any concerns about this provision during the public consultation process for both Committees.

I trust that this advice addresses the Committee's query regarding justification for the proposed approach to the application of the good faith amendments. I understand that this response will be published in the next available *Report* of the Committee.

Thank you for allowing me the opportunity to address the Committee's comments. If you wish to discuss this matter further please contact Nisha Selvaraj in my Department on 02 6141 3778.

Yours sincerely

MARK DREYFUS QC MP

7/3/13