SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2010

23 June 2010

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 2010

The Committee presents its *Seventh Report of 2010* to the Senate.

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

Defence Legislation Amendment Bill (No.1) 2010
Immigration (Education) Amendment Bill 2010
Insurance Contracts Amendment Bill 2010
National Health Amendment (Continence Aids Payment Scheme) Bill 2010
National Security Legislation Amendment Bill 2010

Defence Legislation Amendment Bill (No.1) 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister responded to the Committee's comments in a letter dated 21 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.5 of 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Defence

Background

This bill will address five separate measures by amending the following:
Defence Act 1903 to:

- establish the Defence Honours and Awards Appeals Tribunal by legislation by inserting a new Part VIIIC in the *Defence Act 1903* to establish the Defence Honours and Awards Appeals Tribunal. The amendments include the functions of the tribunal, what decisions are reviewable and who may apply for review, referral of Defence honours and awards issues for inquiry and advice and the constitution of the new Tribunal and appointment of members.

- ensure that there is procedural fairness in the termination and discharge process where a Defence member has tested positive for a prohibited substance.

- make it absolutely clear that section 58B determinations made under the *Defence Act* are subject to tabling and disallowance and able to operate with certainty and transparency.

The *Defence (Home Ownership Assistance) Scheme Act 2008* to ensure that it covers all Reserve members, regardless of the way they became a Reserve member.

Defence Force Discipline Act 1982 to enable the appointment of Chief Petty Officers and Flight Sergeants as discipline officers, to clarify the jurisdiction of discipline officers and to align the punishments available to be imposed in respect of certain ranks.

Excluding merits review
Schedule 1, Part 1, item 110V

This item outlines the scope of a ***reviewable decision*** for the purposes of the Defence Honours and Awards Appeals Tribunal. Subsection 110V(2) excludes decisions made before 3 September 1939 or decisions that relate to service rendered before 3 September 1939. It seems to the Committee to be likely that this date has been selected for a specific reason, but there is no justification for the approach outlined in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** in relation to the why decisions or service prior to 3 September 1939 have been excluded from review and whether there may be a detrimental effect to any person.

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

Relevant extract from the response from the Minister

In relation to Schedule 1 of the Bill, the Committee has sought my advice on why the Honours and Awards Appeal Tribunal will not be reviewing decisions or service prior to the specified date of 3 September 1939 and whether there may be a detrimental effect to any person.

Defence honours and awards are awarded to a person in recognition of their Defence service. The definition of a reviewable decision excluded decisions made before 3 September 1939 or decisions that relate to service rendered before 3 September 1939 to align with the period for which there are living persons who have rendered Defence service and may wish to seek review of a decision concerning their eligibility for Defence honours and awards. It is known that there are living veterans who served in World War II who may possibly seek a review of their eligibility for a Defence honour or award. However, there are no surviving veterans of World War I. Therefore, excluding decisions or decisions prior to this date is regarded as an appropriate limit to the scope of the tribunal's work.

If there are organisations and interested persons who believe that someone who served before 3 September 1939 should have been awarded a Defence honour or that an award or a decision that was made in relation to recognition before 3 September 1939 should be

reconsidered, then they can raise the matter with the Australian Government. The Government may then refer the matter to the Defence Honours and Awards Appeals Tribunal.

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

Delegations of power
Schedule 2, Part 1, items 4, 6 and 8

These items respectively allow the Chiefs of the Army, Navy and Air Force to delegate powers relating to the investigation and discipline of personnel in relation to positive substance test results. The powers include inviting a person to give reasons why they should not be discharged and reducing a person's rank. The delegation of power can be to a person who holds the rank of Lieutenant-Colonel, Commander, Wing Commander or higher or to an APS Executive Level 1 or higher.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those 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.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum restates the content of these items (see pages 11 to 13), but does not provide a justification for the approach. The Committee therefore **seeks the Minister's advice** in relation to the need for the wide delegation.

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

Relevant extract from the response from the Minister

In relation to Schedule 2 of the Bill, the Committee is concerned about the delegation of the powers of the Chiefs of Army, Navy and Air Force to a relatively large class of persons (Lieutenant Colonel equivalent or Executive Level 1 equivalent). 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 has sought my advice in relation to the need for a wide delegation.

In this regard, current legislation requires that a notice of a positive test result is to be issued by a one star officer or above (i.e. Senior Executive Service equivalent). Administratively, this can create an undesirable delay in the issuing of a notice and final resolution of the member's situation. There is a finite number of one star officers available to perform the function and very few are in regional/remote areas and Commanding Officers are not necessarily one star rank or above. The delegations need to be more broadly available so that existing command structures (i.e. a member's Commanding Officer) and resources can be used more effectively. Commanding Officers are closest to the member randomly selected for testing and best placed to issue the notice of positive test result.

The proposed delegated powers for the termination of a member for using a prohibited substance will be in line with other personnel delegation provisions contained in the *Defence (Personnel) Regulations 2002* in relation to terminations. Guidance will be provided in the relevant Defence policy documents clarifying how these delegations are to be exercised. The delegations will specify the rank level for the officers who hold the delegations to initiate a notice and those who exercise the termination delegation. The initiator is to be at least one rank higher than the individual who has tested positive, and the termination delegate is to be equal to or superior in rank to the initiator.

Personnel exercising delegations are generally career military or Defence Australian Public Service personnel with extensive command/supervisory experience. Termination delegations are generally held centrally within the career management agencies, whose members are trained in complex career management issues including the exercising of the associated delegations (including terminations).

The Prohibited Substance Testing Program is subject to regular scrutiny/review. Monthly reports are forwarded to the Secretary of Defence, the Chief of the Defence Force and the Service Chiefs, and quarterly reports are forwarded to the Minister for Defence Personnel.

The Committee thanks the Minister for this response, which addresses its concerns. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

Immigration (Education) Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister responded to the Committee's comments in a letter dated 15 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.5 of 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Immigration and Citizenship

Background

This bill amends the *Immigration (Education) Act 1971* (the Act) to implement the new Adult Migrant English Program (AMEP) Business Model. The AMEP is the program through which English language tuition is delivered under the Act. In particular, the bill amends the Act to:

- remove annual administration fees for English courses;
- provide that New Zealand citizens who hold a special category visa may no longer be provided with English courses under the Act;
- extend the period for registering in an English course from three months to six months after a person's arrival in Australia;
- introduce a five-year timeframe to complete an English course, with an extension for clients with compassionate and compelling circumstances;
- simplify provisions relating to eligibility for English courses, including ensuring all clients provided with English courses in Australia are subject to the same eligibility restrictions;
- allow the Secretary to extend registration, commencement and completion timeframes for English courses retrospectively; and
- update the legislation to reflect current delivery arrangements.

Delayed commencement
Clause 2

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

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

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

Relevant extract from the response from the Minister

Delayed commencement - Clause 2

The Committee noted that the commencement date as set out in clause 2 of the Bill, 1 January 2011, will be longer than six months if the Bill is passed during the Winter 2010 parliamentary sittings. The Committee has further noted that no explanation for this delay is provided in the Explanatory Memorandum in accordance with paragraph 19 of Drafting Direction No 1.3.

My Department is currently undertaking a tender process for the Adult Migrant English Program (AMEP), with new contracts incorporating the new AMEP Business Model scheduled to commence on 1 January 2011. The commencement date of the Bill is scheduled to align with the proposed commencement of the new contracts, to ensure that the new AMEP Business Model will be implemented in it entirety on the same day.

I do not believe that the delay trespasses unduly on personal rights and liberties as clients will continue to receive English language tuition under the current *Immigration (Education) Act 1971* until the Amendment Act commences. The Department will undertake an information campaign to inform clients and the public of the changes to the

legislation prior to the commencement of the Amendment Act, to ensure it is clear when the legislation will apply.

