Senate Standing Committee for the Scrutiny of Bills

No. 9 of 2007

13 August 2007

Senate Standing Committee

for the

Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator R Ray (Chair)
Senator J Adams (Deputy Chair)
Senator G Barnett
Senator A McEwen
Senator A Murray
Senator S Parry

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.

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Commentary on bills

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008

Introduced into the House of Representatives on 7 August 2007
Portfolio: Finance and Administration

Background

This bill appropriates an additional $502 million from the Consolidated Revenue Fund to implement the first stage of emergency measures aimed at protecting Aboriginal children in the Northern Territory. The bill includes:

- $22.5 million for the Attorney-General's Department for the Australian Crime Commission to gather intelligence and analyse Indigenous child abuse in Australia, for the deployment of Australian Federal Police in the Northern Territory, and to fund additional legal services and Night Patrol Programmes;
- $15.5 million for the Department of Defence for logistics support;
- $33.6 million for the Department of Education, Science and Training to provide additional classrooms, strengthen curriculum offerings and deliver a breakfast and lunch program to school-aged children in schools in the targeted communities;
- $115.5 million for the Department of Employment and Workplace Relations to implement a range of employment and welfare reform measures. This includes $24.21 million to Indigenous Business Australia for investment and community initiatives, such as expanding the network of Outback Stores and supporting existing community stores;
- $212.3 million for the Department of Families, Community Services and Indigenous Affairs to implement a wide range of measures in support of the Government's Northern Territory Emergency Response;
- $82.9 million for the Department of Health and Ageing for the introduction of health checks for Aboriginal children in each community targeted under the measure; and

- $18.8 million for the Department of Human Services, including $10.1 million to Centrelink to fund activities to support the implementation of changes to welfare payments.

Legislative Instruments Act—declarations
Subclause 9(10)

Subclause 9(10) of this bill provides that a request made by a Minister or Chief Executive to the Finance Minister under either subclause 9(1) or 9(2) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that there is no explanatory memorandum to the bill. As such, while it appears that this provision is no more than declaratory of the law it is impossible to be sure. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.*

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008

Introduced into the House of Representatives on 7 August 2007
Portfolio: Finance and Administration

Background

This bill appropriates an additional $85.3 million from the Consolidated Revenue Fund to meet expenses in relation to grants to the Northern Territory and capital funding to support the implementation of the Northern Territory Emergency Response. The major components of the bill include:

- $48.8 million for the Department of Families, Community Services and Indigenous Affairs for grants for the employment of child protection workers and for the provision of safe places for families escaping domestic violence. This includes an equity injection of $34.3 million to address the short term accommodation requirements of staff involved in the response;
- $17.7 million in capital funding for Indigenous Business Australia to support measures such as the expansion of Outback Stores; and
- $14.3 million in capital funding for Centrelink to enhance its IT and service delivery capacity to support the implementation of changes to welfare payments.

Legislative Instruments Act—declarations
Subclause 11(10)

Subclause 11(10) of this bill provides that a request made by a Minister or Chief Executive to the Finance Minister under either subclause 11(1) or 11(2) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where

the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that there is no explanatory memorandum to the bill. As such, while it appears that this provision is no more than declaratory of the law it is impossible to be sure. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills developed to support the implementation of the Northern Territory Emergency Response, this bill was introduced with the Northern Territory National Emergency Response Bill 2007 and the Social Security and Other Legislation Amendment (Welfare Payment Reform Bill) 2007.

Schedule 1 inserts a new Part 10 into the *Classification (Publications, Films and Computer Games) Act 1995*, containing measures banning the possession and supply of pornographic materials in prescribed areas within the Northern Territory and giving the police powers in prescribed areas to seize and destroy materials that may be prohibited under this new Part 10.

Schedule 2 amends the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979* to:

- allow the Australian Crime Commission (ACC) Board to authorise the ACC to undertake an intelligence operation or investigation into Indigenous violence or child abuse;
- allow an ACC examiner to request or compel information, documents or things, relevant to an operation/investigation, that are held by state and territory agencies, provided an arrangement is in force between the Commonwealth and the state or territory;
- extend the term of appointment of ACC examiners from five to ten years; and

- clarify that Australian Federal Police officers deployed to the Northern Territory Police Service (NTPS) can exercise all of the powers and duties of a member of the NTPS under NT legislation.

