



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**SEVENTH REPORT**

**OF**

**2005**

**10 August 2005**



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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

### Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## SEVENTH REPORT OF 2005

The Committee presents its Seventh Report of 2005 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

*Defence Amendment Act 2005*

*James Hardie (Investigations and Proceedings) Act 2004*

Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005

## ***Defence Amendment Act 2005***

### ***Introduction***

The Committee dealt with the bill for this Act in *Alert Digest No. 2 of 2005*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter dated 20 June 2005.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 2 of 2005***

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Defence]

The bill amends the *Defence Act 1903* to provide a more comprehensive drug-testing regime for members of the Australian Defence Force. The amendments:

- expand the range of drugs for which testing may be undertaken and the circumstances in which testing may be required;
- make provision for the use of new tests; and
- clarify the action that may follow a confirmed positive test result.

The bill enables details of the drug-testing regime to be set out in Defence Instructions issued under section 9A of the Act and amends that section to provide for the incorporation in Defence Instructions of any instrument 'in force from time to time'. The bill also inserts new powers of delegation into section 120A of the Act.

### **Parliamentary scrutiny of the exercise of legislative power Schedule 1, items 2 to 39**

One of the key principles underlying the work of the Scrutiny of Bills Committee is that Parliament properly carry out its legislative function. Parliament should not inappropriately delegate its legislative power to the Executive and, where it does delegate legislative powers, Parliament must address the question of how much oversight it should maintain over the exercise of the delegated power.

The criterion in standing order 24(1)(a)(v) requires that the Committee draw to the attention of the Senate provisions which seek to delegate legislative power but fail to provide for the proper auditing of its use. One area in which a bill may insufficiently subject the exercise of delegated power to parliamentary scrutiny is in giving a power to make subordinate legislation which is not to be tabled in the Parliament or, where tabled, is free from the risk of disallowance.

This bill raises the question of the adequacy of parliamentary oversight of delegated legislation because it seeks to expand the scope of a scheme (which appears to be legislative in character) at the same time as reducing the opportunity for parliamentary scrutiny.

Part VIIIA of the *Defence Act* 1903 currently provides for a drug-testing regime to be implemented through regulations. Regulations (or, under the *Legislative Instruments Act* 2003, which commenced on 1 January 2005, legislative instruments) implementing that regime must be tabled in each House and are subject to scrutiny by the Parliament, including the Senate Regulations and Ordinances Committee, and to the risk of disallowance.

Despite the provisions in Part VIIIA, it appears that no regulations were ever made. The Minister's second reading speech stated that 'limitations under the legislative drug testing regime were a major reason why a command initiated program of drug testing was implemented.' The Minister indicates that the program was suspended last year when a Defence Force magistrate found 'there is no scope for such testing outside Part VIIIA of the Defence Act'. The changes proposed in the bill are to 'ensure that the legislation better reflects Defence Force policy regarding drug use.'

The bill extends the scope of the drug-testing regime, but at the same time removes aspects of it from the legislative instruments scheme, instead providing for their inclusion in Defence Instructions made under section 9A of the Act. Those Instructions are not required to be tabled and are not subject to the scrutiny of the Parliament.

One difficulty the Committee has found in considering this legislation is that there is nothing in the explanatory memorandum to explain the reasons for moving aspects of the scheme from regulations/legislative instruments, which are susceptible to the usual tabling and disallowance regime, to Defence Instructions, which are not. As a general rule, the Committee would expect the explanatory memorandum accompanying a bill to provide sufficient explanation to enable the Committee and, indeed, the Parliament to assess the need for such a change.

This raises, as a threshold question, whether it is appropriate to remove those aspects of the regime from parliamentary scrutiny. The Committee **seeks the Minister's advice** as to the reasons justifying this change.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered 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.*

### ***Relevant extract from the response from the Minister***

The Committee expressed concern that aspects of the new prohibited substance testing regime have been moved from the regulations, which are legislative instruments and therefore subject to Parliamentary scrutiny, to Defence Instructions, which are not. The Committee seeks reasons justifying this change.

Defence Instructions are an exercise of the prerogative power of the Crown to command and regulate the ADF. They are not legislative in character, and therefore do not come within the ambit of the *Legislative Instruments Act 2003*. Given their prerogative character, it would be inappropriate to make them subject to review and disallowance by Parliament.

