SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2001

28 February 2001

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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

SECOND REPORT OF 2001

The Committee presents its Second Report of 2001 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:

Aboriginal and Torres Strait Islander Commission Amendment Bill 2000

Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000
(previous citation: Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999)

Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000

Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000

Migration Legislation Amendment Bill (No. 1) 2001
(previous citation: Migration Legislation Amendment Bill (No. 2) 2000)

Therapeutic Goods Amendment Bill (No. 4) 2000

Aboriginal and Torres Strait Islander Commission Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 18 of 2000*, in which it made various comments. The Minister for Aboriginal and Torres Strait Islander Affairs responded to those comments in a letter dated 11 January 2001.

In its *First Report of 2001*, the Committee sought further advice from the Minister in relation to the delegation to 'a person'. The Minister has further responded in a letter dated 27 February 2001. A copy of the letter is attached to this report. An extract from the *First Report of 2001* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 18 of 2000

This bill was introduced into the House of Representatives on 29 November 2000 by the Minister representing the Minister for Aboriginal and Torres Strait Islander Affairs, [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to:

- change the name of the Aboriginal and Torres Strait Islander Commercial Development Authority to Indigenous Business Australia;
- expressly allow the Aboriginal and Torres Strait Islander Commission to outsource its commercial functions, including decision making relating to the application of the funds to Indigenous Business Australia; and
- provide the option of appointing a full-time Chairperson to Indigenous Business Australia.

Delegation to 'a person'
Schedule 1, items 13 and 17

Section 7 of the *Aboriginal and Torres Strait Islander Commission Act 1989* sets out the functions of the Commission. Paragraph 7(1)(a) provides that one of these functions is to "formulate and implement programs for Aboriginal persons and Torres Strait Islanders".

Item 13 in Schedule 1 to this bill proposes to insert a new subsection 7(1A) in the principal Act. This subsection provides that a function referred to in paragraph 7(1)(a) need not be performed by the Commission itself, but may be performed by "other persons" who are authorised by the Commission to do so under contracts or agreements entered into by the Commission, or to whom the Commission has delegated the function.

Section 10 of the Principal Act sets out the powers of the Commission. Item 17 in Schedule 1 to this bill proposes to insert a new subsection 10(6) in the Principal Act. This subsection provides that, insofar as a person is authorised to perform a function as an agent or delegate of the Commission, the person may exercise any of the Commission's powers for or in connection with the performance of the function.

Since its establishment, the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated officers or to members of the Senior Executive Service.

Neither of the amendments proposed by this bill imposes any limit on the functions or powers that may be delegated. The Committee, therefore, **seeks the Minister's advice** as to why the bill provides such a wide power of delegation.

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

Relevant extract from the response from the Minister dated 11 January 2001

The Senate Standing Committee for the Scrutiny of Bills has raised concerns with Items 13 and 17 of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2000 (the Bill) with regard to the breadth of those provisions in relation to delegation.

The provisions proposed in items 13 and 17 of the Bill do not of themselves empower the Aboriginal and Torres Strait Islander Commission (ATSIC) to delegate any power or function. The operative delegation sections are in fact strictly limited.

Item 18, which would insert a new section 45B, is the key provision in relation to delegation. That provision would allow ATSIC to 'delegate to Indigenous Business Australia (IBA) any commercial functions falling within paragraph 7(1)(a)' in circumstances where IBA consents to the delegation. Far from being a general power of delegation to any person, the Bill limits the delegation so that it may only be made by ATSIC to IBA. It also restricts the functions which may be delegated to 'commercial functions'. Item 88 also deals with delegations and would allow IBA to delegate powers to the IBA General Manager or a member of staff only. This essentially reproduces the current provision (section 190) in relation to IBA's predecessor, the Aboriginal and Torres Strait Islander Commercial Development Corporation.

The intention and effect of the Bill is to allow a limited delegation by ATSIC (at its option) to IBA so that the smaller and more commercial orientated body may perform certain commercial functions which would otherwise be performed by ATSIC. IBA would be subject to the accountability requirements of the *Commonwealth Authorities and Companies Act* 1997 in the same way as ATSIC.