The Committee thanks the Minister for this response, which addresses its concerns. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

Incorporation of material by reference
Schedule 1, item 13

The purpose of the section is to allow the Minister, by legislative instrument, to 'specify procedures or standards for the purposes of the definition of *functional English*'. This will include the ability for a legislative instrument to incorporate matter 'contained in any other instrument or writing' as in force 'at a particular time' or 'from time to time'.

Justification provided in explanatory memorandum at pages 9 and 10 is that this will allow:

> …the meaning of "functional English" to be further clarified by linking the term to a particular standard of English language ability (which it is intended will be an internationally recognised standard).
>
> …
>
> Although it is possible that the definition of the internationally recognised standard may change from time to time, this standard is widely used in second language learning and any changes to the standard would be implemented across the language learning sector. Linking the standard of "functional English" to an internationally recognised standard provides transparency and certainty as to the standard that providers of approved English courses must use to assess a person's English.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, the Committee is satisfied that the reason for incorporation by reference is clearly outlined in the explanatory memorandum.

> *In the circumstances, the Committee makes no further comment on this clause.*

Relevant extract from the response from the Minister

Incorporation of materia by reference - Schedule 1, item 13

The Committee noted that item 13 of Schedule 1 to the Bill allows the Minister, by legislative instrument, to specify procedures or standards for the purposes of the definition of 'functional English'. The legislative instrument may incorporate any matter contained in any other instrument or writing as in force at a particular time, or from time to time.

I note that the Committee is satisfied that the reason for the incorporation of material by reference is clearly outlined in the explanatory memorandum.

The Committee thanks the Minister for this additional information.

Insurance Contracts Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister responded to the Committee's comments in a letter dated 18 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.5 of 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Treasury

Background

This bill arose out of recommendations made by a review of the *Insurance Contracts Act 1984* (the IC Act). This review was conducted by a Panel comprising Mr Alan Cameron AM and Ms Nancy Milne (the Review Panel). The Review Panel's main conclusion was that the IC Act was generally working satisfactorily to the benefit of insurers and insureds. However, the Review Panel found that some changes would be beneficial, given the passage of time since the Act was originally enacted, developments in the insurance market since that time and judicial interpretation of IC Act provisions.

The Review Panel made detailed recommendations for changes to the IC Act to address issues that had been identified as arising from the above factors. This bill gives effect to a number of the Review Panel's recommendations and amends the IC Act in Schedules 1 to 6 of the Bill.
Broadly, the amendments will:

- make some changes to the scope and application of the IC Act;
- remove the exemption for the IC Act from the Electronic Communications Act
- provide the Australian Securities and Investments Commission a statutory right to intervene in matters arising under the IC Act and the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003;

- make some changes relating to disclosure and misrepresentations;
- amend the IC Act in relation to the remedies of insurers in relation to bundled contracts of life insurance; and
- extends the IC Act in relation to third party beneficiaries.

Possible retrospective effect
Schedule 5, item 1
Schedule 6, items 25 and 36

Item 1, Part 1 of Schedule 5 inserts section 27A into the *Insurance Contracts Act 1984*, so as to amend the way in which remedies for life insurers in cases of misrepresentation or non-disclosure by insureds prior to entry into the contract are dealt with. Item 2 states that these amendments apply 'to a contract of life insurance whether originally entered into before or after the commencement of this item'. The amendments therefore appear to have retrospective affect. The same difficulty arises in respect of the amendments inserted by (i) Schedule 6, Part 5, item 25 and (ii) some of the amendments in Schedule 6, Part 6, item 36.

In relation to each of these provisions the explanatory memorandum merely repeats the effect of items and does not consider whether any person may be adversely affected by what appears to be the retrospective operation of these provisions.

The Committee's attention is attracted by retrospective commencement or the retrospective effect of provisions. If a Bill will have a retrospective commencement or a retrospective effect the Committee looks to the explanatory memorandum to outline the justification for this approach and whether they may have a detrimental effect on any person. The Committee therefore **seeks the Treasurer's advice** as to whether the provisions are intended to operate retrospectively and whether this may have a detrimental affect on any person.

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

Schedule 5, Item 1

This provision requires life insurance contracts that contain more than one kind of insurance (so called 'bundled' contracts), for example, total and permanent disability cover and death cover, to be notionally 'unbundled' when applying the other provisions in the Division regarding remedies for non-disclosure and misrepresentation. It is expressed to apply to contracts entered into before or after commencement.

The reason for the proposed application is so that holders of existing contracts will receive the benefits of unbundling. The main impact of unbundling is that, if an insured person has misrepresented or not disclosed a matter in breach of their duty of disclosure, which would entitle an insurer to a remedy, the remedy will only apply to the kind(s) of cover to which the non-disclosure or misrepresentation relates. Kinds of cover in relation to which the non-disclosure or misrepresentation is irrelevant will no longer be subject to any remedy. This contrasts with the existing position, where if a remedy for non-disclosure or misrepresentation is imposed, it affects all kinds of cover in a bundled contract.

In such a case, an insured would not be affected detrimentally. The only impact would be that the remedy would be lesser in scope than would otherwise apply. The insurer would not be entitled to a remedy affecting the entire contract, which is a lesser remedy than they are currently entitled to. However, the peak life insurer representative body supports the proposed operation of the unbundling provision to existing contracts. The life insurers want to be able to target only the kinds of cover that are affected by a breach and leave the remaining cover unaffected, rather than have to take action against an insured that would potentially jeopardise the entire contract.

The application of the unbundling clause, of itself, does not result in any new/changed remedies being applied to existing contracts. The new remedies have their own application provisions that do not apply to existing contracts. Remedies applicable in the case of a pre-commencement contract will still be pre-commencement remedies. However, they would be applied to each kind of cover as if they were a separate contract.

A further possible issue regarding the application of section 27A is how it affects cases already subject to pending litigation. Treasury has obtained legal advice on concerns surrounding how the amendment would be interpreted in such a case, and does not consider that the unbundling will result in additional remedies becoming available to life insurers under subsection 29(3) in cases subject to pending litigation. The provision will commence on Royal Assent and only affects future rights and liabilities that arise from existing contracts. There is nothing in the language of the Bill that indicates an intention to alter rights and liabilities that have arisen before Royal Assent.

Schedule 6, Item 25

Item 25 of Schedule 6 has the effect that the amendments in Part 5 of Schedule 6 apply to contracts entered into before or after commencement.

The amendments in Part 5 relate to the power of the regulator, the Australian Securities and Investments Commission (ASIC) to bring actions under section 55A of the IC Act on behalf of third party beneficiaries. Currently, ASIC may only bring actions on behalf of insureds.

This does not alter substantive rights or obligations - rather it permits ASIC to bring civil actions in relation to actual and potential breaches of the IC Act. The only persons who might be detrimentally affected by the amendment are insurers, who would be subject to actions for breaches of the IC Act brought by ASIC in the public interest on behalf of third party beneficiaries, as well as insureds. The addition of third party beneficiaries to section 55A is in line with the policy intention of other amendments in relation to third parties.

Schedule 6, Item 36

Item 36 of Schedule 6 applies certain parts of Part 6 to life insurance contracts entered into before or after commencement. The amendments are in the nature of correcting drafting errors and making technical changes to a definition and do not affect substantive rights. It is desirable to apply them to existing contracts to minimise complexity. Their application to existing contracts does not impact detrimentally on any class of person.

The Committee thanks the Treasurer for this comprehensive response. The Committee **recommends and requests that the Treasurer** amends the explanatory memorandum to make explicit the Treasurer's advice that the bill is not intended to confer additional remedies becoming available to life insurers in current litigation and that the provision will only affect future rights and liabilities that arise from existing contracts.