The Defence Instructions that are to be made for the purposes of prohibited substance testing under the new testing regime will deal with the administrative detail of the regime, such as the procedures for handling and analysing samples and the general conduct of testing. As this detail is administrative rather than legislative in character, it was considered to be more appropriate that it be included in Defence Instructions rather than regulations. This approach will, as operational needs change, allow rapid adjustment to the procedures contained within the Instructions.

These Defence Instructions do not define the scope of the prohibited substance testing regime. That has been done by Parliament under the Act and by determinations of prohibited substances and prohibited substance tests by the Chief of the Defence Force. These determinations are legislative in character and will, as legislative instruments, be subject to Parliamentary scrutiny and disallowance.

The Committee thanks the Minister for this response.

The Minister notes that it would be ‘inappropriate to subject [Defence Instructions] to review and disallowance by the Parliament’. The Committee concurs. It is for that reason the Committee sought more information on the reasons for moving aspects of the revised scheme into Defence Instructions. The Committee would expect, however, that with reduced parliamentary scrutiny, Defence would ensure that the detail and effectiveness of these Defence Instructions would be subject to periodic internal review.

The Committee particularly notes the Minister’s assurance that the Defence Instructions will deal only with ‘the administrative detail of the regime’ rather than aspects which are legislative in character. The Committee considers that it would have been useful if the explanatory memorandum had provided a fuller explanation of the changes.

## **Privacy**

### **Schedule 1, items 2 to 39**

The current provisions, which enable drug urinalysis of Defence Force members undertaking combat and combat-related duties, are contained in Part VIIIA of the *Defence Act 1903*. They were introduced as part of the *Defence Legislation Amendment Act (No. 1) 1999* after concerns were raised by the Privacy Commissioner and the Attorney-General’s Department about a 1993 command-initiated proposal to instigate random drug testing among Defence personnel (see Privacy Commissioner, *Seventh and Eighth Annual Report on the Operation of the Privacy Act*). Those concerns focused on balancing the privacy rights of personnel and associated civil liberties concerns against the public interest in promoting and maintaining a drug-free Defence Force.

The Committee **seeks the Minister’s advice** as to what consideration has been given to these concerns in formulating the measures in the bill.

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

### ***Relevant extract from the response from the Minister***

The Committee notes that the original drug testing provisions in the Act were implemented following concerns raised by the Privacy Commissioner and the Attorney-General's Department about balancing privacy rights of ADF members against the public interest in promoting and maintaining a drug-free Defence Force. The Committee seeks advice as to what consideration has been given to these concerns in formulating these amendments to the original provisions.

The new measures do not affect the current requirement in the Act that any prohibited substance test be conducted in circumstances affording reasonable privacy to the person being tested. This requirement is reinforced in new section 95 of the Act.

Further, the Defence Instructions will prohibit the unauthorised disclosure of prohibited substance test results. Any unauthorised disclosure of information revealed by a prohibited substance test contrary to the terms of the Defence Instructions will be dealt with in accordance with the existing law. The *Defence Force Discipline Act 1982*, the *Public Service Act 1999*, the *Crimes Act 1914*, and the *Privacy Act 1988* all provide a range of criminal and administrative penalties that may be used to protect the privacy rights of persons being tested for prohibited substances under the Act.

I trust this information will be of assistance to the Committee.

The Committee thanks the Minister for this response and for his assurance that the new provisions do not affect the current requirements 'affording reasonable privacy to the person being tested.' Given the concerns raised in devising the original testing regime, the Committee considers it might have been useful for these matters to be addressed in the explanatory memorandum.

# ***James Hardie (Investigations and Proceedings) Act 2004***

## ***Introduction***

The Committee dealt with the bill for this Act in *Alert Digest No. 12 of 2004*. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 29 June 2005. A copy of the letter is attached to this report.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 12 of 2004***

[Introduced in the House of Representatives on 2 December 2004. Portfolio: Treasury]

The bill is intended to facilitate investigation by the Australian Securities and Investments Commission (ASIC) of matters arising from the James Hardie Special Commission of Inquiry in New South Wales as well as any proceedings that may result from those investigations.

The bill expressly abrogates legal professional privilege in relation to certain materials for the purposes of those investigations and proceedings.