Once ATSIC has properly delegated a function to IBA under proposed section 45B, items 13 and 17 operate only to ensure that a delegation can take effect. Item 13 clarifies that ATSIC need not itself perform one or more of its functions where there is a proper delegation, contract or agreement already in place in accordance with the legislation. Item 17 ensures that the scope of a delegation can take effect in accordance with its terms. Neither of these proposed provisions would expand the scope of the strictly limited powers to delegate contained in sections 45, 45A and proposed 45B.

The Committee thanks the Minister for this response, and notes that Item 13 in Schedule 1 does not, of itself, empower the Aboriginal and Torres Strait Islander Commission (the Commission) to delegate any power or function, but simply facilitates the performance of functions that the Commission may validly delegate under other provisions of the Act.

The Committee also accepts that the power to delegate under the Act as presently drafted is limited, and that the immediate effect of the bill will be to allow the Commission (at its option) to delegate certain commercial functions to Indigenous Business Australia.

However, proposed new subsection 7(1A) is worded more generally. It also applies to anyone 'authorised' under contract to perform a function (in effect, 'delegation' through outsourcing), and might apply if the principal Act were later amended to increase the scope for formal delegations. It was in this wider sense that the Committee drew attention to the width of powers that might be exercised by persons or organisations other than the Commission. The Committee would, therefore, appreciate **the Minister's further advice** as to why no limit is imposed on the functions or powers that the Commission may authorise 'other persons' to undertake on its behalf.

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

Relevant extract from the further response from the Minister dated 27 February 2001

Further to advice provided by the former Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, on 11 January 2001, the Senate Standing Committee for the Scrutiny of Bills has invited additional advice in relation to proposed new paragraph 7(1A)(a) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Act) contained in the *Aboriginal and Torres Strait Islander Commission Amendment Bill* 2000 (the Bill). In particular, the Committee has sought advice as to the limitations imposed on the Aboriginal and Torres Strait Islander Commission (the Commission) in relation to entering into contracts and agreements.

The proposed new paragraph 7(1A)(a) does not of itself empower the Commission to authorise other persons to exercise the powers of the Commission by way of contract or agreement.

Item 16 in Schedule 1 to the Bill, which would insert a new paragraph 10(2)(f) into the Act, is the key provision in relation to appointing agents. That provision would allow the Commission to 'appoint as its agents Indigenous Business Australia (IBA) or any **other persons** who it is satisfied have qualifications and experience that are appropriate to enable them to act on its behalf in the matter to which the appointment relates.'

Further, item 17 in Schedule 1 to the Bill, which would insert a new subsection 10(6) into the Act, provides that in so far as a person is authorised to perform a function as an agent or delegate of the Commission, the person may exercise any of the Commission's powers for or in connection with the performance of the function. By virtue of proposed subsection 10(6), a person would be able to exercise the Commission's powers for or in connection with the performance of the paragraph

7(1)(a) function only if authorised to perform that function as an agent or delegate of the Commission.

Proposed paragraph 10(2)(f) contains a limitation in respect of the persons whom the Commission may appoint as its agents. Also, proposed section 45B, to be inserted by item 18 in Schedule 1 to the Bill, enables the Commission to delegate only to IBA commercial functions falling within paragraph 7(1)(a) of the Act. If, in accordance with proposed paragraph 7(1A)(a) of the Act, the Commission were to enter into a contract or agreement authorising a person to perform a function referred to in paragraph 7(1)(a) otherwise than as an agent of the Commission, the person would not be authorised by proposed subsection 10(6) to exercise the Commission's powers for or in connection with the performance of the function.

The Committee thanks the Minister for this further response and notes that the key provision in relation to the appointment of agents is new paragraph 10(2)(f). This provision will allow ATSIC to appoint as its agents "other persons who it is satisfied have qualifications and experience that are appropriate…"

The Committee recognises that this provision limits the class of potential appointees. However, it does this by imposing what is essentially a subjective test – ATSIC must be satisfied that appointees have appropriate qualifications and experience. Where a subjective test is imposed, no criteria need be specified or applied.

The Committee prefers to see objective limitations on a class of potential appointees or delegates – appointees should occupy defined positions (ie be members of the Senior Executive Service) or possess defined qualifications or experience. The specification (whether in the bill itself, or in documents produced by the Department) of criteria such as these ensures that administrative powers are better defined. For this reason, the Committee continues to draw Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 22 February 2001. 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. 1 of 2001

This bill was introduced into the House of Representatives on 7 December 2000 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to make consequential amendments to certain offence provisions contained in 11 Acts within the Communications, Information Technology and the Arts portfolio. The amendments are intended to ensure that when Chapter 2 of the *Criminal Code Act 1995* (the Code) is applied to all Commonwealth criminal offences, from 15 December 2001, those provisions will continue to operate in a similar manner.