National Health Amendment (Continence Aids Payment Scheme) Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Minister responded to the Committee's comments in a letter dated 21 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2010

Introduced into the House of Representatives on 12 May 2010
Portfolio: Health and Ageing

Background

This bill amends the *National Health Act 1953* that will provide the Minister with the legislative authority (via legislative instrument) to formulate the Continence Aids Payments Scheme (the CAP Scheme) which will replace the Continence Aids Assistance Scheme (CAA Scheme).

The CAP Scheme will provide payments to eligible persons towards the cost of purchasing products that help manage incontinence.

Strict liability
Schedule 1, item 13

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case, page 3 of the explanatory memorandum notes that strict liability applies to the offence for failing to provide requested information, but does not explain the reasons for this approach. The Committee therefore **seeks the Minister's advice** about the justification for making this an offence of strict liability and whether the principles in the *Guide* were taken into account.

> *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

Schedule 1 - Amendment a/the National Health Act 1953, Section 13 has been drafted in consideration of part 4.5 of the Guide to the Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (2007) and is compliant with the Criminal Code. I am advised that strict liability:

- may be appropriate where it is necessary to ensure the integrity of a regulatory regime for example, related to health;
- is considered appropriate for regulatory offences related to the provision of documentary information;
- may be appropriate where its application is necessary to protect the general revenue;
- may be appropriate where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention;
- should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties (in this case the penalty is 30 units); and
- may be appropriate where the offence is tempered by appropriate defences, ensuring the offence does not operate unduly harshly.

The objective of the strict liability offence for the CAP Scheme is to provide a coercive lever in the context of audit and scrutiny. The information likely to be gathered under these powers will relate to possible fraudulent activity, eligibility, contribution amounts payable and importantly, will encompass any third party commercial organisations that may be receiving funds on behalf of significant numbers of clients.

I consider that the inclusion of a strict liability offence in relation to the CAP Scheme strikes a balance between the rights, liberties and protection of the client, at the same time

as providing transparency on the expenditure of tax payers' funds. Further, an individual's right are protected by the provision of an exclusion clause, where the giving of information may be incriminating.

I am also pleased to advise that the Criminal Law and Law Enforcement Branch, and the Administrative Law Branch of the Attorney-General's Department have provided endorsement of the Bill. This includes the strict liability offence, which is not considered out of place in the broader *National Health Act* 1953 offences.

The Committee thanks the Minister for this response, which addresses its concerns. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

National Security Legislation Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Attorney-General responded to the Committee's comments in a letter dated 11 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.5 of 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Attorney-General

Background

This bill implements amendments to Australia's national security legislation. A process of public consultation took place and concluded in October 2009.
Many of the proposed reforms in this bill will implement the response to several independent and bipartisan parliamentary committee reviews of Australian national security and counter-terrorism legislation, which was tabled in Parliament on 23 December 2008. These reviews are:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008)
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007)
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006), and
- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).

The bill will primarily amend the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Charter of the United Nations Act 1945*, the *National Security Information (Criminal and Civil Proceedings) Act 2004*, and the *Inspector-General of Intelligence and Security Act 1986*.

Delegation of legislative power
Schedule 1, Part 1, item 15

Part 1 of Schedule 1 contains amendments relating to treason and sedition offences. The new treasons offence, inserted by item 15, depends upon the enemy being specified by Proclamation. The proposed new subsection 80.1AA(2) of the Criminal Code enables a Proclamation declaring an enemy to be an enemy at war with the Commonwealth to take effect from a day before the day on which it is registered under the *Legislative Instruments Act 2003*. (Such a Proclamation may not, however, take effect before the day it is made (subsection 80.1AA(2)).

The Committee acknowledges the fine considerations it is sometimes necessary to balance to maintain both the security of the community and the protection of personal rights and liberties. Therefore, whether or not this provision inappropriately delegates legislative power, by allowing part of the content of an offence to be set out in a Proclamation, is a question that the Committee **leaves to the consideration of the Senate as a whole**.

In relation to the process that will be applicable to a Proclamation (which is covered by the *Legislative Instruments Act 2003*) the Committee notes that the normal rule that legislative instruments do not become enforceable until registered does not apply. The explanatory memorandum at page 8 states that:

> In a national security emergency situation, where a decision is made to declare an enemy to be an enemy at war with the Commonwealth by a Proclamation…it may be desirable for the Proclamation to take effect immediately. This means that the act of assisting an enemy specified in a Proclamation could become an offence…from the time that the Proclamation is made, rather than the time that the Proclamation is registered, which can be several days after the Proclamation has been made.

The Committee understands the arguments outlined in the explanatory memorandum, but given the serious nature of this offence the Committee **seeks the Attorney-General's advice** about the justification for this approach and whether the legislation may provide for other mechanisms by which the public may be adequately notified of a Proclamation declaring an enemy to be an enemy at war with the Commonwealth, especially in the period after the Proclamation is made and before its registration under the *Legislative Instruments Act 2003* is finalised.

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

Relevant extract from the response from the Minister

Schedule 1 - Treason and Urging Violence

Delegation of Legislative Power

The Alert Digest notes that there are fine considerations to be made in balancing security of the community with the protection of personal rights and liberties. The Committee elected not to draw its own conclusions on whether or not proposed subsection 80.1 AA(2) of the *Criminal Code Act* 1995 (the Act) inappropriately delegates legislative power by allowing part of the content of the offence to be set out in a proclamation.

It is Commonwealth criminal law policy that the elements of an offence should be stated in the offence provision and not provided under another instrument, unless appropriate limitations apply. However, there are occasions when it is necessary to delegate some of the offence elements to secondary instruments. The only element that is delegated to a subordinate instrument in the relevant offence is that Australia is at war with the specified country. I consider the delegation of the particular element in the proposed offence at subsection 80.1AA(2) is appropriate and justified.

Proclamation

The Alert Digest notes that the Committee seeks my advice on the justification for a proclamation under proposed subsection 80.1AA(2) of the Act taking immediate effect in a national security emergency situation, rather than taking effect at the time it is registered under the Legislative Instruments Act 2003.

In the proposed offence, the requirement that the enemy with whom Australia is at war is the subject of a Proclamation ensures both sufficient scrutiny of the decision to declare that enemy and also ensures that the scope and effect of the offence is clear to the Government, the Parliament and those subject to the offence.

It is necessary and appropriate that the offence be contained in the Act. It is also appropriate for the specific enemy to be identified under a subordinate instrument. It would not be practicable for an amendment to the Act to be made within the necessarily short timeframe that Australia was at war with a specific enemy. It is impossible to predict whether electronic communications or other means of communications would be adversely impacted if Australia was at war. Accordingly, including the requirement that the offence did not commence operation until the Proclamation was published might defeat the intended operation of the offence. The offence contains an appropriate safeguard by requiring the Government to make an accountable decision that Australia is at war with the enemy specified in the Proclamation. This element of the offence serves as an additional safeguard as that element would have to be proved beyond reasonable doubt for a prosecution to be successful.

I also note that, under the existing legislation, a person cannot be prosecuted for treason or sedition unless that person assists an enemy who is *both* at war with the Commonwealth (whether or not war has been declared) *and* the enemy has been specified by Proclamation for the purposes of the relevant criminal offence (see paragraphs 80.1(1)(e) and 80.2(7)(c)). Accordingly, for a successful prosecution, it would be necessary to prove both

these matters beyond a reasonable doubt. While paragraphs 80.1(1)(e) and 80.2(7)(c) are proposed to be repealed, the latter completely, these requirements will still exist under proposed new section 80.1AA of the Act.

In addition, the content that is to be determined under the subordinate instrument is defined and circumscribed in the Act; that is, the country with which Australia is at war.

The Committee thanks the Attorney-General for this comprehensive response, but remains concerned about whether the public will be adequately notified of a Proclamation specifying an enemy to be an enemy at war with the Commonwealth, especially in the period after the Proclamation is made and before its registration under the *Legislative Instruments Act 2003* is finalised.