#### **Abrogation of legal professional privilege**

##### **Clause 4**

Clause 4 of this bill would abrogate legal professional privilege in relation to a wide range of records and books connected with the Special Commission of Inquiry conducted in New South Wales into the conduct of the James Hardie Group of companies. In his second reading speech the Treasurer acknowledges that ‘legal professional privilege is ... an important common law right’ that ought to be abrogated only in special circumstances, but goes on to assert that such abrogation is justified ‘in order to serve higher public policy interests’ such as the ‘effective enforcement of corporate regulation.’

Any abrogation of legal professional privilege trespasses on the rights of those affected and the Committee will always draw such provisions to the attention of the Senate.

The Committee also notes the retrospective effect of the legislation, which would abrogate legal professional privilege in respect of records produced to, or created by, the James Hardie Special Commission of Inquiry and transferred from the NSW Government to ASIC, as well as relevant material obtained after the commencement of the bill.

The Committee considers that, while clause 4 clearly trespasses on the rights of the James Hardie Group of companies (to the extent that the group can be considered to enjoy such rights), the question of whether it does so *unduly* is **a matter for the Senate as a whole**.

*In respect of those matters, 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.*

The Committee further notes the discussion in the explanatory memorandum of the justification for abrogating the privilege:

4.23 As recognised by the High Court in the *Daniels* case, legal professional privilege is not merely a rule of substantive law but an important common law right. Nevertheless, there are situations in which its abrogation is justified in order to serve higher public policy interests. One such situation is the effective enforcement of corporate regulation.

4.24 The community must have confidence in the regulation of corporate conduct, financial markets and services. This confidence would be undermined if ASIC was unduly inhibited in its ability to obtain and use material necessary to conduct investigations and take enforcement action where appropriate in relation to matters arising from the James Hardie Special Commission of Inquiry and any subsequent investigations and prosecutions instigated by the regulator.

4.25 In relation to matters concerning, or arising out of, the James Hardie Special Commission of Inquiry, the Government considers that it is clearly in the public interest that any investigation and subsequent action by ASIC and the DPP be unfettered by claims of legal professional privilege.

While the Committee, according to its usual practice, has left for the Senate as a whole the question of whether this abrogation of a common law right *unduly trespasses* on rights, it is concerned at the use of criteria such as ‘higher public policy interests’, which are not susceptible to objective definition, to justify the intrusion on such rights. The Committee considers that, if such an approach is to be adopted in the future, the criteria should be better developed and defined, and **seeks the Treasurer’s advice** on the development of this approach.

In the absence of a better developed definition of criteria such as ‘higher public policy interests’, the Committee does not consider that the bill provides a useful precedent for future legislation intended to abrogate legal professional privilege.

### ***Relevant extract from the response from the Parliamentary Secretary***

I understand that the Treasurer’s Chief of Staff, Mr Phil Gaetjens, responded to the Committee’s comments on 27 May 2005, but that the Committee remains concerned that the response was not addressed to you as Chairman of the Committee, nor initiated by the Treasurer. As I have responsibility within the Treasury portfolio for corporations law issues, I would like to respond appropriately to the Committee’s concerns.

In Alert Digest No. 12 of 2004, the Committee raised a number of concerns in relation to the Bill, which was intended to facilitate investigations by the Australian Securities and Investments Commission (ASIC) of matters arising from the Special Commission of Inquiry into the James Hardie Group, by abrogating legal professional privilege in certain materials for the purposes of those investigations.

The Committee considered that clause 4 of the Bill trespassed on the rights of the James Hardie Group in breach of principle 1(a)(i) of the Committee’s terms of reference, but left the question of whether clause 4 *unduly* trespassed on those rights for the Senate as a whole.

Nonetheless, the Committee commented on the use of certain criteria (in the second reading speech and the explanatory memorandum) to justify the abrogation of legal professional privilege in the particular circumstances and sought the Treasurer’s advice as to whether, if such criteria were to be adopted in the future, they would be better developed and defined. In that regard, I reiterate the comments previously conveyed to the Committee, that whether such an approach might be adopted in the future is hypothetical.

The Committee also raised a concern about the retrospective operation of the Bill, in that it would abrogate legal professional privilege in respect of records produced to, or created by, the Special Commission of Inquiry, as well as relevant material obtained after the commencement of the Bill. In this regard, I note that as was previously conveyed to the Committee, it is the Government's view that ASIC must be provided with the powers necessary to conduct a comprehensive investigation into the conduct of the James Hardie Group, its directors and officers, and its advisers.