Schedule 3 amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to allow the Commonwealth and Northern Territory to retain an interest in buildings and infrastructure constructed or upgraded on Aboriginal land with government funding (construction or renovation to be undertaken with the consent of the relevant Land Council). The schedule also provides a mechanism for the statutory rights to come to an end once the buildings and infrastructure are no longer required.

Schedule 4 amends provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* governing access to Aboriginal land. It removes the requirement for people to obtain permits to enter and remain on certain areas of Aboriginal land, including common areas of townships, road corridors, boat landings and airstrips. It also allows for the placement of temporary restrictions on access to these areas to protect the privacy of cultural events or public health and safety.

Schedule 5 makes several amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* and to what is referred to as the Northern Territory National Emergency Response Act 2007, which is currently still a bill.

The bill also provides that, for the purposes of the *Racial Discrimination Act 1975*, the provisions of this Act are deemed to be special measures and are excluded from the operation of Part II of that Act.

The bill also contains application provisions.

Personal rights and liberties
Subclause 4(2)

Subclause 4(2) provides that the provisions of virtually the whole of this bill are excluded from the operation of Part II of the *Racial Discrimination Act 1975*. Since Part II of that Act is the Part which prohibits racial discrimination, this subclause may appear to trespass on personal rights and liberties. However, subclause 4(2) must be read with subclause 4(1), under

which the same provisions of this bill are declared to be 'special measures' for the purposes of the *Racial Discrimination Act 1975*. The explanatory memorandum (page 1) to the bill indicates that Article 1.4 of the International Convention on the Elimination of all Forms of Racial Discrimination provides that:

> *Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

The Committee notes that the explanatory memorandum seeks to justify the implementation of such 'special measures' on the basis that 'the emergency measures in the bill are part of the action to improve the ability of Indigenous peoples to enjoy [their rights to health, development, education, property, social security and culture]...This cannot be achieved without implementing measures that do not apply in other parts of Australia… The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms.' The Committee also notes that a number of the provisions in the bill will sunset in 5 years time.

Nevertheless, the Committee considers that these provisions may be considered to trespass on personal rights and liberties but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

> *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.*

Delegation of legislative power
Schedule 1, item 1

Proposed new section 114 of the *Classification (Publications, Films and Computer Games) Act 1995*, to be inserted by item 1 of Schedule 1, would permit the Minister, by legislative instrument, to repeal some or all of the provisions of Part 10 of that Act (which have also been inserted by item 1 of Schedule 1). Subsection 114(4) provides that section 42 of the *Legislative Instruments Act 2003* does not apply to an instrument made under subsection 114(1), thus exempting the instrument from the disallowance provisions of the Act.

The Committee notes that the explanatory memorandum (page 14) seeks to justify this delegation of legislative power on the basis that '[a]llowing for repeal by legislative instrument, effective when the instrument is made, means that, if circumstances arise whereby some or all of the provisions are no longer required, those provisions may be repealed without the delay involved in enacting repealing legislation.' The Committee takes the view, however, that the legislature, that is the Parliament, is the appropriate body to determine when laws are to come into force and when they are to cease to have effect.

The Committee considers that this provision may inappropriately delegate legislative power but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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

Retrospective application
Schedule 2, item 33

Item 33 of Schedule 2 provides that proposed new subsection 46B(4) of the *Australian Crime Commission Act 2002* (to be inserted by item 32 of Schedule 2), which extends the maximum period of reappointment of an Australian Crime Commission (ACC) examiner from five years to ten years,

will apply to 'examiners who hold office immediately before that commencement, and to examiners who are appointed on or after that commencement.' The provision may, therefore, have a retrospective effect.

As a matter of practice the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes, however, that in this instance the retrospective application is providing a benefit to ACC examiners who hold office immediately prior to the commencement of the provisions.

In the circumstances, the Committee makes no further comment on this provision.

Legislative Instruments Act—exemptions
Schedule 4, item 12

Proposed new subsection 70B(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70B(2), to specify roads in vested Aboriginal land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 42) states that this subsection is included to assist readers, as the determination is not legislative in character.

Similarly, proposed new subsection 70E(4) of the same Act, also to be inserted by item 12 of Schedule 4, declares a determination made by the Minister under new subsection 70E(3), to specify roads within Aboriginal community land on which any person may lawfully enter or remain, is not a legislative instrument. The explanatory memorandum (page 47) provides the same explanation, that is, that the new subsection is merely declaratory of the law.