The bill also makes other minor amendments to offence provisions in the Communications, Information Technology and the Arts portfolio, which are consistent with the general criminal law policy, to simplify offence provisions and improve their operation.

Strict liability offences
Schedule 1, items 4, 12, 38, 44, 46, 56, 57, 60, 74, 92, 94, 96, 98, 99, 148 and 154

This bill provides for the application of the Criminal Code to offences in legislation administered within the Communications, Information Technology and the Arts portfolio. As a result, a number of offences are now declared to be offences of strict liability. Where an offence is one of strict liability, a person is held to be legally liable for their conduct irrespective of their moral responsibility, and the Committee draws the Senate's attention to provisions which create such offences.

The Minister concludes his Second Reading Speech by observing that, apart from some minor exceptions, which are noted in the Explanatory Memorandum, "this Bill does not affect the operation of the current criminal offences. It ensures that the current criminal offences are not altered following the application of the *Criminal Code* to Commonwealth legislation". While the Committee notes this observation, it **seeks the Minister's confirmation** that the bill creates no new offences of strict liability.

Pending the Minister'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.

Relevant extract from the response from the Minister

As identified in the Alert Digest, the Bill declares that a number of offences in the legislation administered within the Communications, Information Technology and the Arts portfolio are offences of strict liability. These amendments are necessary to ensure that after the *Criminal Code* (the Code) comes into operation offences that could currently be interpreted as strict liability offences continue to be offences of strict liability. Section 6.1 of the *Criminal Code* states that a criminal offence is a strict liability offence only if express provision is made to that effect. If an offence is not specified to be one of strict liability, after the Code comes into operation a court would be required to interpret it as a fault offence and no longer as a strict liability offence. The intention behind the strict liability amendments made by the Bill is to preserve the status quo in relation to strict liability. It is important to note that subject to two exceptions discussed below, such amendments are only made to offences that are judged to be presently of a strict liability character, thus maintaining the status quo.

In some instances the amendments involve a judgement about the likely effect of existing offences and whether they are presently of a strict liability character. This has been necessary in some instances as the operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences – and in particular those which have never been prosecuted – are offences of strict liability.

As few Commonwealth criminal offences expressly state whether they are offences of strict liability, in most instances whether an offence is currently one of strict liability must be settled by judicial interpretation. In the absence of specific judicial interpretation, it has been necessary for officers of the Department of Communications, Information Technology and the Arts to determine in each instance whether Parliament originally intended that the criminal offence be one of strict liability. This has been done in consultation with the Attorney-General's Department and with the relevant administering Division of the Department in each instance.

In determining whether an individual offence is one of strict liability, officers of the Department of Communications, Information Technology and the Arts, on the advice of the Attorney-General's Department, followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons.

The first offences to be excluded were those that expressly provided a fault element of any nature (such as intentionally or recklessly) or necessarily implied a fault element. This exclusion was based on the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

The next step was to exclude all offences where the relevant penalty is sufficiently high – either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment – to indicate that Parliament intended that the offences be fault-based. On the advice of the Attorney-General's Department it was decided that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

In addition, the existence of an express defence to an offence and the nature of the offence itself were two other significant considerations taken into account in determining whether an offence was one of strict liability. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " … if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Communications, Information Technology and the Arts portfolio include those concerning failure to comply with reporting or record-keeping requirements.

The above factors were all taken into account in assessing each individual criminal offence for strict liability. Subject to two exceptions discussed below, I confirm that the Bill only applies strict liability to offences where it can be clearly inferred that Parliament intended that strict liability would apply.

As noted in the Committee's report, in my Second Reading Speech I concluded that subject to minor exceptions, which are noted in the Explanatory Memorandum, this Bill does not affect the operation of the current criminal offences. Two of the exceptions which are noted in the Explanatory Memorandum (at pages 56 and 58) are the creation of two new offences of strict liability. I have attached a copy of the relevant pages of the Explanatory Memorandum for your information **(Attachment A**).