In the Committee's view the publication of a Proclamation should be contemporaneous with its commencement. In addition, the public should be informed not only of the making of a Proclamation, but also of its effect (giving rise to new criminal liability). In the Committee's view this need to be achieved by publishing the material aspects of the Proclamation and offence. The Committee does not accept that the reasons offered justify the general exclusion of a publication requirement. In view of its concern that this provision will trespass unduly on personal rights and liberties, the Committee **recommends and requests that the Attorney-General amends** the bill to address these concerns.

Reversal of onus of proof
Schedule 1, Part 1, proposed subsection 80.1AA(6)

The new subsection 80.1AA(6) makes it a defence of an offence of treason that the conduct is engaged in for the purposes of the provision of aid or humanitarian assistance. The explanatory memorandum does not state why it is appropriate that the defendant bear the onus of proof in relation to this aspect of the criminal offence. The *Guide to Framing Commonwealth Offences* indicates that any reversal needs to be well justified. The Committee therefore **seeks the Attorney-General's advice** about the justification for placing the evidentiary onus on the defendant in relation to this element of the offence.

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

Defence relating to Humanitarian Aid

The Alert Digest notes that the defendant bears the onus of proof in relation to whether conduct engaged in is for the purposes of the provision of aid or humanitarian assistance. You have requested my advice on the justification for placing the evidentiary onus on the defendant in relation to that element of the offence.

Existing section 80.1(1A) of the Act creates a defence where the conduct is for the provision of aid of a humanitarian nature. This defence is being retained and renumbered under the amended provisions to subsection 80.1AA(6) of the Act as a result of the relocation of the offence of 'materially assisting enemies'.

The prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. This is the case where assistance or humanitarian aid as contemplated by the defence is provided to an enemy at war with Australia.

This matter is peculiarly within the defendant's knowledge and not available to the prosecution. Accordingly, it is legitimate to cast the matter as a defence. Furthermore, the defence only provides that the defendant bears the standard 'evidential burden'. Accordingly, the defence is only required to adduce or point to evidence that suggests a reasonable possibility that the defence is made out (section 13.3 of the Act).

Once this is done the prosecution must refute the defence beyond reasonable doubt (section 13.1 of the Act). The defence does not impose a 'legal burden' defence, in which case it would be necessary for the defendant to establish the defence on the balance of probabilities. It was considered appropriate to create this defence in addition to the standard defences in Part 2.3 of the Act that apply to all Commonwealth criminal offences.

This is because those general defences may not adequately cover the conduct the subject of this specific defence. As recommended by Commonwealth criminal law policy, because the matter is intended to be a defence, it has been set out separately from the offence, in a separate subsection.

The Committee thanks the Attorney-General for this response, which addresses its concerns. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

Freedom of speech
Schedule 1, Part 2, item 35

Item 35, Part 2 of Schedule 1, introduces new offences of 'urging violence against groups' and 'members of groups' which are distinguished by national or ethnic origin. Although these offences obviously encroach upon freedom of speech, a right which is often said to be recognised as fundamental by the common law and which also is protected constitutionally in relation to speech which is thought to amount to 'political communication', the question of whether this is a proportionate and justified response, in light of the objectives of the amendments, is a question that the Committee **leaves to the consideration of the Senate as a whole**.

> *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

Freedom of Speech

The Alert Digest notes that the amendments to Item 35, Part 2 of Schedule I, as it relates to 'urging violence against groups' and 'members of groups', encroach upon freedom of speech. It leaves open the question of whether these limitations are proportionate and justified, in light of the broader objectives of the amendments.

The 'urging violence' offences are serious offences, which are directed at the urging of violence in circumstances where the person intends that force or violence will occur as a result of their urging.

The offences provide a good faith defence which quarantines genuine good faith speech from the scope of the offence. The new provision under the proposed expanded good faith defence will explicitly recognise the work of artists, academics and journalists and will ensure that legitimate expression is not captured under the offence.

The new provision under the proposed expanded good faith defence is dealt with as a defence to the offences because it is consistent with the way criminal law is drafted and will avoid complicating the newly drafted urging violence offences. However, the primary safeguard to free speech is the explicit requirement that, in order for a person to commit an offence, they must intentionally urge the use of force or violence, intending for that force or violence to occur.

The Committee thanks the Attorney-General for this additional information.

Possible insufficient parliamentary scrutiny
Schedule 2, item 3

Schedule 2, item 3 has the effect of increasing the period of effect of a regulation which lists a terrorist organisation from 2 to 3 years. Item 4 provides that this extended period applies to a listing of an organisation under the old provision where that listing was immediately in force before the commencement of the new law. The explanatory memorandum does not explain why it is necessary that the extended period should apply in relation to organisations listed under the old law. By extending the time period beyond 2 years this amendment has the effect of removing the parliamentary oversight at the time that it would have been expected when the regulation was originally adopted.

As there are significant offences connected to the activities of listed terrorist organisations, the Committee **seeks the Attorney-General's advice** about the justification for applying this amendment to listings made before the commencement of this item.

> *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

Schedule 21 Item 3 - Listing of terrorist organisations under the Criminal Code

The Alert Digest notes that the proposed amendment to extend the period of operation of listing regulations from 2 years to 3 years will apply retrospectively to regulations that are in force immediately before the commencement of the new law. The Committee has indicated that this has the effect of removing the parliamentary oversight at the time that it would have been expected when the regulation was originally adopted.

Organisations that are listed as terrorist organisations by regulations under the Act are monitored by the Australian Security Intelligence Organisation (ASIO) throughout the period that the regulations remain in force. Should there be any developments or a change in circumstances that might affect whether or not an organisation continues to meet the

legislative test for listing as a terrorist organisation under the Act, these developments are brought to the attention of the Attorney-General. Subsection 102.1 (4) of the Act specifically provides that, should the Attorney-General cease to be satisfied that an organisation continues to meet the legislative test for listing as a terrorist organisation, that organisation must be delisted. In light of this continuous monitoring of organisations that are listed as terrorist organisations, I am confident that extending the period of operation of listing regulations from 2 years to 3 years will still afford an appropriate level of Parliamentary scrutiny to these regulations.

The Committee thanks the Attorney-General for this response.

Trespass on personal rights and liberties
Schedule 3

Part 1C of the Crimes Act sets out the investigation powers of law enforcement officers when a person has been arrested for a Commonwealth offence. As the explanatory memorandum states (at page 20), Part 1C was amended in 2004 by the Anti-Terrorism Act 2004 and:

> …the purpose of the amendments was to provide for a longer investigation period for investigations of terrorism offences and provide for additional types of time which were excluded from the investigation period.

Deficiencies in the provisions in Part 1C were considered as part of the Clarke Inquiry into the Case of Dr Mohamed Haneef (November 2008) and Schedule 3 will amend Part 1C in response to the findings of the Clarke Report (see explanatory memorandum page 20).

It is an inherent aspect of many of these provisions that they trespass on personal rights and liberties. The Committee acknowledges, however, that these amendments are intended to 'clarify and improve the practical operation' (explanatory memorandum page 1) of the existing law in 'direct response to the issues raised in the Clarke inquiry' (Minister's second reading speech). The Committee draws these provisions to the attention of the Senate and notes that they trespass on personal rights and liberties, but leaves the question of whether they do so unduly to the **consideration of 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.*

Relevant extract from the response from the Minister

Schedule 3 - Investigation of Commonwealth offences

Part 1C of the *Crimes Act 1914* provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer. These safeguards include the right for a suspect to have a lawyer present during questioning and the right to be treated with humanity and respect for human dignity.

The provisions in Part IC were considered by the Hon John Clarke QC, who I appointed to conduct an independent inquiry into the case of Dr Mohamed Haneef. Mr Clarke produced a Report on his inquiry. One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part IC of the Crimes Act. Schedule 3 of the Bill will amend Part 1C in response to the findings in the Clarke Report. The amendments will improve the practical operation of Part IC and enhance existing safeguards.