Proposed new subsections 70B(16) and 70E(20) also state that determinations made under other subsections of sections 70B and 70E are not legislative instruments. In this case, the determinations would impose temporary restrictions on the rights of any person to enter or remain on roads in vested Aboriginal land or within Aboriginal community land respectively. The

Committee notes that, in contrast to the earlier occurrences, in these cases the explanatory memorandum (pages 43 and 48 respectively) states that the reason for these determinations not being legislative instruments is that the 'Attorney-General has granted an exemption from the Legislative Instruments Act on the basis that the restrictions will be temporary in nature and may need to take effect on short notice.'

The Committee notes that these determinations appear to be identical in nature, except that some specify roads on which a person may lawfully enter or remain, while others apply temporary restrictions on the right of any person to enter or remain on specified roads. Despite this, the bill indicates that one set of determinations (those that specify roads on which a person may lawfully enter or remain and which would appear to be more legislative in character) are *not* legislative instruments, while another set (those that apply temporary restrictions on access and appear to be more administrative in nature) are not legislative instruments because they have been exempted from the provisions of the Legislative Instruments Act by the Attorney-General.

The Committee **seeks the Minister's clarification** as to the nature of these determinations and whether a more considered explanation could be included in the explanatory memorandum.

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.

Northern Territory National Emergency Response Bill 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

This bill is the principal bill in a package of five bills to support the implementation of the Australian Government's response to the 'national emergency confronting the welfare of Aboriginal children in the Northern Territory.' The bill:

- modifies the Northern Territory *Liquor Act* to restrict the possession, consumption, sale and transportation of liquor in the Northern Territory, particularly in areas of land prescribed by the bill;

- introduces a scheme of accountability to prevent, and detect, the misuse of publicly funded computers located in the prescribed areas;

- provides for the acquisition of five-year leases over certain Aboriginal townships, preserves the underlying ownership by traditional owners, preserves or excludes any existing interests, provides for compensation to be paid for any acquisition of property, and allows for the early termination of a lease, including when a township lease is granted;

- allows the Australian Government to exercise the powers of the Northern Territory Government to forfeit or resume certain leases known as 'town camps' during the five-year period of the emergency response and the option of acquiring a freehold interest over these areas;

- appoints Government Business Managers to assist local people to improve services such as housing construction, maintenance services, community services and various types of municipal services such as waste collection and road maintenance;

- amends Northern Territory law to prohibit any form of customary law or cultural practice excuses when exercising bail or sentencing discretion in relation to offences and strengthens bail provisions with a view to better securing the safety of victims and witnesses in remote communities;

- introduces a new licensing regime for persons operating community stores in Indigenous communities; and

- declares that the provisions of this bill are 'special measures' for the purposes of the *Racial Discrimination Act 1975* and excludes these provisions from the operation of Part II of that Act.

The bill also contains application provisions.

Personal rights and liberties
Paragraph 12(4)(a), clause 7, subclause 12(6), subclause (6)

Paragraph 12(4)(a) creates an offence relating to the transport, possession or consumption of **liquor** in a prescribed area, while clause 7, by incorporating in this bill the definition of terms used in the *Liquor Act* of the Northern Territory, would define **liquor** as meaning 'a beverage that contains more than 1.15% by volume of ethyl alcohol'. Subclause 12(6) then provides for an increase in the penalty that may be imposed if the quantity of **alcohol** involved in the commission of the offence is greater than 1,350 ml.

Similarly, clause 20 creates various offences relating to the sale of liquor containing more than 1,350 ml of **alcohol** for consumption away from licensed premises. The examples used in the explanatory memorandum (page 17) would imply that the term **alcohol** is referring to the amount of ethyl alcohol in the beverage. The Committee notes, however, that the term **alcohol** does not appear to be defined either in this bill or in the Northern Territory *Liquor Act*.

In addition, the Committee is concerned that the average person would be at a loss to know how to calculate the amount of ethyl alcohol in an alcoholic beverage. Australian information campaigns relating to alcohol consistently refer to 'standard drinks' and the number of 'standard drinks' in an alcoholic beverage is required to be identified on the label. The amount of ethyl alcohol in the beverage can be calculated using standard drink information, but it is

not something that most Australians would know how to do. As such, the Committee is concerned that, as currently drafted, these clauses may be considered to trespass on personal rights and liberties, by creating offences that lack clear definition.