The Bill creates two new strict liability offences, subsections 534(3) and 548(2) of the *Telecommunications Act 1997*.

Subsection 534(3) of the Telecommunications Act makes it an offence for a person who ceases to be an inspector to fail to return his or her identity card to the Australian Communications Authority as soon as practicable after he or she ceases to be an inspector. This offence could not currently be interpreted as a strict liability offence as the fault elements of 'intentionally or recklessly' are applied to the offence. As discussed above, the existence of a fault element in an offence was a reason for excluding the offence from strict liability consideration. However, this Bill proposes to make this offence one of strict liability.

As the Explanatory Memorandum to the Bill points out (at page 56), the Government decided that this offence should be one of strict liability for reasons of public interest. It is important that identity cards are returned as soon as the cardholder stops being an inspector so that false representations cannot be made about the scope of the person's powers and authority. Inspectors have general and rather wide ranging powers under the Telecommunications Act, including powers to enter and search property and seize items. These powers could be open to abuse by persons who no longer have the authority of an inspector if they did not return the identity cards as soon as they ceased to be an inspector. Another important factor in determining that strict liability was warranted in this instance was the small pecuniary penalty attached to this offence (5 penalty units or $550) and the absence of any penalty of imprisonment. In addition, this offence provided an express defence of reasonable excuse. As discussed above, the availability of an express defence of reasonable excuse is a reasonable grounds for imposing strict liability. It ensures that there is a balance between the need for efficient prosecution of offences and the need to provide a defence to persons where there is a reasonable excuse for their contravention of the provision in the circumstances. For these reasons the Government formed the view that strict liability is warranted in this instance.

Providing that subsection 534(3) of the Telecommunications Act is a strict liability offence also ensures consistency with similar offences in other portfolio legislation. Like subsection 534(3) of the Telecommunications Act, subsection 29(3) of the *Protection of Movable Cultural Heritage Act 1986* and subsection 268(3) of the *Radiocommunications Act 1992* make it an offence for a person who ceases to be an inspector to fail to return his or her identity card as soon as practicable. These

offences are specified to be strict liability offences (see items 44 and 92 of Schedule 1 to the Bill).

In addition the Bill amends subsection 548(2) of the Telecommunications Act to make it a strict liability offence. Subsection 548(2) makes it an offence to contravene a requirement of an inspector to produce certain documents, such as a licence, permit, label, statement of certification, or records which a person is required to hold, in certain circumstances. Currently this offence could not be interpreted as a strict liability offence as the fault elements of 'intentionally or recklessly' are applied to the offence.

The Government has decided that this offence should be a strict liability offence because of the public importance of ensuring that persons have appropriate licences, have appropriately tested certain equipment and have equipment which complies with specified standards. The regulatory nature of this offence suggested that strict liability could be appropriate in this instance. As with the offence in subsection 534(3) of the Telecommunications Act, another important factor in determining that strict liability was warranted in this instance was the small pecuniary penalty attached to this offence (20 penalty units or $2,200) and the absence of any penalty of imprisonment. In addition this offence provides an express defence of reasonable excuse. As discussed above, the availability of an express defence of reasonable excuse is a reasonable grounds for imposing strict liability. It ensures that there is a balance between the need for efficient prosecution of offences and the need to provide a defence to persons where there is a reasonable excuse for their contravention of the provision in the circumstances. For these reasons the Government formed the view that strict liability is warranted in this instance.

This offence is similar to offences in other portfolio legislation (subsection 39(2) of the *Protection of Movable Cultural Heritage Act 1986* and subsection 279(2) of the *Radiocommunications Act 1992*) which relate to requiring persons to comply with directions of an inspector to produce permits or evidence of such in certain circumstances. These offences are specified to be ones of strict liability (see items 46 and 96 of Schedule 1 to the Bill).

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

The Committee thanks the Minister for this comprehensive and thorough response.

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000

(previous citation: Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999)

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 19 of 1999*, in which it made various comments. The Minister for Justice and Customs responded to those comments in a letter dated 13 March 2000.