The Committee thanks the Attorney-General for this additional information.

Trespass on personal rights and liberties
Schedule 4, item 4

Item 4 of Schedule 4 inserts a new section 3UEA into the *Crimes Act 1914*. The new provision will enable a police officer to enter premises (and conduct related searches and to seize relevant things) without a warrant if the police officer suspects, on reasonable grounds, that it is necessary in order to prevent something on the premises from being used in connection with a terrorism offence and that there is a serious and imminent threat to a person's life, health or safety. Under the proposed subsection 3UEA(7) the occupier of the premises must be notified that entry has taken place if they are not there. However, there is no requirement that senior executive authorisation be required nor that the exercises of these powers be supervised by general reporting requirements to the Parliament.

The Committee again acknowledges the fine considerations it is sometimes necessary to balance to maintain both the security of the community and the protection of personal rights and liberties. However, given the scope and importance of the proposed powers, the Committee is concerned to ensure that an appropriate balance is struck. The Committee therefore **seeks the Attorney-General's advice** about the whether the emergency situations envisaged are inconsistent with alternative forms of accountability such as requiring senior executive authorisation or that the exercises of these powers be supervised by general reporting requirements to the Parliament.

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

Schedule 4 - Powers to search premises in relation to terrorism offences

Item 4

Schedule 4 of the Bill will amend the Crimes Act to include a new power for police to enter premises without a warrant in emergency circumstances. The Committee asks for advice about whether the emergency situations envisaged are inconsistent with alternative forms of accountability such as requiring senior executive authorisation or that the exercises of these powers be supervised by general reporting requirements to the Parliament.

The proposed power is narrowly constrained so that it can only be used where the police officer suspects on reasonable grounds that:

- it is necessary to prevent a thing that is on the premises from being used in connection with a terrorism offence and

- it is necessary to exercise this power without the authority of a warrant because there is a serious and imminent threat to a person's life, health or safety.

For example, the proposed amendment will provide police with clear authority to take immediate action where a member of the public alerts the police to a terrorist threat such as the presence of an explosive device in a building. Without the ability to take such action in a scenario such as this, there is the risk that lives could be lost or property destroyed. The powers available under the proposed amendments will be limited to searching and seizing a particular thing in emergency circumstances. They cannot be used for general evidence

gathering. If, in the course of their search, police find evidence relevant to an offence, they must secure the premises and obtain a search warrant to be able to seize that evidence.

Given the imminent threat, it would be impractical to seek senior executive authorisation prior to the officer entering the premises.

There are also sufficient mechanisms in place to ensure accountability which would limit the utility of reporting to Parliament on the use of this power. The power cannot be exercised covertly and a seizure notice is required to be given to the owner of anything that is taken from the premises. The use of the power will be scrutinised by the courts if criminal proceedings are initiated.

Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will review the use or purported use of this provision in accordance with its functions.

The Committee thanks the Attorney-General for this response, which identifies avenues of complaint available to a person concerned about the exercise of these powers. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

Trespass on personal rights and liberties
Schedule 8, items 36, 37, 79 and 80

These items relate to the ability of the Attorney-General to issue a certificate that constitutes conclusive evidence that disclosure of particular information in a proceeding is likely to prejudice national security. The proposed provisions will amend the Attorney-General's existing ability to issue a conclusive certificate contained in section 27 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The explanatory memorandum states at page 68 that the proposed amendments are 'consequential to the proposed repeal and replacement of the definition of 'federal criminal proceedings' within section 14 (Item 11)'. A court will retain its existing ability to determine whether the material the subject of the conclusive certificate is able to be disclosed (section 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Items 79 and 80 contain consequential amendments proposed to the existing power granted to the Attorney-General under section 38H of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to give a certificate preventing a person from calling a witness in a proceeding who will disclose national security information by his or her mere presence. The explanatory memorandum states at page 75 that these amendments are consequential 'as a result of proposed amendments to section 38D which will extend the notification obligations to parties' legal representatives as well as to the parties themselves (item 67)'.

It is again an inherent aspect of these provisions that they trespass on personal rights and liberties. However, the Committee notes that the purpose of the amendments is to make consequential changes to existing provisions. The Committee draws these provisions to the attention of the Senate and notes that they trespass on personal rights and liberties, but leaves the question of whether they do so unduly to the **consideration of 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.*

Relevant extract from the response from the Minister

Schedule 8 - Amendments relating to the disclosure of national security information in criminal and civil proceedings

Items 36, 37, 79 and 80

If the Attorney-General is notified of an expected disclosure of information which relates to or may affect national security, the Attorney-General may issue a criminal non-disclosure certificate in a federal criminal proceeding under section 26 of the *National Security Information (Criminal and Civil Proceedings Act 2004* (the NSI Act) if satisfied that disclosure of the information would be likely to prejudice national security. Under section 27, once a criminal non-disclosure certificate is given in a federal criminal proceeding, a closed court hearing takes place to determine whether it will maintain, modify or remove the restriction on disclosure of information. The Attorney-General's certificate is conclusive evidence that disclosure of the information in the proceeding is likely to prejudice national security, but *only* until the closed court hearing takes place. Items 36 and 37 are consequential amendments to section 27 as a result of the proposed amendment to the definition of federal criminal proceedings so that it docs not include extradition proceedings.

Proposed new section 38H of the NSI Act provides the Attorney-General with the power to issue a witness exclusion certificate in a civil proceeding if he or she has been notified by a party or expects that a person whom a party intends to call as a witness may disclose information by his or her mere presence and the disclosure would be likely to prejudice national security. Items 79 and 80 are consequential to other amendments in the Bill to reflect the fact that the legal representative of a party (as well as a party) could also notify the Attorney-General of the potential disclosure.

The Committee thanks the Attorney-General for this additional information.

Inappropriately delegate legislative power
Schedule 8, items 103 and 107

Items 103 and 107 of Schedule 8 insert two new offences into part 5 of the *National Security Information Act*: the proposed sections 45A and 46FA. These offences will make it an offence to contravene the NSI regulations (made under sections 23 and 38C) in civil and criminal proceedings.

The explanatory memorandum justifies a penalty of 6 months imprisonment—despite the fact that substantial components of the offences are contained in the Regulations—by reference to the serious consequences which may be consequent on failures to comply with requirements relating to the storage, handling and destruction of national security information in civil and criminal proceedings. The explanatory memorandum adds (at page 79) 'without a sufficient penalty the offence will not act as a sufficient deterrent against failing to comply with the requirements of the Regulations.'

Nevertheless, the explanatory memorandum (at pages 63 and 72) does not explain why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information. Given that failure to comply with the Regulations is an offence which carries with it a penalty of imprisonment the Committee **seeks the Attorney-General's advice** about the justification for the proposed approach.

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

Relevant extract from the response from the Minister

Schedule 8 - Amendments relating to the disclosure of national security information in criminal and civil proceedings

Items 103 and 107

Items 103 and 107 will create new offences to contravene the National Security Information Act (Criminal and Civil Proceedings) Regulations (the Regulations). The Regulations incorporate the Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings (the Requirements), which specify how and where national security information must be accessed, stored and otherwise handled and address a range of physical security matters. The penalty for the proposed new offences will be 6 months imprisonment. The Committee asks why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information.

The consequences of failing to comply with the requirements in the Regulations are serious, and accordingly should attract a criminal sanction. Given the detailed nature of the requirements, it would be impractical to include their content in specific offence provisions in the Act. Further more, the proposed new offences are consistent with existing offences in the Act for contravening a court order (see sections 45 and 46F).

At any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of national security information in the proceeding. The court has a broad discretion under subsection 22(2) of the NSI Act to make orders it considers appropriate to give effect to the arrangement. When a section 22 arrangement is in place, the requirements set out in the Regulations and Requirements do not apply. Section 22 arrangements have become common practice in most cases, particularly where parties are willing to negotiate to protect the information appropriately.