I also wish to reiterate, as was previously indicated to the Committee, that the higher public policy interest in this matter is clear.

Finally, I note that the Bill was passed by the Senate without amendment to clause 4 (or to any other provision of the Bill for that matter), and that the Bill received Royal Assent on 14 December 2004.

The Committee thanks the Parliamentary Secretary for this response.

The Committee considers it important that responses to concerns raised in its Alert Digests and Reports be initiated by the Minister or Parliamentary Secretary responsible for the legislation, rather than a member of his or her staff.

The Committee reiterates that it did not question the public policy imperatives of the instant case but merely, in accordance with its usual practice, drew the Senate's attention to the competing interests involved. That question aside, the Committee was concerned at the use of criteria such as 'higher public policy interests', which are not susceptible to objective definition, to justify the intrusion on important rights. The Committee was interested in the phrasing in the explanatory memorandum, which seemed to suggest the formulation of a range of 'higher public policy interests' which might justify the abrogation of legal professional privilege. The Parliamentary Secretary's response would seem to indicate that this is not the case.

While the question of whether such an approach might be adopted again may be hypothetical, the Committee considers that the passage of this legislation has introduced a measure of uncertainty into the area of legal professional privilege which is, as noted by the explanatory memorandum, an important common law right. The development of a more objective approach, which could alleviate that uncertainty, may be warranted.

*In the circumstances, the Committee makes no further comment on the matter.*

# Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for Justice and Customs has responded to those comments in a letter dated 25 July 2005. A copy of the letter is attached to this report.

### ***Extract from Alert Digest No. 5 of 2005***

Introduced into the House of Representatives on 26 May 2005

Portfolio: Justice and Customs

#### **Background**

Schedule 1 of the bill inserts new serious drug offences into the *Criminal Code*. The new offences apply to drugs crossing Australia's borders and to drug dealing within Australia. Among the provisions are measures dealing with:

- trade in 'precursor' chemicals,
- increased penalties, including heavier penalties for people who use children to traffic in drugs;
- offences aimed at those who harm or endanger children by exposing them to the manufacture of drugs; and
- adding new drugs to the list of illicit substances.

Schedule 2 of the bill also makes amendments to the *Criminal Code* to criminalise the recruitment by armed groups (not part of the State) of persons under 18 years of age, an obligation under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

There are seven further schedules to the bill, including provisions:

- clarifying the functions of the Australian Federal Police in assisting other agencies and in operations in other countries [Schedule 4]; and

- clarifying the application of the power which allows Customs officers to detain a person in breach of a bail condition intended to prevent that person leaving Australia [Schedule 8].

## **Uncertainty of commencement**

### **Schedule 2, item 3**

By virtue of item 3 in the table in subclause 2(1) of this bill, the amendments proposed by Schedule 2 may commence on the day on which the Optional Protocol enters into force for Australia, but do not commence at all if the Optional Protocol does not come into force. However, the item does not provide any fixed date by which it can be finally determined that the Optional Protocol will **not** come into force.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force and has endorsed the formulation in paragraph 83 of *Drafting Direction No. 3 of 2003* from the Office of Parliamentary Counsel:

83 In some situations, there may be a need to build a time limit into the wording that states that the relevant items do not commence if an uncertain event does not occur. For example, “However, the items do not commence at all if the event mentioned in paragraph (b) does not occur before 1 July 2004” (where the event might, eg, be Australia entering into an international agreement).

In relation to the *Copyright Legislation Amendment Act 2004*, the Committee sought the advice of the Minister for Justice and Customs on a similar matter. In his response the Minister stated that ‘the Committee’s point will be kept in mind in the preparation of any future bills, the commencement of which is to be made contingent on the happening of some independent event.’ [*First Report of 2005*, at p. 6]

The Committee **seeks the Minister’s advice** as to whether the item might not provide a means of determining when (if ever) the Optional Protocol is to be regarded as not coming into force.

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

### ***Relevant extract from the response from the Minister***

The Committee has raised concerns about uncertainty of commencement of Schedule 2 of the Bill, which will give effect to Australia's obligations under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

Item 3 in the table in subclause 2(1) of the Bill states that Schedule 2 will commence on the day on which the Optional Protocol enters into force for Australia, but does not commence at all if the Optional Protocol does not come into force.