In its *Fifteenth Report of 2000*, the Committee thanked the Minister for this response, but expressed some concern about the way in which requiring a defendant to adduce evidence about the content of foreign law would operate in practice. The Committee sought further advice on this issue. The Minister responded to these concerns in a letter dated 1 November 2000, and the Committee received a briefing on the bill on 8 November 2000. A copy of the letter and the transcript of the briefing are attached to this report. An extract from the *Fifteenth Report* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 19 of 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Criminal Code Act 1995* to:

- provide for a range of geographical jurisdictional options to apply to all offences;
- implement a scheme of theft, fraud, bribery, forgery and related offences (based on chapter 3 of the Model Criminal Code);
- provide additional protection for Commonwealth public officials from violence and harassment enabling the Commonwealth to prosecute those who seek to cause them harm (based on chapter 5 of the Model Criminal Code);

- provide protection of any part of the national infrastructure about which the Commonwealth has power and believes it is in the national interest to protect regardless of ownership details, including postal and communications services;

and amends 123 Acts and five regulations to repeal more than 250 offences as a consequence of amendments to the *Criminal Code Act 1995*.

Reversal of the onus of proof
Proposed new sections 14.1, 15.1, 15.2 and 15.3

Item 12 of this bill inserts a new set of general principles into Chapter 2 of the Criminal Code which deal with the geographical reach of Commonwealth offences. These are contained in a new Part 2.7, which contains proposed new sections 14.1, 15.1, 15.2 and 15.3. These sections are drafted to specify the geographical jurisdiction of the Criminal Code widely.

Proposed new subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) then allow for a defence to the liability imposed by the preceding provisions in each section. For example, proposed subsection 14.1(3) states that a person is not guilty of a relevant offence if the conduct constituting the alleged offence occurs wholly in a foreign country (but not on board an Australian aircraft or ship) and in the foreign country where the conduct took place there is no law that creates a corresponding offence. The defendant bears an evidential burden in relation to these matters, and the other comparable defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

With regard to proposed subsection 14.1(3), the Explanatory Memorandum states that it "provides the possibility of a defence" and that this defence is "that there was no offence in the place where the conduct occurred … the inquiry is not into whether the particular conduct alleged would have amounted to an offence of some kind or other under the law of [country] X … the inquiry is into whether [country] X has in its law a corresponding offence."

While significant, these words provide no explanation for the adoption of this form of drafting, nor do they seek to justify the imposition of an evidential burden on a defendant to raise issues of the content of foreign law.

Further, the relationship between proposed subsection 14.1(2) and 14.1(3) is not clear. Under subsection 14.1(2) the prosecution would bear the onus of proving that the conduct constituting the offence occurs partly or wholly in Australia. Under proposed subsection 14.1(3) the defendant bears an evidential burden of showing that the conduct constituting the offence occurred wholly in a foreign country. It is not clear how the two burdens are to relate in practice. The Committee, therefore, **seeks the Minister's advice** as to why these provisions have been drafted in this way, and why the defendant should bear an evidential burden in relation to the defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

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

Relevant extract from the response from the Minister dated 13 March 2000

The digest raises concerns that certain provisions in the Bill may be considered to trespass unduly on personal rights and liberties.

Geographical jurisdiction - onus of proof

Item 12 of the Bill inserts into Chapter 2 of the Criminal Code (which contains the general principles of criminal responsibility) a new set of provisions which deal with the geographical reach of Commonwealth offences. These provisions on geographical reach are contained in new Part 2.7, which contains proposed sections 14.1, 15.1, 15.2, 15.3 and 15.4.

Proposed Part 2.7 provides a range of options for geographical jurisdiction which it is proposed should be used to determine this issue in relation to specific offences. Each time an offence is developed it will be possible to select the appropriate option for geographical reach. If the offence requires only a narrow territorial basis for jurisdiction then proposed section 14.1 would apply as the 'default provision' without the need for reference to the issue. Proposed section 14.1 provides for a basic but narrow geographical jurisdiction based on a territorial connection to Australia.

The options in proposed sections 15.1, 15.2, 15.3 and 15.4 provide for more extensive jurisdiction, increasing in reach by degrees from category A (section 15.1) through to an unrestricted jurisdiction in category D (section 15.4). (The latter might be appropriate for those offences which are regarded as matters of universal jurisdiction such as piracy and the like.) It will be for the Parliament to determine on a case by case basis which of the provisions is appropriate for a particular offence. The presentation of the options in Part 2.7 is not in itself going to make the geographical jurisdiction of the Code wider than current provisions. Indeed it is quite possible that section 3A of the *Crimes Act 1914* provides for much broader

jurisdiction than some of these options - particularly when compared to proposed section 14.1. (Section 3A states rather baldly, and unhelpfully, that the *Crimes Act 1914* 'applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories'.)