The Committee thanks the Attorney-General for this response and notes the reasons for the proposed approach and the availability of section 22 arrangements.

Senator the Hon Helen Coonan
Chair

21 JUN 2010

Senator the Hon John Faulkner
Minister for Defence

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

Dear Senator Coonan Helen,

Thank you for the letter of 13 May 2010 on behalf of the Standing Committee for the Scrutiny of Bills concerning the Defence Legislation Amendment Bill (No.1) 2010 (the Bill) and for drawing my attention to the matters raised in the Scrutiny of Bills Committee's Alert Digest No.5 of 2010 (12 May 2010).

In relation to Schedule 1 of the Bill, the Committee has sought my advice on why the Honours and Awards Appeal Tribunal will not be reviewing decisions or service prior to the specified date of 3 September 1939 and whether there may be a detrimental effect to any person.

Defence honours and awards are awarded to a person in recognition of their Defence service. The definition of a reviewable decision excluded decisions made before 3 September 1939 or decisions that relate to service rendered before 3 September 1939 to align with the period for which there are living persons who have rendered Defence service and may wish to seek review of a decision concerning their eligibility for Defence honours and awards. It is known that there are living veterans who served in World War II who may possibly seek a review of their eligibility for a Defence honour or award. However, there are no surviving veterans of World War I. Therefore, excluding decisions or decisions prior to this date is regarded as an appropriate limit to the scope of the tribunal's work.

If there are organisations and interested persons who believe that someone who served before 3 September 1939 should have been awarded a Defence honour or that an award or a decision that was made in relation to recognition before 3 September 1939 should be reconsidered, then they can raise the matter with the Australian Government. The Government may then refer the matter to the Defence Honours and Awards Appeals Tribunal.

In relation to Schedule 2 of the Bill, the Committee is concerned about the delegation of the powers of the Chiefs of Army, Navy and Air Force to a relatively large class of persons (Lieutenant Colonel equivalent or Executive Level 1 equivalent). 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 has sought my advice in relation to the need for a wide delegation.

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In this regard, current legislation requires that a notice of a positive test result is to be issued by a one star officer or above (i.e. Senior Executive Service equivalent). Administratively, this can create an undesirable delay in the issuing of a notice and final resolution of the member's situation. There is a finite number of one star officers available to perform the function and very few are in regional/remote areas and Commanding Officers are not necessarily one star rank or above. The delegations need to be more broadly available so that existing command structures (i.e. a member's Commanding Officer) and resources can be used more effectively. Commanding Officers are closest to the member randomly selected for testing and best placed to issue the notice of positive test result.

The proposed delegated powers for the termination of a member for using a prohibited substance will be in line with other personnel delegation provisions contained in the *Defence (Personnel) Regulations 2002* in relation to terminations. Guidance will be provided in the relevant Defence policy documents clarifying how these delegations are to be exercised. The delegations will specify the rank level for the officers who hold the delegations to initiate a notice and those who exercise the termination delegation. The initiator is to be at least one rank higher than the individual who has tested positive, and the termination delegate is to be equal to or superior in rank to the initiator.

Personnel exercising delegations are generally career military or Defence Australian Public Service personnel with extensive command/supervisory experience. Termination delegations are generally held centrally within the career management agencies, whose members are trained in complex career management issues including the exercising of the associated delegations (including terminations).

The Prohibited Substance Testing Program is subject to regular scrutiny/review. Monthly reports are forwarded to the Secretary of Defence, the Chief of the Defence Force and the Service Chiefs, and quarterly reports are forwarded to the Minister for Defence Personnel.

I trust this information will be of assistance in the Committee's consideration of the Bill.

Yours sincerely

JOHN FAULKNER

Senator Chris Evans
Leader of the Government in the Senate
Minister for Immigration and Citizenship

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

Dear Senator Helen

Thank you for your letter of 13 May 2010 concerning the comments of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Immigration (Education) Amendment Bill 2010 (the Bill) in the *Alert Digest No. 5 of 2010* (12 May 2010). I am writing in response to the request for advice about the reason for the proposed commencement date.

Delayed Commencement – Clause 2

The Committee noted that the commencement date as set out in clause 2 of the Bill, 1 January 2011, will be longer than six months if the Bill is passed during the Winter 2010 parliamentary sittings. The Committee has further noted that no explanation for this delay is provided in the Explanatory Memorandum in accordance with paragraph 19 of Drafting Direction No 1.3.

My Department is currently undertaking a tender process for the Adult Migrant English Program (AMEP), with new contracts incorporating the new AMEP Business Model scheduled to commence on 1 January 2011. The commencement date of the Bill is scheduled to align with the proposed commencement of the new contracts, to ensure that the new AMEP Business Model will be implemented in its entirety on the same day.

I do not believe that the delay trespasses unduly on personal rights and liberties as clients will continue to receive English language tuition under the current *Immigration (Education) Act 1971* until the Amendment Act commences. The Department will undertake an information campaign to inform clients and the public of the changes to the legislation prior to the commencement of the Amendment Act, to ensure it is clear when the legislation will apply.

Incorporation of material by reference – Schedule 1, item 13

The Committee noted that item 13 of Schedule 1 to the Bill allows the Minister, by legislative instrument, to specify procedures or standards for the purposes of the definition of 'functional English'. The legislative instrument may incorporate any matter contained in any other instrument or writing as in force at a particular time, or from time to time.

I note that the Committee is satisfied that the reason for the incorporation of material by reference is clearly outlined in the explanatory memorandum.

I trust the information provided is helpful to the Committee.

Yours sincerely

CHRIS EVANS

15.6.10.

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

18 JUN 2010

Ms Toni Dawes
Committee Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your letter of 13 May 2010 to the Treasury concerning the Insurance Contracts Amendment Bill 2010 (the Bill). As I am the Minister responsible for this Bill, I have been asked to respond.

Alert Digest 5/10 noted a possible retrospective effect of some provisions of the Bill. The Committee sought advice about whether this was intentional, and whether this may have a detrimental impact on any person.

Schedule 5, Item 1

This provision requires life insurance contracts that contain more than one kind of insurance (so called 'bundled' contracts), for example, total and permanent disability cover and death cover, to be notionally 'unbundled' when applying the other provisions in the Division regarding remedies for non-disclosure and misrepresentation. It is expressed to apply to contracts entered into before or after commencement.

The reason for the proposed application is so that holders of existing contracts will receive the benefits of unbundling. The main impact of unbundling is that, if an insured person has misrepresented or not disclosed a matter in breach of their duty of disclosure, which would entitle an insurer to a remedy, the remedy will only apply to the kind(s) of cover to which the non-disclosure or misrepresentation relates. Kinds of cover in relation to which the non-disclosure or misrepresentation is irrelevant will no longer be subject to any remedy. This contrasts with the existing position, where if a remedy for non-disclosure or misrepresentation is imposed, it affects all kinds of cover in a bundled contract.

In such a case, an insured would not be affected detrimentally. The only impact would be that the remedy would be lesser in scope than would otherwise apply. The insurer would not be entitled to a remedy affecting the entire contract, which is a lesser remedy than they are currently entitled to. However, the peak life insurer representative body supports the proposed operation of the unbundling provision to existing contracts. The life insurers want to be able to target only the kinds of cover that are affected by a breach and leave the remaining cover unaffected, rather than have to take action against an insured that would potentially jeopardise the entire contract.

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The application of the unbundling clause, of itself, does not result in any new/changed remedies being applied to existing contracts. The new remedies have their own application provisions that do not apply to existing contracts. Remedies applicable in the case of a pre-commencement contract will still be pre-commencement remedies. However, they would be applied to each kind of cover as if they were a separate contract.

