SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2000

12 April 2000

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 2000

The Committee presents its Fifth Report of 2000 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:

A New Tax System (Family Assistance and Related Measures) Bill 2000

Jurisdiction of Courts Legislation Amendment Bill 2000

A New Tax System (Family Assistance and Related Measures) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 3 of 2000*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 3 April 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 3 of 2000

This bill was introduced into the House of Representatives on 9 March 2000 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the *A New Tax System (Family Assistance) Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to simplify the structure and administration of family assistance to:

- provide the administrative infrastructure to support the payment of child care benefit;
- clarify the operation of certain aspects of the family assistance law;
- replace regulation-making powers with substantive provisions; and
- make technical amendments.

The bill also proposes to amend the *Social Security Act 1991* in relation to a 4 per cent increase for certain social security payment supplements and allowances.

Consequential and technical amendments are also proposed to 7 other Acts. These amendments are part of the overall financial implications for the Government's family assistance package and contain both savings and transitional provisions.

Non-reviewable decisions
Schedule 2, item 103

Item 103 of Schedule 2 to this bill proposes to insert a new section 104 in the *A New Tax System (Family Assistance)(Administration) Act 1999*. This new section states that, under proposed section 105, "the Secretary may review a decision of any officer under the family assistance law" but then sets out certain exceptions.

The Explanatory Memorandum accompanying the bill seems to suggest that the exceptions listed are reviewable. Given the lack of explanation in the Explanatory Memorandum, the Committee **seeks the Minister's advice** as to the reasons for excluding the specified decisions from the general scheme of internal and external review.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

I am writing in response to the Scrutiny of Bills Alert Digest No. 3 of 2000, dated 15 March 2000, which contained comments by your Committee on the *A New Tax System (Family Assistance and Related Measures) Bill 2000* and the *Family and Community Services Legislation Amendment Bill 2000*.

In relation to the *A New Tax System (Family Assistance and Related Measures) Bill 2000 (the Family Assistance Bill)* the Committee points out some confusion, arising from an editing error in the Explanatory Memorandum for the Bill, over which family assistance decisions are and are not reviewable. Advice is sought as to the reasons for excluding the decisions specified in new subsection 104(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* from the general scheme of internal and external review.

I hope that the following explanation sets right the confusion caused by this untoward error.

Certain decisions by approved child care services

Paragraphs (a) and (b) of new subsection 104(1) exclude from review the Secretary's determination of child care benefit entitlement in so far as it relates to certain decisions made by an approved child care service. This may be whether the determination of entitlement is made in relation to an individual or the service being eligible for child care benefit.

The formal rate of child care benefit for sessions of care provided during an income year, in respect of an individual or a service eligible for child care benefit by fee reduction, is generally worked out after the end of the income year as part of the Secretary's determination of entitlement. However, the formal rate for certain sessions is set during the year, while an individual is conditionally eligible. These sessions are those in relation to which a special rate applies because the family is in hardship or the child is at risk of serious abuse or neglect, generally certified for an initial period by the service providing the care.

If a child is at risk and no individual is already conditionally eligible, then the service may make itself eligible for a period. This is purely for the purpose of providing child care, at a special rate of child care benefit, to help persuade the child's family to place the child into care and away from the at risk situation.

The formal certifications of rate by the service are applied by the Secretary in the eventual determination of the individual's or service's entitlement to be paid child care benefit for the income year.

New subparagraphs 104(1)(a)(i) and (b)(ii) exclude from review the elements of the Secretary's determination of entitlement that are based on certifications of rate made by the service during the income year on the basis of hardship or child at risk. New subparagraph 104(1)(b)(i) excludes from review the element based on the service's own decision to make itself eligible for the purpose of delivering such a rate in a child at risk case. These exclusions are consistent with the fact that the service's decisions themselves are not reviewable because, not being decisions of an "officer", they do not fall within the broad review power provided by new subsection 104(1).

Thus, the decisions of the service itself, and of the Secretary in so far as they are based on the service's decisions, are not reviewable. The reason for this is to protect the effectiveness of this important area of child care policy. If a family using an approved child care service is in hardship or a child is at risk, the service may authorise a higher level of child care benefit if it thinks that this will help the situation. If the service were to make such a decision and later have it overruled on review by the Secretary, for example, (including on review of the relevant elements of the Secretary's own determination of entitlement) the service would have a debt to repay. This insecurity would lead to services being unwilling to make such decisions and this, in turn, would prevent families or children in difficulty from receiving the extra help that the Government intends them to receive.

Any concerns that these discretions might be overused, or inappropriately used, by services are addressed by the presence of new section 80 of the *A New Tax System (Family Assistance) Act 1999*, under which the Secretary may remove a service's discretions if it has demonstrated a pattern of abusing the discretions.