Proposed subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) provide for a defence where there is no law of a corresponding kind in the other country where conduct constituting the offence occurs. The provisions are protective of the rights of the citizen in that there is currently no specified defence of this nature under the existing *Crimes Act 1914* equivalent (section 3A). The defence is included to ensure there is no undue trespass on personal rights and liberties in relation to offences where standard or category A, B or C geographical jurisdiction applies. (There is, of course, no similar defence in relation to category D - unrestricted jurisdiction.)

The provisions impose an *evidential burden* upon the defendant in relation to these matters. The Criminal Code defines an *evidential burden* as the burden on the defendant to adduce or point to evidence that suggests a reasonable possibility that there is no corresponding foreign law, (sections 13.3(3) and (6) of the *Criminal Code*). If this occurs, then it is for the prosecution to prove beyond a reasonable doubt that there is a corresponding law. The burden of proof on the defendant is not a particularly onerous requirement. It would be unacceptably onerous on the prosecution to prove in every case beyond a reasonable doubt that there were laws of a corresponding kind, even where there was no evidence that this was an issue.

I turn now to your comment that the relationship between proposed subsections 14.1(2) and (3) is not clear. Proposed paragraph 14.1(2)(c) refers to ancillary offences, such as conspiracy or attempt or the like, which even under the most limited option for geographical jurisdiction may involve conduct constituting an offence which occurs wholly outside Australia. In those circumstances the defendant may have a defence under proposed subsection 14.1(3) if there is no corresponding offence in that country.

The Committee thanks the Minister for this detailed response and notes the breadth of the existing section 3A of the *Crimes Act 1914*. Nevertheless, it continues to have some concerns about the way in which requiring a defendant to adduce evidence about the content of foreign law will operate in practice. The Committee would appreciate a further briefing on this issue.

Relevant extract from the further response from the Minister dated 1 November 2000

I understand that the Senate Standing Committee for the Scrutiny of Bills would be grateful for some additional briefing on the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill* in relation to the defence provided in the provisions concerning geographical jurisdiction. You will recall I wrote to you about this issue on 13 March 2000 in response to Alert Digest 19/1999.

On that occasion I mentioned that the group of provisions in proposed Part 2.7 of the Bill provides for a range of options for geographical jurisdiction which it is proposed should be used to determine this issue in relation to specific offences. Proposed section 14.1 provides for a basic but narrow geographical jurisdiction based on a territorial connection to Australia. The options in proposed sections 15.1, 15.2 and 15.3 provide for more extensive jurisdiction, but it is for the Parliament to determine on a case by case basis whether those provisions are appropriate for a particular offence. The presentation of the options in Part 2.7 is not in itself going to make the geographical jurisdiction of the Code wider than current provisions. Indeed it is quite possible that section 3A of the *Crimes Act 1914* provides for much broader jurisdiction than some of these options - particularly when compared to proposed section 14.1. (Section 3A simply states that the Act 'applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.')

I also mentioned that in my view there is nothing unreasonable about proposed subsections 14.1(3) - (5), 15.1(2) - (4), 15.2(2) - (4) and 15.3(2) - (4) which provide for a defence where there is no law of a corresponding kind in the other country where conduct constituting the offence occurs. There is currently no specified defence of this nature under the existing *Crimes Act 1914* equivalent (section 3A). The defence is included to ensure there is no undue trespass on personal rights and liberties in relation to offences where standard or category A, B or C geographical jurisdiction applies. It thus represents a significant improvement over the existing law.

The provisions impose an evidential burden upon the defendant in relation to these matters. The *Criminal Code* defines an evidential burden as the burden on the defendant to adduce or point to evidence that suggests a reasonable possibility that there is no corresponding foreign law (sections 13.3(3) and (6) of the *Criminal Code).* If this occurs, then it is for the prosecution to prove beyond a reasonable doubt that there is such a corresponding law.