The Committee **seeks the Minister's advice** whether the reference to **alcohol** in subclause 12(6) and in clause 20 is a reference to the volume of ethyl alcohol in liquor and whether this should be clearly defined in the bill, along with a method for calculating it. The Committee also **seeks the Minister's advice** whether, for ease of reference for law enforcement officers, licensees etc, the explanatory memorandum could be amended to include a plain English explanation.

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.

Legislative Instruments Act—exemptions
Subclause 12(9)

Subclause 12(9) provides that a declaration under subclause 12(8) – which would have the effect of removing particular waterways from an exemption from the offences created by subclauses 12(2) and (4) – is a legislative instrument, but is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. The Committee notes that the explanatory memorandum seeks to justify this subclause on the basis that the Ministerial declaration is an emergency measure, and that there is a 'need to respond quickly where people are circumventing the new measures'.

The Committee considers that this provision may insufficiently subject the exercise of legislative power to parliamentary scrutiny, but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly*.

The Committee draws Senators' attention to the provision, as it 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.

Excluding merits review
Subclauses 13(4) and (5) and clause 14

Subclauses 13(4) and (5), and clause 14, enable the Commonwealth Minister to vary the application and conditions of a liquor licence by Ministerial determination, but with no recourse by the licensee to merits review. The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee notes that, in this instance, the explanatory memorandum (page 15) seeks to justify this lack of merits review on the basis that 'merits review is not considered appropriate given the emergency nature of these measures.'

The Committee considers that these provisions may be considered to make rights, liberties or obligations dependent upon non-reviewable decisions but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Delegation of legislative power
Subclauses 19(1) and 22(1), subclauses 19(2) and 22(2) and subclauses 24(1) and 24(2)

Subclauses 19(1) and 22(1) permit the Minister to make declarations that some or all of Divisions 2 or 3 of Part 2 cease to have effect, and subclauses 19(2) and 22(2) declare such declarations to be legislative instruments, but to be exempt from the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003*.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Similarly, subclause 24(1) permits the Minister to make a declaration that Division 4 of Part 2 ceases to have effect and subclause 24(2) declares that this declaration is a legislative instrument but is exempt from the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003*.

The Committee notes that the explanatory memorandum (pages 16 and 19) seeks to explain why the disallowance and sunsetting provisions of the *Legislative Instruments Act 2003* shouldn't apply to these declarations but provides no explanation for why the Minister should have the power to declare that parts of the Act cease to apply, rather then repealing them through the Parliament.

The Committee takes the view that the legislature, that is the Parliament, is the appropriate body to determine when laws are to come into force and when they are to cease to have effect. As such, the Committee considers that these provisions may inappropriately delegate legislative power but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

> *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.*

Legislative Instruments Act—declaration
Subclause 26(1)

Subclause 26(4) states that an accreditation of a filter under subclause 26(1) is not a legislative instrument. Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that the explanatory memorandum does not advert to subclause 26(4). The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Strict liability
Subclauses 30(2) and (7)

Subclauses 30(2) and 30(7) make the offences created by subclause 30(1) and 30(6) respectively, offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum (page 23) provides a detailed explanation as to why the offences created by subclause 30(1) are offences of strict liability.

In the circumstances, the Committee makes no further comment on these provisions.

Legislative Instruments Act—determinations
Subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4)

Subclauses 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) declare various determinations and notices relating to interests in land not to be legislative instruments. The Committee notes that, in each case, the explanatory memorandum asserts that this information 'is for the assistance of readers because [the determination or notice] is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003'*.

The Committee **seeks the Minister's advice** whether these determinations and notices are all administrative in character and, if so, whether they should be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

> *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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

'Henry VIII' clauses
Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4)

Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) allow regulations to amend or modify parts of this Act or other Commonwealth or Northern Territory Acts and are, therefore, 'Henry VIII' clauses.

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee. Subclauses 44(3), 46(3), 58(3), 64(1), 78(4) and 81(4) create such a delegation of legislative power.