Similarly excluded from review are certifications made by the service in relation to the weekly limit of hours that applies to a conditionally eligible individual, or to the service itself if it is eligible. The weekly limit of hours is the maximum number of hours for which child care benefit may be paid in a week. The service also has discretions in this area, in relation to a child at risk or 24 hour care, to allow child care benefit to be paid for a higher number of hours in the week than would otherwise be available.

The weekly limit of hours has a direct impact on the level of child care benefit paid and so is in the same category as the rate certifications mentioned above. Again, these are areas in which the service must be able to respond immediately to the needs

of families and children in some difficulty, without fear of later owing a debt because of a review.

> The amount of fee reductions for a reporting period is calculated by the service.
> The Secretary makes an acquittal determination in reliance on the amount of fee reductions reported by the service. The amount of fee reductions the service gets after the advance has been acquitted is the amount the service reports. The level of the advance, which is only an interim amount, does not affect the amount of fee reductions the service gets.

Advances to approved child care services

Paragraph (c) of new subsection 104(1) excludes from review a decision by the Secretary under the provisions that relate to advances to approved child care services.

The advance payment provisions in new Part 8A, Division 2 provide an administrative system that supports the working of the new child care benefit system as far as it relates to payment of child care benefit by fee reductions. The advance provisions are separate to child care benefit entitlement provisions.

Individuals who are determined to be conditionally eligible for child care benefit by fee reduction for care provided by an approved child care service are entitled to have their child care fees reduced each time the fees are charged. The fees are reduced in anticipation of a determination of entitlement setting out the rate and amount of child care benefit of a conditionally eligible individual. While the determination of entitlement is made by the Secretary after the end of each income year during which the individual was so eligible, the reduction of fees occurs throughout the income year.

New Part 8A, Division 1 requires an approved child care service to reduce fees that the service charges conditionally eligible individuals. To ensure that the reduction of fees does not affect the business operation of the service, the advance provisions in new Part 8A, Division 2 allow the Secretary to fund the fee reductions the service makes so that the service effectively receives 100% of its fee (partly through the reduced fees paid by the individuals and partly through the funding). It is done via the 2-stage process, that is, payment of an advance amount to an approved child care service for a reporting period (eg a calendar quarter) and the acquittal of the advance amount (under new sections 219Q and 219S) after that period. The result of the process is that the amount the service eventually gets under the advance provisions is equal to the amount of fee reductions made by the service during the period.

Given that the amount of the advance is an interim amount, it would not be appropriate to provide formal review procedure relating to the determination of advances. The advance provisions are designed to operate in a way that provides funds to services at the level they need to cover the services' ongoing fee reduction expenses. The Secretary's discretion in deciding the level of advances allows the Secretary to set the amount of money being advanced to the service at the level the service is expected to need (as a matter of administration the amount required by the service is consulted with the service). The amount the service receives as a result of the operation of the provisions in new Part 8A, Division 2 is simply the reimbursement of services' fee reductions expenses. Any discrepancy between the amount of fee reductions made by the service and the amount the service receives as an advance amount is simply adjusted at the payment of the subsequent advance.

As such, a review mechanism for decisions concerning advances is not necessary.

I trust the above comments are of assistance to the Committee.

The Committee thanks the Minister for this comprehensive response.

Jurisdiction of Courts Legislation Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 3 of 2000*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 28 March 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 3 of 2000

This bill was introduced into the House of Representatives on 8 March 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend a number of Acts to:

- deal with some of the consequences of the High Court's decision in *Re Wakim; ex parte McNally* in relation to the inability of federal courts to exercise State jurisdiction;
- repeal provisions which purport to consent to the conferral of State jurisdiction on federal courts;
- confer federal jurisdiction on federal courts to review the decisions of Commonwealth officers and bodies made in performance of functions conferred on them by State and Territory law; and
- enable State and Territory Supreme Courts to exercise limited federal judicial review jurisdiction.

The bill also proposes to amend the *Administrative Decisions (Judicial Review) Act 1977,* the *Corporations Act 1989* and the *Judiciary Act 1903* to make provision with respect to the review of decisions in the criminal justice process to restrict access by defendants in criminal matters to administrative law remedies.

Reducing the review rights of defendants
Schedule 2

Schedule 2 to this bill proposes a series of amendments relating to the review of administrative decisions made in the criminal justice process. Specifically, this Schedule proposes to amend a number of Acts to remove the right of defendants to access federal administrative law procedures and remedies. For example, defendants will no longer be able to use the *Administrative Decisions (Judicial Review) Act 1977* to challenge decisions to prosecute, or other decisions taken in the criminal justice process at any time after a prosecution has commenced, or when an appeal is on foot. Neither will defendants in State and Territory courts be able to use section 39B of the *Judiciary Act 1903* to bring an application in the Federal Court to review decisions of Commonwealth officers made in the prosecution process.