If someone choses to conduct his or her affairs in another country it is reasonable to expect the person to appreciate there is a risk he or she will offend some local law. For example, if the person goes to a very religious society and there are offences prohibiting the consumption of liquor, few would have any problem with that person being prosecuted for breaking that law. It is reasonable to expect the person to be careful about differences in the law.

However, an example relevant to the proposed provisions is where the defendant goes to that other country and does things that are illegal in his or her own society (such as having sex with a young child). Surely if that person has come to the view that the activity is not illegal in that other country, he or she should have some basis for that view and be able to point to something of substance which led him or her to reach that conclusion. If the person is able to point to something which suggests that there is a reasonable possibility that there is no corresponding foreign law, then the prosecution must prove such a law does exist beyond a reasonable doubt. This is both reasonable and good policy.

These are not circumstances where the prosecution should from the very beginning in every prosecution for an offence committed in some foreign country be required to establish beyond reasonable doubt that the conduct did not constitute an offence under the law of the foreign country concerned. The Government is not about to support a policy which would mean that in every charge under the Commonwealth child sex tourism provisions the prosecution must be required to establish that such

conduct was also an offence under the law of the foreign country concerned. It would be an intolerable burden in circumstances where the defendant cannot even point to some basis for the suggestion that the activity was not illegal in that other country.

The Committee thanks the Minister for this comprehensive additional response, and for fully briefing the Committee.

Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 17 of 2000*, in which it made various comments. The Minister assisting the Minister for Defence has responded to those comments in a letter dated 5 December 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. 17 of 2000

This bill was introduced into the House of Representatives on 9 November 2000 by the Minister for Veterans' Affairs. [Portfolio responsibility: Defence]

Introduced with the Defence Reserve Service (Protection) Bill 2000, the bill amends the *Defence Act 1903* and other legislation as follows:

Schedule 1 to the bill proposes to amend the *Defence Act 1903* to repeal sections 50D, 50E, 50F and 50G, and substitute new provisions to enable the call out of members of the Reserve Forces in circumstances less than in the defence of Australia.

Schedule 2 proposes amendments to the *Defence Act 1903* and 17 other Acts to modernise the organisation and structure of the Defence Force Reserve. The Schedule also contains saving and transitional provisions.

Schedule 3 repeals the *Defence (Re-establishment) Act 1965*, makes consequential amendments to the *Defence Act 1903* and the *Disability Services Act 1986*, and contains application and transitional provisions.

Schedule 4 proposes to expand the allowances and benefits for employers to better compensate them for the effects of Reservists undertaking defence duties, and makes other consequential amendments.

Commencement
Subclause 2(3)

Subclause 2(3) of this bill provides that many of the amendments proposed in Schedule 2 are to commence on Proclamation or 12 months after Assent – whichever is the earlier.

This is a departure from the practice set out in *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, where a clause provides for commencement after assent, the preferred period should not be longer than 6 months. The *Drafting Instruction* goes on to state that, where a longer period is chosen "Departments should explain the reason for this in the Explanatory Memorandum".

The Explanatory Memorandum accompanying this bill provides no explanation for the adoption of a longer period for the commencement of the relevant provisions in Schedule 2. The Committee, therefore, **seeks the Minister's advice** as to why these provisions may not commence until 12 months after Assent.

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

Relevant extract from the response from the Minister

> The Committee was concerned by an apparent departure from drafting practice that, where a clause provides for commencement after Royal Assent, the preferred period should be no longer than 6 months. Subsection 2(2) of the Bill provides that Items 12 to 15, 19, 27 to 31, 67, 68 and 75 to 77 commence on a day or days to be fixed by Proclamation. Subsection 2(3) goes onto provide that if anyone of these provisions do not commence under subsection (2) within the period of 12 months from the day of Royal Assent, they will commence on the first day after the end of that period of 12 months.
>
> Item 19, contained in Schedule 2 of the Bill, amends Division 2 of the *Defence Act 1903.* Sections 33 to 44A of that Act mentioned in this Item will be repealed. These provisions provide for the enlistment, discharge and transfer of soldiers. As part of the Government's initiative to modernise the organisation and structure of the Defence Force, these provisions will be transferred into Defence Regulations. This ensures that matters relating to the administration of the Defence Force can be more appropriately prescribed in regulations (where appropriate) rather than in primary legislation. This is already the case in relation to the Air Force, contained in the *Air Force Regulations 1927.*

Item 67 of the Bill will repeal Part II of the *Naval Defence Act 1910* which sets out the regime for the enlistment, discharge and transfer of sailors. These provisions are also being transferred into Regulations for the same reasons mentioned above.

