



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FOURTEENTH REPORT
OF
2009

25 November 2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 2009

The Committee presents its Fourteenth Report of 2009 to the Senate.

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

Crimes Legislation Amendment (Serious and Organised Crime)
Bill 2009

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Attorney-General responded in a letter received on 4 September 2009 (see *Tenth Report of 2009*), stating that he had asked his Department to consult with the Ombudsman on options to limit the delegation of the Ombudsman's powers under proposed new section 15HX of the *Crimes Act 1914* (contained in item 10 of Schedule 3 of the bill).

The Attorney-General has provided a further letter (dated 23 November 2009), which includes advice regarding the outcome of the Department's consultations with the Ombudsman. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Attorney-General

Background

In April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a set of resolutions for a comprehensive national legislative and operational response to combat organised crime. This bill implements the Commonwealth's commitment as part of the SCAG agreement to enhance its legislation to combat organised criminal activity.

Schedules 1 and 2 amend the *Proceeds of Crime Act 2002*, the *Bankruptcy Act 1966*, the *Crimes Act 1914* and the *Family Law Act 1975* to strengthen the Commonwealth criminal assets confiscation regime, in response to recommendations of law enforcement agencies and to the *Report of the Independent Review of the Operation of the Proceeds of Crime Act* by Mr Tom Sherman AO (tabled in Parliament in October 2006).

Specifically, Schedule 1 introduces unexplained wealth provisions to target wealth that a person cannot demonstrate that he or she has lawfully acquired. Schedule 2:

- introduces freezing orders to ensure assets are not dispersed;
- removes time limitations on orders;
- provides for non-conviction-based restraint and forfeiture of instruments of serious crime;
- enhances information-sharing under the Proceeds of Crime Act, and
- reimburses legal aid commission legal costs from the Confiscated Assets Account.

Schedule 3 amends the *Crimes Act 1914* and the *Customs Act 1901* to implement model laws for controlled operations, assumed identities and witness identity protection.

Schedule 4 amends the *Criminal Code Act 1995* to extend criminal liability to persons who jointly commit offences, or engage in criminal activity as part of a group, to enable the prosecution to obtain higher penalties for such offenders by aggregating the conduct of offenders who operate together. Schedule 4 also amends the *Telecommunications (Interception and Access) Act 1979* to facilitate greater access to telecommunications interception for criminal organisation offences.

Wide delegation of powers

Schedule 3, item 10, new subsection 15HX(1)

Item 10 of Schedule 3 also provides new powers to the Ombudsman in relation to the new regime for controlled operations. Proposed new subsection 15HX(1) of the Crimes Act would permit the Ombudsman to delegate powers under new Division 3 of Part 1AB to ‘an APS employee responsible to the Ombudsman’ (paragraph 15HX(1)(a)) or to ‘a person having similar oversight functions to the Ombudsman under the law of a State or Territory or to an employee responsible to that person’ (paragraph 15HX(1)(b)).

As a consequence, the delegations in new subsection 15HX(1) may be to any APS employee, regardless of the position which such an employee holds, or of his or her qualifications; or to a person in a similar position in a state or territory. This is a delegation to a large class of persons with very limited specificity. Generally, the Committee prefers to see a limit set on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated.

The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Therefore, the Committee **seeks the Attorney-General's advice** as to the justification for such a wide discretion, and whether it might be appropriate to limit the delegation in some way.

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

Relevant extract from the first response from the Attorney-General (received on 4 September) and Tenth Report of 2009

The Committee sought advice on the justification for a wide discretion in the delegation of the Ombudsman's powers, and whether it might be appropriate to limit the delegation in some way.

I agree that there is a wide discretion to delegate and I have asked my Department to consult the Ombudsman on whether there are options to limit the delegation.

Please let me know if I can be of further assistance, or provide you with any further information.

The Committee thanks the Attorney-General for this response and his undertaking to consult the Ombudsman on whether there are options to limit the proposed delegation. The Committee looks forward to receiving the Attorney-General's further advice, following his receipt of the Ombudsman's views.

Relevant extract from the further response from the Attorney-General (dated 23 November)

I refer to my letter of 3 September 2009 responding to matters raised by the Senate Standing Committee for the Scrutiny of Bills about the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill). In that letter I indicated that I had asked my Department to consult with the Ombudsman on options to limit the delegation of the Ombudsman's powers under proposed new section 15HX of the *Crimes Act 1914* (Cth) at Schedule 3 of the Bill.

My Department has since consulted the Ombudsman on this provision. To limit the breadth of the delegation power, I will seek an amendment to omit the discretion for the Ombudsman to delegate his or her powers to a person having similar oversight functions under a law of a State or Territory or an employee responsible to that person.

I do not propose to limit the ability of the Ombudsman to delegate his or her powers to any APS employee responsible to the Ombudsman. This delegation is equivalent to that in the *Surveillance Devices Act 2004* and, while I do not anticipate the Ombudsman's powers would be delegated widely, flexibility should be provided for the Ombudsman to delegate his or her powers as deemed appropriate.

The Committee thanks the Attorney-General for this further response, noting that an amendment has already been agreed to in the House of Representatives which gives effect to the proposal outlined in the response (refer to *Alert Digest No. 15 of 2009*, at pages 25-26, for further information).

Senator the Hon Helen Coonan
Chair



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

23 NOV 2009

RECEIVED

25 NOV 2009

Senate Standing Committee
for the Scrutiny of Bills

09/21513, MC09/15867

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

Helen
Dear Chair

I refer to my letter of 3 September 2009 responding to matters raised by the Senate Standing Committee for the Scrutiny of Bills about the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill). In that letter I indicated that I had asked my Department to consult with the Ombudsman on options to limit the delegation of the Ombudsman's powers under proposed new section 15HX of the *Crimes Act 1914* (Cth) at Schedule 3 of the Bill.

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I do not propose to limit the ability of the Ombudsman to delegate his or her powers to any APS employee responsible to the Ombudsman. This delegation is equivalent to that in the *Surveillance Devices Act 2004* and, while I do not anticipate the Ombudsman's powers would be delegated widely, flexibility should be provided for the Ombudsman to delegate his or her powers as deemed appropriate.

The action officer for this matter in my Department is Sarah Chidgey who can be contacted on 02 6141 2800.

Yours sincerely

Robert McClelland