The Minister's Second Reading Speech states that the object of the bill is "to avoid the use of unmeritorious delaying tactics in the criminal justice process". While the bill may have this effect, it will also affect "meritorious" claims for review, and therefore the rights of defendants.

The Committee is concerned at such a significant reduction in the rights currently available to defendants, and **seeks the Attorney-General's advice** as to why such action is appropriate; how the action proposed in the bill is proportionate to the mischief it is aimed at; and whether an alternative approach should be adopted involving the imposition of time-limits on applications for review.

Pending the Attorney's advice, the Committee draws Senators' attention to these 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, and 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.

Relevant extract from the response from the Attorney-General

I refer to your letter of 16 March 2000 regarding the Jurisdiction of Courts Legislation Amendment Bill, and the apparent reduction in the rights currently available to defendants in criminal matters. You have sought my views on why such action is appropriate, how the proposed action is proportionate to the mischief at which it is aimed, and whether an alternative approach should be adopted involving the imposition of time-limits on applications for review.

Schedule 2 of the Jurisdiction of Courts Legislation Amendment Bill addresses the divided jurisdiction in criminal proceedings, to prevent what is known as "collateral

attack". This involves the bringing of applications for judicial review of decisions made in the criminal justice process in the Federal Court system. As you know, prosecutions for federal offences are conducted in State and Territory courts.

The tactic of bringing collateral proceedings in the Federal Court is frequently used in relation to white collar crime as a means of stalling a prosecution. The amendments will ensure that where a State or Territory court is hearing a criminal prosecution that arises under a Commonwealth law, the State or Territory courts will also be able to deal with any related administrative law challenge to decisions that were taken in the criminal justice process.

The main disadvantage of the existing law is that it provides the means to remove an action from the State or Territory court that is hearing the trial into the Federal Court system. That causes a loss of priority for the prosecutions in the State or Territory courts and substantially increases the duration and cost of proceedings.

It also allows the tactical use of delay by providing a separate three tiered appeal system which suspends the trial while issues are finally resolved. In addition to the direct costs of delay, there is also the consequence of loss of recall on the part of witnesses, and the possible unavailability of documentary evidence for investigators. These cannot be seen to be in the public interest.

You have suggested the imposition of time limits as a possible means of dealing with the problem of delay. Subject to judicial discretion, which, in fairness, I do not think should be removed, time limits already apply to applications for judicial review and the lodging of appeals. There are significant difficulties involved in attempting to limit the duration of trials, and it is virtually impossible to prevent delays due to adjournments, in the availability of hearing dates or the periods of waiting for the delivery of judgments. I do not believe that the imposition of time-limits on the management of proceedings in the Federal Court system would adequately address the issue of a defendant who sought to delay a criminal trial until a challenge (or sometimes sequential and multiple challenges) of criminal justice decisions and the appeals arising from those challenges had been dealt with.

Schedule 2 of the Bill removes the Federal Court's jurisdiction to review decisions about the criminal investigation or the criminal charge while any criminal proceedings remain on foot.

Defendants are not being denied judicial review remedies. Relevant decisions will still be subject to review by a court, either in the course of the criminal trial itself, when issues of the admissibility of improperly or unlawfully obtained evidence are being considered; or under the section 39B Judiciary Act jurisdiction which is being conferred on State and Territory Supreme Courts by the Bill (amendments of the *Corporations Act 1989* proposed new section 51AA, and *Judiciary Act 1903* proposed new subsections 39B(1B) and (1C). That is a balanced outcome, and one which serves to streamline the criminal justice process.

The new system would place defendants in Commonwealth prosecutions in essentially the same position as their State counterparts. It would remove a means of attempting to defeat justice which is not open to State and Territory defendants, while preserving the safeguards against injustice required in a fair criminal justice system. I believe that the proposed amendments are proportionate to the forms of mischief they address, and streamline the procedures in a system where cost and delay currently present a major challenge to the administration of justice.

I trust that my explanation will satisfy your concerns on the issues you have raised.

The Committee thanks the Attorney-General for this considered response and notes that, under the bill, administrative law challenges to pre-trial decisions may still be heard by the court hearing the criminal prosecution. The Committee would be concerned if the bill had any significant effect on the jurisdiction of the federal administrative law system.