The Committee notes that in each of these cases the explanatory memorandum to the bill does not provide an explanation regarding why it was considered necessary to be able to amend or modify primary legislation through regulations, rather than by reference to the Parliament. The Committee **seeks the Minister's advice** regarding why each of these 'Henry VIII' clauses was considered necessary and whether these explanations could be included in the explanatory memorandum.

> *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.*

Special (Standing) Appropriation
Clause 63

Clause 63 would make a special appropriation out of Consolidated Revenue for the amounts payable by the Commonwealth under clauses 60 and 62, under the *Special Purposes Leases Act* of the Northern Territory. In its *Fourteenth Report of 2005*, the Committee stated that:

> *The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.*

The Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum merely records the operation of the clause and does not provide any further reason for the special appropriation.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

The Committee **seeks the Minister's advice** regarding why this special (standing) appropriation is considered necessary, whether any limit has been forecast as to the total amount of such an appropriation, and whether an explanation could have been included in the explanatory memorandum.

> *Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Personal Rights and Liberties
Subclause 60(2)

Subclause 60(2) of the bill provides that:

> *… if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.*

The Committee is concerned that the 'reasonable amount' of compensation which the Commonwealth is obliged to pay under this subclause is not necessarily compensation on just terms within the meaning of paragraph 51(xxxi) of the Constitution and the subclause may therefore be void, leaving considerable uncertainty as to the rights of both the Commonwealth and any person affected by the operation of Part 4 of this bill.

The Committee **seeks the Minister's advice** as to the reason for the amount of compensation payable not following more closely the terms of paragraph 51(xxxi) of the Constitution.

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

Retrospective application
Clause 65

Clause 65 allows the Commonwealth to vary or terminate Commonwealth funding agreements, under which funding is provided to communities in business management areas. Subclause 65(3) inserts a new standard clause into funding agreements relating to the termination or reduction in scope of a funding agreement. Subclause 65(1) provides that 'this section applies to a funding agreement whether entered into before, on or after the day on which this section commences'. These provisions may, therefore, be retrospective in their application.

As a matter of practice the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth. The Committee notes that, in this instance, the explanatory memorandum (pages 40-41) justifies the inclusion of the standard clause in all funding agreements, on the basis that it 'will ensure consistency in the terms and conditions under which a funding agreement may be terminated, or reduced in scope, throughout the communities including in the business management areas… [and] will also provide a mechanism for the calculation of compensation payable by the Commonwealth.'

In the circumstances, the Committee makes no further comment on these provisions.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Excluding merits review
Clause 78

Clause 78 would permit the Commonwealth Minister to suspend all the members of a community government council on him or her being satisfied as to the matters in paragraph 78(2)(b). However, there does not appear to be any provision for merits review of such a decision under the *Administrative Appeals Tribunal Act 1975.* The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review and **seeks the Minister's advice** as to the reason for this lack of review.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

Legislative Instruments Act—declaration
Subclause 86(6)

Subclause 86(6) declares that a requirement made under subclause 86(2), that a person give the Secretary of the Department all reasonable assistance in connection with an application for a civil penalty order, is 'not a legislative instrument.'

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this instance, the Committee notes that the explanatory memorandum (page 51) merely repeats the words of the subclause, and provides no further

clarification regarding their meaning. The Committee **seeks the Minister's advice** whether this provision is merely declaratory in nature and, if so, whether this information could be included in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Excluding merits review
Clause 97 and 106

Clause 97 gives to the Secretary of the Department the discretion to grant or refuse a community store licence, and clause 106 permits the Secretary to revoke an existing community store licence. The Committee notes that the explanatory memorandum (page 62) indicates that a 'decision to refuse to grant a community store licence will not be subject to internal review or to external review by the Administrative Appeals Tribunal (AAT).' The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review as such provisions may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

The Committee notes that the explanatory memorandum seeks to justify this provision on the basis that 'given the emergency response, opening the licensing process to review could unduly prolong matters before action to improve the operation of community stores could be confirmed and hence such review processes are not considered appropriate in the circumstances.'

The Committee expressed concern that a decision to revoke a community store licence because the community store does not comply with newly developed 'assessable matters' and a decision to refuse to grant a community store licence to a new applicant, who has taken into account the 'assessable matters' in their application, are treated in the same way in terms of access to merits review. The Committee considers that the first decision fits more

clearly within the 'emergency response' scenario outlined in the explanatory memorandum than the second decision does.