A further possible issue regarding the application of section 27A is how it affects cases already subject to pending litigation. Treasury has obtained legal advice on concerns surrounding how the amendment would be interpreted in such a case, and does not consider that the unbundling will result in additional remedies becoming available to life insurers under subsection 29(3) in cases subject to pending litigation. The provision will commence on Royal Assent and only affects future rights and liabilities that arise from existing contracts. There is nothing in the language of the Bill that indicates an intention to alter rights and liabilities that have arisen before Royal Assent.

Schedule 6, Item 25

Item 25 of Schedule 6 has the effect that the amendments in Part 5 of Schedule 6 apply to contracts entered into before or after commencement.

The amendments in Part 5 relate to the power of the regulator, the Australian Securities and Investments Commission (ASIC) to bring actions under section 55A of the IC Act on behalf of third party beneficiaries. Currently, ASIC may only bring actions on behalf of insureds.

This does not alter substantive rights or obligations – rather it permits ASIC to bring civil actions in relation to actual and potential breaches of the IC Act. The only persons who might be detrimentally affected by the amendment are insurers, who would be subject to actions for breaches of the IC Act brought by ASIC in the public interest on behalf of third party beneficiaries, as well as insureds. The addition of third party beneficiaries to section 55A is in line with the policy intention of other amendments in relation to third parties.

Schedule 6, Item 36

Item 36 of Schedule 6 applies certain parts of Part 6 to life insurance contracts entered into before or after commencement. The amendments are in the nature of correcting drafting errors and making technical changes to a definition and do not affect substantive rights. It is desirable to apply them to existing contracts to minimise complexity. Their application to existing contracts does not impact detrimentally on any class of person.

I trust this information will be of assistance to you.

Yours sincerely

CHRIS BOWEN

THE HON JUSTINE ELLIOT MP
MINISTER FOR AGEING

RECEIVED
22 JUN 2010
Senate Standing C'ttee for the Scrutiny of Bills

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

Dear Senator Helen

Thank you for your letter of 16 June 2010 regarding *Alert Digest No. 6 of 2010*, concerning the National Health Amendment (Continence Aids Payment Scheme) Bill 2010.

I note the *Alert Digest* seeks justification for the inclusion of an offence of strict liability for the Continence Aids Payment (CAP) Scheme, and confirmation of compliance with part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers (2007).*

Schedule 1 – Amendment of the National Health Act 1953, Section 13 has been drafted in consideration of part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers (2007)* and is compliant with the *Criminal Code.* I am advised that strict liability:

- may be appropriate where it is necessary to ensure the integrity of a regulatory regime for example, related to health;
- is considered appropriate for regulatory offences related to the provision of documentary information;
- may be appropriate where its application is necessary to protect the general revenue;
- may be appropriate where there are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention;
- should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties (in this case the penalty is 30 units); and
- may be appropriate where the offence is tempered by appropriate defences, ensuring the offence does not operate unduly harshly.

The objective of the strict liability offence for the CAP Scheme is to provide a coercive lever in the context of audit and scrutiny. The information likely to be gathered under these powers will relate to possible fraudulent activity, eligibility, contribution amounts payable and importantly, will encompass any third party commercial organisations that may be receiving funds on behalf of significant numbers of clients.

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I consider that the inclusion of a strict liability offence in relation to the CAP Scheme strikes a balance between the rights, liberties and protection of the client, at the same time as providing transparency on the expenditure of tax payers' funds. Further, an individual's right are protected by the provision of an exclusion clause, where the giving of information may be incriminating.

I am also pleased to advise that the Criminal Law and Law Enforcement Branch, and the Administrative Law Branch of the Attorney-General's Department have provided endorsement of the Bill. This includes the strict liability offence, which is not considered out of place in the broader *National Health Act 1953* offences.

Yours sincerely

JUSTINE ELLIOT

21 JUN 2010

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

10/925, MC10/7479

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

11 JUN 2010

Dear Senator Coonan

I refer to the Committee Secretary's letter dated 13 May 2010 to my office about the National Security Legislation Amendment Bill 2010 (the Bill). In her letter, the Committee Secretary requested my advice on several issues in the Bill identified in the Scrutiny of Bills Committee's *Alert Digest No. 5 of 2010* (12 May 2010).

Schedule 1 – Treason and Urging Violence

Delegation of Legislative Power

The Alert Digest notes that there are fine considerations to be made in balancing security of the community with the protection of personal rights and liberties. The Committee elected not to draw its own conclusions on whether or not proposed subsection 80.1AA(2) of the *Criminal Code Act 1995* (the Act) inappropriately delegates legislative power by allowing part of the content of the offence to be set out in a proclamation.

It is Commonwealth criminal law policy that the elements of an offence should be stated in the offence provision and not provided under another instrument, unless appropriate limitations apply. However, there are occasions when it is necessary to delegate some of the offence elements to secondary instruments. The only element that is delegated to a subordinate instrument in the relevant offence is that Australia is at war with the specified country. I consider the delegation of the particular element in the proposed offence at subsection 80.1AA(2) is appropriate and justified.

Proclamation

The Alert Digest notes that the Committee seeks my advice on the justification for a proclamation under proposed subsection 80.1AA(2) of the Act taking immediate effect in a national security emergency situation, rather than taking effect at the time it is registered under the *Legislative Instruments Act 2003*.

In the proposed offence, the requirement that the enemy with whom Australia is at war is the subject of a Proclamation ensures both sufficient scrutiny of the decision to declare that enemy and also ensures that the scope and effect of the offence is clear to the Government, the Parliament and those subject to the offence.

It is necessary and appropriate that the offence be contained in the Act. It is also appropriate for the specific enemy to be identified under a subordinate instrument. It would not be practicable for an amendment to the Act to be made within the necessarily short timeframe that Australia was at war with a specific enemy. It is impossible to predict whether electronic communications or other means of communications would be adversely impacted if Australia was at war. Accordingly, including the requirement that the offence did not commence operation until the Proclamation was published might defeat the intended operation of the offence. The offence contains an appropriate safeguard by requiring the Government to make an accountable decision that Australia is at war with the enemy specified in the Proclamation. This element of the offence serves as an additional safeguard as that element would have to be proved beyond reasonable doubt for a prosecution to be successful.

I also note that, under the existing legislation, a person cannot be prosecuted for treason or sedition unless that person assists an enemy who is *both* at war with the Commonwealth (whether or not war has been declared) *and* the enemy has been specified by Proclamation for the purposes of the relevant criminal offence (see paragraphs 80.1(1)(e) and 80.2(7)(c)). Accordingly, for a successful prosecution, it would be necessary to prove both these matters beyond a reasonable doubt. While paragraphs 80.1(1)(e) and 80.2(7)(c) are proposed to be repealed, the latter completely, these requirements will still exist under proposed new section 80.1AA of the Act.

In addition, the content that is to be determined under the subordinate instrument is defined and circumscribed in the Act; that is, the country with which Australia is at war.

Defence relating to Humanitarian Aid

The Alert Digest notes that the defendant bears the onus of proof in relation to whether conduct engaged in is for the purposes of the provision of aid or humanitarian assistance. You have requested my advice on the justification for placing the evidentiary onus on the defendant in relation to that element of the offence.

Existing section 80.1(1A) of the Act creates a defence where the conduct is for the provision of aid of a humanitarian nature. This defence is being retained and renumbered under the amended provisions to subsection 80.1AA(6) of the Act as a result of the relocation of the offence of 'materially assisting enemies'.

The prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. This is the case where assistance or humanitarian aid as contemplated by the defence is provided to an enemy at war with Australia.

This matter is peculiarly within the defendant's knowledge and not available to the prosecution. Accordingly, it is legitimate to cast the matter as a defence. Furthermore, the defence only provides that the defendant bears the standard 'evidential burden'. Accordingly,

the defence is only required to adduce or point to evidence that suggests a reasonable possibility that the defence is made out (section 13.3 of the Act).