Barney Cooney
Chairman

MINISTER FOR FAMILY AND COMMUNITY SERVICES
MINISTER ASSISTING THE PRIME MINISTER FOR THE STATUS OF WOMEN

Senator Barney Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in response to the Scrutiny of Bills Alert Digest No. 3 of 2000, dated 15 March 2000, which contained comments by your Committee on the *A New Tax System (Family Assistance and Related Measures) Bill 2000* and the *Family and Community Services Legislation Amendment Bill 2000.*

In relation to the *A New Tax System (Family Assistance and Related Measures) Bill 2000 (the Family Assistance Bill)* the Committee points out some confusion, arising from an editing error in the Explanatory Memorandum for the Bill, over which family assistance decisions are and are not reviewable. Advice is sought as to the reasons for excluding the decisions specified in new subsection 104(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* from the general scheme of internal and external review.

I hope that the following explanation sets right the confusion caused by this untoward error.

Certain decisions by approved child care services

Paragraphs (a) and (b) of new subsection 104(1) exclude from review the Secretary's determination of child care benefit entitlement in so far as it relates to certain decisions made by an approved child care service. This may be whether the determination of entitlement is made in relation to an individual or the service being eligible for child care benefit.

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CANBERRA ACT 2600

The formal rate of child care benefit for sessions of care provided during an income year, in respect of an individual or a service eligible for child care benefit by fee reduction, is generally worked out after the end of the income year as part of the Secretary's determination of entitlement. However, the formal rate for certain sessions is set during the year, while an individual is conditionally eligible. These sessions are those in relation to which a special rate applies because the family is in hardship or the child is at risk of serious abuse or neglect, generally certified for an initial period by the service providing the care.

If a child is at risk and no individual is already conditionally eligible, then the service may make itself eligible for a period. This is purely for the purpose of providing child care, at a special rate of child care benefit, to help persuade the child's family to place the child into care and away from the at risk situation.

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New subparagraphs 104(1)(a)(i) and (b)(ii) exclude from review the elements of the Secretary's determination of entitlement that are based on certifications of rate made by the service during the income year on the basis of hardship or child at risk. New subparagraph 104(1)(b)(i) excludes from review the element based on the service's own decision to make itself eligible for the purpose of delivering such a rate in a child at risk case. These exclusions are consistent with the fact that the service's decisions themselves are not reviewable because, not being decisions of an "officer", they do not fall within the broad review power provided by new subsection 104(1).

Thus, the decisions of the service itself, and of the Secretary in so far as they are based on the service's decisions, are not reviewable. The reason for this is to protect the effectiveness of this important area of child care policy. If a family using an approved child care service is in hardship or a child is at risk, the service may authorise a higher level of child care benefit if it thinks that this will help the situation. If the service were to make such a decision and later have it overruled on review by the Secretary, for example, (including on review of the relevant elements of the Secretary's own determination of entitlement) the service would have a debt to repay. This insecurity would lead to services being unwilling to make such decisions and this, in turn, would prevent families or children in difficulty from receiving the extra help that the Government intends them to receive.

Any concerns that these discretions might be overused, or inappropriately used, by services are addressed by the presence of new section 80 of the *A New Tax System (Family Assistance) Act 1999*, under which the Secretary may remove a service's discretions if it has demonstrated a pattern of abusing the discretions.

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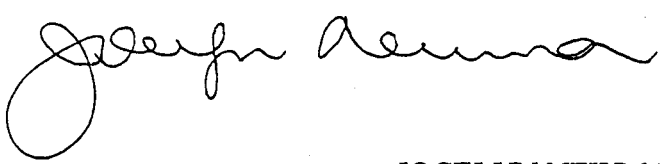
As such, a review mechanism for decisions concerning advances is not necessary.

(This portion of the Minister's letter has been deleted as it refers to the Family and Community Services Legislation Amendment Bill 2000 which has not, as yet, been introduced into the Senate.)

I trust the above comments are of assistance to the Committee.

Yours sincerely



JOCELYN NEWMAN

The Hon Daryl Williams AM QC MP

Attorney-General

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Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your letter of 16 March 2000 regarding the Jurisdiction of Courts Legislation Amendment Bill, and the apparent reduction in the rights currently available to defendants in criminal matters. You have sought my views on why such action is appropriate, how the proposed action is proportionate to the mischief at which it is aimed, and whether an alternative approach should be adopted involving the imposition of time-limits on applications for review.

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The main disadvantage of the existing law is that it provides the means to remove an action from the State or Territory court that is hearing the trial into the Federal Court system. That causes a loss of priority for the prosecutions in the State or Territory courts and substantially increases the duration and cost of proceedings.

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You have suggested the imposition of time limits as a possible means of dealing with the problem of delay. Subject to judicial discretion, which, in fairness, I do not think should be removed, time limits already apply to applications for judicial review and the lodging of appeals. There are significant difficulties involved in attempting to limit the duration of trials, and it is virtually impossible to prevent delays due to adjournments, in the availability of hearing dates or the periods of waiting for the

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Yours sincerely

Daryl Williams

DARYL WILLIAMS