I agree that the Bill should be amended to provide certainty of commencement of the Optional Protocol. I propose to introduce a Government amendment to the Bill to provide that Schedule 2 will not commence at all if the Optional Protocol does not come into force in Australia within **6 months** of the Act receiving the Royal Assent.

The Department of Foreign Affairs and Trade intend to seek ratification of the Optional Protocol as soon as the amendments in Schedule 2 of the Bill are passed into law.

The Committee thanks the Minister for this response and for undertaking to introduce amendments to address the Committee's concerns.

The Committee also notes more generally that the new Drafting Direction on commencement provisions – *Drafting Direction 2005, No. 10*, issued by the Office of Parliamentary Counsel, has highlighted the Committee's concerns on the commencement of bills implementing international agreements without a time limit (at paragraph 90).

Robert Ray  
Chair



**The Hon De-Anne Kelly BE MP**

Federal Member for Dawson  
Minister for Veterans' Affairs  
Minister Assisting the Minister for Defence

**RECEIVED**

22 JUN 2005

Senate Standing C'ttee  
for the Scrutiny of Bills

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

20 JUN 2005

Dear Senator Ray

Thank you for drawing my attention to the Scrutiny of Bills Alert Digest No 2 of 2005, concerning the now *Defence Amendment Act 2005* which amends the *Defence Act 1903* (the Act) to provide for a more comprehensive drug testing regime for members of the Australian Defence Force (ADF). My response to the Committee's concerns is set out below:

**Parliamentary scrutiny of the exercise of legislative power**

The Committee expressed concern that aspects of the new prohibited substance testing regime have been moved from the regulations, which are legislative instruments and therefore subject to Parliamentary scrutiny, to Defence Instructions, which are not. The Committee seeks reasons justifying this change.

Defence Instructions are an exercise of the prerogative power of the Crown to command and regulate the ADF. They are not legislative in character, and therefore do not come within the ambit of the *Legislative Instruments Act 2003*. Given their prerogative character, it would be inappropriate to make them subject to review and disallowance by Parliament.

The Defence Instructions that are to be made for the purposes of prohibited substance testing under the new testing regime will deal with the administrative detail of the regime, such as the procedures for handling and analysing samples and the general conduct of testing. As this detail is administrative rather than legislative in character, it was considered to be more appropriate that it be included in Defence Instructions rather than regulations. This approach will, as operational needs change, allow rapid adjustment to the procedures contained within the Instructions.

These Defence Instructions do not define the scope of the prohibited substance testing regime. That has been done by Parliament under the Act and by determinations of prohibited substances and prohibited substance tests by the Chief of the Defence Force. These determinations are legislative in character and will, as legislative instruments, be subject to Parliamentary scrutiny and disallowance.

### **Privacy**

The Committee notes that the original drug testing provisions in the Act were implemented following concerns raised by the Privacy Commissioner and the Attorney-General's Department about balancing privacy rights of ADF members against the public interest in promoting and maintaining a drug-free Defence Force. The Committee seeks advice as to what consideration has been given to these concerns in formulating these amendments to the original provisions.

The new measures do not affect the current requirement in the Act that any prohibited substance test be conducted in circumstances affording reasonable privacy to the person being tested. This requirement is reinforced in new section 95 of the Act.

Further, the Defence Instructions will prohibit the unauthorised disclosure of prohibited substance test results. Any unauthorised disclosure of information revealed by a prohibited substance test contrary to the terms of the Defence Instructions will be dealt with in accordance with the existing law. The *Defence Force Discipline Act 1982*, the *Public Service Act 1999*, the *Crimes Act 1914*, and the *Privacy Act 1988* all provide a range of criminal and administrative penalties that may be used to protect the privacy rights of persons being tested for prohibited substances under the Act.

I trust this information will be of assistance to the Committee.

Yours sincerely



**De-Anne Kelly**



**THE HONOURABLE CHRIS PEARCE MP**  
**Parliamentary Secretary to the Treasurer**  
**Federal Member for Aston**

29 JUN 2005

**RECEIVED**

1 JUL 2005

Senate Standing C'ttee  
for the Scrutiny of Bills

Senator Robert Ray  
Chairman  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Ray

I refer to correspondence dated 7 June 2005 from Mr Richard Pye, the Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee), concerning the comments of the Committee on the James Hardie (Investigations and Proceedings) Bill 2004 (the Bill), which were contained in the Scrutiny of Bills Alert Digest No. 12 of 2004 (8 December 2004).