The Committee **seeks the Minister's advice** whether a decision not to grant a licence to a new applicant should be subject to merits review, as this process will occur in full cognisance of the new 'assessable matters' and would not result in a non-compliant community store continuing to operate pending the review.

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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Legislative Instruments Act—Declarations and excluding merits review
Subclause 112(6)

Subclause 112(6) states that a declaration made by the Minister under subclause 112(2), as to the assets and liabilities of a community store, is 'not a legislative instrument.' The Committee notes that the explanatory memorandum (pages 67-68) advises that the Minister's powers in this regard are discretionary then goes on to re-state that the declarations made by the Minister are 'not a legislative instrument' but provides no further point of clarification.

The Committee **seeks the Minister's advice** whether a declaration under subclause 112(2), although not legislative in character, is a determination subject to review under the *Administrative Decisions (Judicial Review) Act 1977*, and, if so, whether the exercise of the Minister's discretion ought not to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights,

liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Strict liability
Subclause 119(4)

Subclause 119(4) makes the offences created by subclauses 119(2) and 119(3) offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance the Committee notes that the explanatory memorandum (pages 70-71) provides a detailed explanation as to why the offences created by subclauses 119(2) and 119(3) are offences of strict liability.

In the circumstances, the Committee makes no further comment on this provision.

Personal rights and liberties
Subclauses 132(1) and 132(2)

Subclause 132(2) provides that the provisions of this bill are excluded from the operation of Part II of the *Racial Discrimination Act 1975*. Since Part II of that Act is the Part which prohibits racial discrimination, this subclause may appear to trespass on personal rights and liberties. However, that subclause must be read with subclause 132(1) under which the provisions of this bill are declared to be 'special measures' for the purposes of the *Racial Discrimination Act 1975*.

The explanatory memorandum (page 76) to the bill indicates that Article 1.4 of the International Convention on the Elimination of all Forms of Racial Discrimination provides that:

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

> *Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

The Committee notes that the explanatory memorandum seeks to justify the implementation of such 'special measures' on the basis that 'the emergency measures in the bill are the basis of action to improve the ability of Indigenous peoples to enjoy [their rights to health, development, education, property, social security and culture]...This cannot be achieved without implementing measures that do not apply in other parts of Australia… The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms.' The Committee also notes that a number of the provisions in the bill are subject to a 5 year sunset period. Nevertheless, the Committee considers that these provisions may be considered to trespass on personal rights and liberties but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

> *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.*

Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007

Introduced into the House of Representatives on 7 August 2007
Portfolio: Families, Community Services and Indigenous Affairs

Background

Part of a package of five bills to support the implementation of the Government's Northern Territory Emergency Response, this bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Veterans' Entitlements Act 1986*, the *A New Tax System (Family Assistance) Act 1999*, and the *Income Tax Assessment Act 1936*, to provide new national welfare measures aimed at helping address child neglect and encourage school attendance. The bill:

- establishes a national income management regime that requires parents on income support to ensure that their children are enrolled at, and regularly attend, school. This applies whether either or both parents receive income support and family payments. In the case of more complex family circumstances it is intended that all adults who have a recognised level of responsibility (at least 14 per cent) for the care of the child must ensure the child attends school;

- establishes an income management regime that applies in respect of people on certain welfare payments in the Northern Territory and in Cape York;

- provides for the baby bonus to be paid in 13 fortnightly instalments to claimants who are subject to the income management regime;

- progressively replaces the Community Development Employment Program in the Northern Territory with other employment services and amends procedures and guidelines relating to Work for the Dole; and

- provides that new Part 3B of the *Social Security (Administration) Act 1999*, to be inserted by this bill, and all actions or omissions in any way

related to it or the income support management regime, are deemed to be 'special measures' and are excluded from the operation of Part II of the *Racial Discrimination Act 1975*

The bill also contains application provisions.

Personal rights and liberties
Subclauses 4(3), 4(5) and 6(3)

Subclauses 4(3), 4(5) and 6(3) declare that various provisions of this bill and other matters are excluded from the operation of Part II of the *Racial Discrimination Act 1975.* Since Part II of that Act is the Part which prohibits racial discrimination, this subclause may appear to trespass on personal rights and liberties. However, these subclauses must be read with subclauses 4(2), 4(4) and 6(3) respectively, under which the same provisions of this bill are declared to be 'special measures' for the purposes of the *Racial Discrimination Act 1975*.