Once this is done the prosecution must refute the defence beyond reasonable doubt (section 13.1 of the Act). The defence does not impose a 'legal burden' defence, in which case it would be necessary for the defendant to establish the defence on the balance of probabilities. It was considered appropriate to create this defence in addition to the standard defences in Part 2.3 of the Act that apply to all Commonwealth criminal offences.

This is because those general defences may not adequately cover the conduct the subject of this specific defence. As recommended by Commonwealth criminal law policy, because the matter is intended to be a defence, it has been set out separately from the offence, in a separate subsection.

Freedom of Speech

The Alert Digest notes that the amendments to Item 35, Part 2 of Schedule 1, as it relates to 'urging violence against groups' and 'members of groups', encroach upon freedom of speech. It leaves open the question of whether these limitations are proportionate and justified, in light of the broader objectives of the amendments.

The 'urging violence' offences are serious offences, which are directed at the urging of violence in circumstances where the person intends that force or violence will occur as a result of their urging.

The offences provide a good faith defence which quarantines genuine good faith speech from the scope of the offence. The new provision under the proposed expanded good faith defence will explicitly recognise the work of artists, academics and journalists and will ensure that legitimate expression is not captured under the offence.

The new provision under the proposed expanded good faith defence is dealt with as a defence to the offences because it is consistent with the way criminal law is drafted and will avoid complicating the newly drafted urging violence offences. However, the primary safeguard to free speech is the explicit requirement that, in order for a person to commit an offence, they must intentionally urge the use of force or violence, *intending* for that force or violence to occur.

Schedule 2, Item 3 – Listing of terrorist organisations under the Criminal Code

The Alert Digest notes that the proposed amendment to extend the period of operation of listing regulations from 2 years to 3 years will apply retrospectively to regulations that are in force immediately before the commencement of the new law. The Committee has indicated that this has the effect of removing the parliamentary oversight at the time that it would have been expected when the regulation was originally adopted.

Organisations that are listed as terrorist organisations by regulations under the Act are monitored by the Australian Security Intelligence Organisation (ASIO) throughout the period that the regulations remain in force. Should there be any developments or a change in circumstances that might affect whether or not an organisation continues to meet the legislative test for listing as a terrorist organisation under the Act, these developments are brought to the attention of the Attorney-General. Subsection 102.1(4) of the Act specifically provides that, should the Attorney-General cease to be satisfied that an organisation continues

to meet the legislative test for listing as a terrorist organisation, that organisation must be de-listed. In light of this continuous monitoring of organisations that are listed as terrorist organisations, I am confident that extending the period of operation of listing regulations from 2 years to 3 years will still afford an appropriate level of Parliamentary scrutiny to these regulations.

Schedule 3 – Investigation of Commonwealth offences

Part 1C of the *Crimes Act 1914* provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer. These safeguards include the right for a suspect to have a lawyer present during questioning and the right to be treated with humanity and respect for human dignity.

The provisions in Part 1C were considered by the Hon John Clarke QC, who I appointed to conduct an independent inquiry into the case of Dr Mohamed Haneef. Mr Clarke produced a Report on his inquiry. One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part 1C of the Crimes Act. Schedule 3 of the Bill will amend Part 1C in response to the findings in the Clarke Report. The amendments will improve the practical operation of Part 1C and enhance existing safeguards.

Schedule 4 – Powers to search premises in relation to terrorism offences

Item 4

Schedule 4 of the Bill will amend the Crimes Act to include a new power for police to enter premises without a warrant in emergency circumstances. The Committee asks for advice about whether the emergency situations envisaged are inconsistent with alternative forms of accountability such as requiring senior executive authorisation or that the exercises of these powers be supervised by general reporting requirements to the Parliament.

The proposed power is narrowly constrained so that it can only be used where the police officer suspects on reasonable grounds that:

- it is necessary to prevent a thing that is on the premises from being used in connection with a terrorism offence and

- it is necessary to exercise this power without the authority of a warrant because there is a serious and imminent threat to a person's life, health or safety.

For example, the proposed amendment will provide police with clear authority to take immediate action where a member of the public alerts the police to a terrorist threat such as the presence of an explosive device in a building. Without the ability to take such action in a scenario such as this, there is the risk that lives could be lost or property destroyed. The powers available under the proposed amendments will be limited to searching and seizing a particular thing in emergency circumstances. They cannot be used for general evidence gathering. If, in the course of their search, police find evidence relevant to an offence, they must secure the premises and obtain a search warrant to be able to seize that evidence.

Given the imminent threat, it would be impractical to seek senior executive authorisation prior to the officer entering the premises.

There are also sufficient mechanisms in place to ensure accountability which would limit the utility of reporting to Parliament on the use of this power. The power cannot be exercised covertly and a seizure notice is required to be given to the owner of anything that is taken from the premises. The use of the power will be scrutinised by the courts if criminal proceedings are initiated.

Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will review the use or purported use of this provision in accordance with its functions.

Schedule 8 – Amendments relating to the disclosure of national security information in criminal and civil proceedings

Items 36, 37, 79 and 80

If the Attorney-General is notified of an expected disclosure of information which relates to or may affect national security, the Attorney-General may issue a criminal non-disclosure certificate in a federal criminal proceeding under section 26 of the *National Security Information (Criminal and Civil Proceedings Act 2004* (the NSI Act) if satisfied that disclosure of the information would be likely to prejudice national security. Under section 27, once a criminal non-disclosure certificate is given in a federal criminal proceeding, a closed court hearing takes place to determine whether it will maintain, modify or remove the restriction on disclosure of information. The Attorney-General's certificate is conclusive evidence that disclosure of the information in the proceeding is likely to prejudice national security, but *only* until the closed court hearing takes place. Items 36 and 37 are consequential amendments to section 27 as a result of the proposed amendment to the definition of federal criminal proceedings so that it does not include extradition proceedings.

Proposed new section 38H of the NSI Act provides the Attorney-General with the power to issue a witness exclusion certificate in a civil proceeding if he or she has been notified by a party or expects that a person whom a party intends to call as a witness may disclose information by his or her mere presence and the disclosure would be likely to prejudice national security. Items 79 and 80 are consequential to other amendments in the Bill to reflect the fact that the legal representative of a party (as well as a party) could also notify the Attorney-General of the potential disclosure.

Items 103 and 107

Items 103 and 107 will create new offences to contravene the *National Security Information Act (Criminal and Civil Proceedings) Regulations* (the Regulations). The Regulations incorporate the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* (the Requirements), which specify how and where national security information must be accessed, stored and otherwise handled and address a range of physical security matters. The penalty for the proposed new offences will

be 6 months imprisonment. The Committee asks why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information.

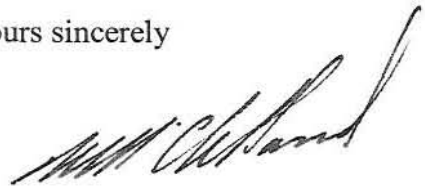
The consequences of failing to comply with the requirements in the Regulations are serious, and accordingly should attract a criminal sanction. Given the detailed nature of the requirements, it would be impractical to include their content in specific offence provisions in the Act. Furthermore, the proposed new offences are consistent with existing offences in the Act for contravening a court order (see sections 45 and 46F).

At any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of national security information in the proceeding. The court has a broad discretion under subsection 22(2) of the NSI Act to make orders it considers appropriate to give effect to the arrangement. When a section 22 arrangement is in place, the requirements set out in the Regulations and Requirements do not apply. Section 22 arrangements have become common practice in most cases, particularly where parties are willing to negotiate to protect the information appropriately.

I trust this information is of assistance.

The action officer for this matter in my Department is Annette Willing who can be contacted on 02 6141 2915.

Yours sincerely



Robert McClelland