I understand that the Treasurer's Chief of Staff, Mr Phil Gaetjens, responded to the Committee's comments on 27 May 2005, but that the Committee remains concerned that the response was not addressed to you as Chairman of the Committee, nor initiated by the Treasurer. As I have responsibility within the Treasury portfolio for corporations law issues, I would like to respond appropriately to the Committee's concerns.

In Alert Digest No. 12 of 2004, the Committee raised a number of concerns in relation to the Bill, which was intended to facilitate investigations by the Australian Securities and Investments Commission (ASIC) of matters arising from the Special Commission of Inquiry into the James Hardie Group, by abrogating legal professional privilege in certain materials for the purposes of those investigations.

The Committee considered that clause 4 of the Bill trespassed on the rights of the James Hardie Group in breach of principle 1(a)(i) of the Committee's terms of reference, but left the question of whether clause 4 *unduly* trespassed on those rights for the Senate as a whole.

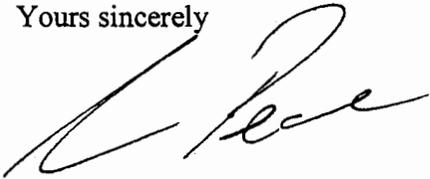
Nonetheless, the Committee commented on the use of certain criteria (in the second reading speech and the explanatory memorandum) to justify the abrogation of legal professional privilege in the particular circumstances and sought the Treasurer's advice as to whether, if such criteria were to be adopted in the future, they would be better developed and defined. In that regard, I reiterate the comments previously conveyed to the Committee, that whether such an approach might be adopted in the future is hypothetical.

The Committee also raised a concern about the retrospective operation of the Bill, in that it would abrogate legal professional privilege in respect of records produced to, or created by, the Special Commission of Inquiry, as well as relevant material obtained after the commencement of the Bill. In this regard, I note that as was previously conveyed to the Committee, it is the Government's view that ASIC must be provided with the powers necessary to conduct a comprehensive investigation into the conduct of the James Hardie Group, its directors and officers, and its advisers.

I also wish to reiterate, as was previously indicated to the Committee, that the higher public policy interest in this matter is clear.

Finally, I note that the Bill was passed by the Senate without amendment to clause 4 (or to any other provision of the Bill for that matter), and that the Bill received Royal Assent on 14 December 2004.

Yours sincerely

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

**CHRIS PEARCE**



**SENATOR THE HON. CHRISTOPHER ELLISON**

Minister for Justice and Customs  
Senator for Western Australia  
Manager of Government Business in the Senate

MC05/6299

**RECEIVED**

**26 JUL 2005**

Senate Standing C'ttee  
for the Scrutiny of Bills

Senator Robert Ray  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Department of the Senate  
Parliament House  
CANBERRA ACT 2600

**25 JUL 2005**

Dear Senator Ray

Thank you for your correspondence dated 1 June 2005 seeking my response to the comments contained in the Scrutiny of Bills Alert Digest No. 5 of 2005 (1 June 2005) concerning the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*.

The Committee has raised concerns about uncertainty of commencement of Schedule 2 of the Bill, which will give effect to Australia's obligations under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

Item 3 in the table in subclause 2(1) of the Bill states that Schedule 2 will commence on the day on which the Optional Protocol enters into force for Australia, but does not commence at all if the Optional Protocol does not come into force.

I agree that the Bill should be amended to provide certainty of commencement of the Optional Protocol. I propose to introduce a Government amendment to the Bill to provide that Schedule 2 will not commence at all if the Optional Protocol does not come into force in Australia within **6 months** of the Act receiving the Royal Assent.

The Department of Foreign Affairs and Trade intend to seek ratification of the Optional Protocol as soon as the amendments in Schedule 2 of the Bill are passed into law.

The action officer for this matter in the Attorney-General's Department is Corinne Vale who can be contacted on (02) 6250 5867.

I will also e-mail a copy of my response to the Committee Secretariat at [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Ellison". The signature is written in a cursive style with a large initial "C".

**CHRIS ELLISON**  
**Senator for Western Australia**