The Committee notes that the explanatory memorandum (pages 2-3) seeks to justify the implementation of such 'special measures' on the basis that the 'provisions of this bill that relate to the Northern Territory national emergency response and the Queensland Commission reforms are the basis of action to improve the ability of Indigenous peoples to enjoy [their rights to health, development, education, property, social security and culture]...This cannot be achieved without implementing measures that do not apply in other parts of Australia… The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms.'

Nevertheless, the Committee considers that these provisions may be considered to trespass on personal rights and liberties but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

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.

Legislation by press release
Paragraphs 6(1)(a) and 7(1)(a)

Paragraphs 6(1)(a) and 7(1)(a) allow parts of this bill to apply from 9 July 2007, and are therefore to some extent retrospective in operation. The explanatory memorandum notes that some action has already been undertaken in pursuance of a Government announcement of a national emergency response, and these paragraphs are therefore instances of legislation by press release.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law tends to undermine the principle that the law is made by Parliament, not by the Executive. Whereas the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

However, the Committee has, in the past, been prepared to accept legislation by press release, so long as the legislation is introduced within six months of the press release, as is the case in respect of this bill. The Committee also notes that it appears that the action taken is intended to be beneficial to welfare recipients.

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

Legislative Instruments Act—exemptions
Schedule 1, item 17

Proposed new subsections 123TE(13) and (14) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, provide that a determination under new subsections 123TE(1), (7) or (10) – under which the Minister has the power, by legislative instrument, to determine that specified relevant areas of the Northern Territory are declared relevant Northern Territory areas for the purposes of the Act – are not disallowable.

The Committee notes that the justification given in the explanatory memorandum (page 12) for this lack of Parliamentary scrutiny is that the implementation of the income management regime 'is a matter of significant government policy' and that it is 'important that there is certainty in relation to the making of these welfare payments'.

The Committee considers that these provisions may insufficiently subject the exercise of legislative power to parliamentary scrutiny, but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly.*

> *The Committee draws Senators' attention to the provision, as it 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.*

Legislation by press release
Schedule 1, item 17, paragraph 123UB(1)(b)

Paragraph 123UB(1)(b) provides that a person is subject to the income management regime set up under proposed new Part 3B of the *Social Security (Administration) Act 1999* if they are, amongst other things, 'physically present overnight in a relevant Northern Territory area at any time during the period beginning at the start of 21 June 2007…' This provision is therefore, to some extent retrospective in operation.

The Committee notes that the explanatory memorandum reiterates the provisions of the bill, but provides no explanation for why the provision is backdated to 21 June 2007. The Committee is aware, however, that 21 June 2007 is in fact the date that the Minister announced the Government's national emergency response to protect Aboriginal children in the NT. This is, therefore, a case of legislation by press release.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law tends to undermine the principle that the law is made by Parliament, not by the Executive. Whereas the making of legislation retrospective to the date of its introduction into

Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

However, the Committee has, in the past, been prepared to accept legislation by press release, so long as the legislation is introduced within six months of the press release, as is the case in respect of this bill.

In the circumstances, the Committee makes no further comment on this provision.

Excluding merits review
Schedule 1, item 17, paragraph 123UC(b)

Proposed new paragraph 123UC(b) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, would allow a Child Protection Officer of a state or territory to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by proposed new Part 3B of that Act. The Committee notes that the *Social Security (Administration) Act 1999* makes provision for review by the Social Security Appeals Tribunal of 'all decisions of an officer under the social security law' (with some specified exceptions). However, it is unclear to the Committee if a 'Child Protection Officer of a state or territory' would be classified as 'an officer under the social security law'.

The Committee further notes that the explanatory memorandum does not give any indication that a person subject to such a notice has any right to seek the review of the exercise of the discretion by the Child Protection Officer. The Committee **seeks the Minister's advice** whether there is any such right of review and, if there is none, whether it should be provided for.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable

decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Excluding merits review
Schedule 1, item 17

Proposed new paragraph 123UF(1)(b) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, would allow the Queensland Commission (an authority defined merely as 'a body or agency established by the law of Queensland') to give to the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by proposed new Part 3B of that Act. The Committee notes that the *Social Security (Administration) Act 1999* makes provision for review by the Social Security Appeals Tribunal of 'all decisions of an officer under the social security law' (with some specified exceptions). However, it is unclear to the Committee if 'the Queensland Commission' would be classified as 'an officer under the social security law'.

The Committee further notes that the explanatory memorandum does not give any indication whether a person subject to such a notice has any right to seek the review of the exercise of the discretion by the Queensland Commission. The Committee **seeks the Minister's advice** whether there is any such right of review and, if there is none, whether it should be provided for.

Pending the Minister's advice the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Determination of important matters by legislative instrument
Schedule 1, item 17, subsection 123UK(1)

Proposed new subsection 123UK(1) of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, provides that the question

of whether an ***unsatisfactory school attendance situation*** exists or has existed in relation to a child is to be ascertained in accordance with a legislative instrument made by the Minister. The Committee notes that the explanatory memorandum (page 25) indicates that 'a person can be subject to the income management framework only when an unsatisfactory school attendance situation exists'.

The Committee draws attention to provisions which may be considered to inappropriately delegate legislative powers of a kind that ought to be exercised by Parliament alone. In this instance, the Committee notes that the definition of an 'unsatisfactory school attendance situation' is fundamental to the application of the income management framework to welfare recipients. As such, the Committee suggests that the definition of an 'unsatisfactory school attendance situation' may be considered to be a matter which is more appropriately dealt with in the primary legislation. Accordingly, the Committee considers that this provision may inappropriately delegate legislative powers but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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

Personal rights and liberties
Schedule 1, item 17

Proposed new section 123WA of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, provides for the establishment of a 'separate notional account' within the Special Account in the names of persons subject to the income management regime established by proposed new Part 3B of that Act, also to be inserted by item 17 of Schedule 1.

Division 5 of that Act, also to be inserted by item 17 of Schedule 1, provides for deductions of between 50% and 100% to be made from the welfare payments of people subject to the income management regime, for 'deposit' in these notional accounts. The second reading speech (page 3) indicates that

'the bill makes it quite clear individuals [subject to the income management regime] will not lose any of their entitlements'. However, the Committee notes that the bill does not appear to make any reference to the payment of bank interest in respect of funds deducted and held in an income management account. This is income that would have been available to the individual had these funds been deposited in their own bank account.

The Committee **seeks the Minister's advice** whether persons subject to the income management regime will be paid interest on their funds held in income management accounts and, if not, why not.

> *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.*

Special (Standing) Appropriation
Schedule 1, item 17

Proposed new section 123ZN of the *Social Security (Administration) Act 1999*, to be inserted by item 17 of Schedule 1, makes a special appropriation out of Consolidated Revenue for the amounts payable under various provisions of proposed new Part 3B of the Act. In its *Fourteenth Report of 2005*, the Committee stated that:

> *The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.*

The Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum merely records the

operation of the clause and does not provide any further reason for the special appropriation.

The Committee **seeks the Minister's advice** as to why this special (standing) appropriation was considered necessary and whether an explanation should have been included in the explanatory memorandum.

> *Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

Non-reviewable decisions
Schedule 1, item 18

Proposed new paragraph 144(ka) of the *Social Security (Administration) Act 1999*, to be inserted by item 18 of Schedule 1, would deny to a person (in relevant Northern Territory areas) subject to the income management regime under proposed new section 123UB of that Act, to be inserted by item 17 of Schedule 1, the right to seek a review by the Social Security Review Tribunal of decisions that relate to that person.

The Committee consistently draws attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee notes that the explanatory memorandum states that 'the reason for these review arrangements is the unique circumstances of the emergency response' and 'such decisions will still be subject to review by an authorised review officer, the Secretary of the Department and the Chief Executive Officer of Centrelink'.

The Committee considers that this provision may make rights, liberties or obligations dependent upon non-reviewable decisions but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly.*

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Northern Territory National Emergency Response Bill 2007	Subclause 86(5)	Failure to provide information	30 penalty units
	Subclause 119(2)	Failure to provide documents and materials	60 penalty units
	Subclause 120(3)	Failure to provide information	10 penalty units

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Bill/Act	Section/Subsection	Offence	Penalty
Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007	Schedule 1, item 19	Failure to provide information	Imprisonment for a term of not more than 12 months
	Schedule 1, item 20	Failure to provide information	Imprisonment for a term of not more than 12 months