The other Items mentioned are consequential in these two Parts.

The Regulations referred to above are in the process of being developed. Given that this process will take some time, it was considered appropriate to extend the commencement period to ensure sufficient time to properly develop these regulations.

The Committee thanks the Minister for this response which indicates that a 12 month commencement period is required to enable the development of regulations. The Committee notes that a 6 month period is traditionally regarded as sufficient for this purpose, and is the period usually required by most Departments.

In the case of this bill, it seems that provisions are simply being "transferred" from primary to subordinate legislation, as has already occurred in relation to the Air Force. The development of regulations in these circumstances would seem to be straightforward, and requiring 12 months to finalise them to be excessive. The Committee, therefore, **seeks the Minister's further advice** as to why the development of these regulations requires twice as much time as is usual. Pending the Minister's further advice, the Committee continues to draw Senators' attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference

Non-reviewable discretion
Schedule 1, item 1

Among other things, item 1 of Schedule 1 to this bill proposes to insert a new section 50D in the *Defence Act 1903*. This new section authorises the Governor-General to call out the Reserves, or a part of the Reserves, for continuous full time service. Some examples of circumstances which may give rise to such a call out are set out in proposed new subclause 50D(2) – these include (but are not limited to) war, defence, emergency, defence preparation, peacekeeping or peace enforcement, civil aid, humanitarian assistance or disaster relief.

Proposed new subclause 50D(3) provides that, in making or revoking a call out, the Governor-General must act with the advice of the Executive Council. However if, after the Minister has consulted the Prime Minister, the Minister is satisfied that, for reasons of urgency, the Governor-General should act on his or her advice alone, then the Governor-General must call out the troops on the advice of the Minister alone.

The exercise of either of these discretions is not subject to any form of review, other than the general accountability of the Executive Council to the Parliament, and where the Reserves are called out on the advice of the Minister alone, not even this level of accountability exists. The Committee, therefore, **seeks the Minister's advice** as to why the bill provides no scope for review of the exercise of these discretions.

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

In relation to the second area of concern regarding non-reviewable exercise of discretion, it is not standard practice in legislation to include provisions that provide for review of Ministerial decisions. Of course, there are exceptions to this, for example under the *Social Security Act 1991* or the *Migration Act 1958* where the respective Ministers make many decisions that affect individual rights and liberties. Where there are no such provisions, the general law, including relief under the *Administrative Decisions (Judicial Review) Act 1977,* applies and furthermore under section 75 of the Constitution, which provides for the original jurisdiction of the High Court in relation to which a writ of mandamus or prohibition or an injunction may be sought against an "officer of the Commonwealth".

Given the circumstances in which a potential challenge to the exercise of the discretion would be exceptionally rare, it was not considered necessary to include separate review provisions in this Bill.

I hope that the above explanation of the matters of concern to the Committee has been of assistance. If you wish, I would be happy to arrange for Defence officials to give the Committee a private briefing on the legislation.

The Committee thanks the Minister for this response. The Committee would **appreciate the Minister's confirmation** that decisions under proposed new section 50D are subject to the *Administrative Decisions (Judicial Review) Act 1977*.

Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 23 February 2001. 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. 1 of 2001

This bill was introduced into the Senate on 6 December 2000 by the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to make consequential amendments to certain offence provisions contained in 11 Acts administered by the Department of the Environment and Heritage. The amendments are intended to ensure that when Chapter 2 of the *Criminal Code Act 1995* (the Code) is applied to all Commonwealth criminal offences from 15 December 2001, those provisions will continue to operate in the manner they operated previously.

The bill also makes other amendments to ensure the portfolio's legislation more closely accords with the Criminal Code. These include the requirement that defendants generally should bear an evidential, not a legal burden, in the *Antarctic Marine Living Resources Conservation Act 1981* and the *Antarctic Treaty (Environment Protection) Act 1980*.

Strict liability offences and reversals of the onus of proof
Schedule 1, items 16, 20, 24, 34, 39, 42, 43, 45, 53, 55, 57, 59, 61-65, 68, 85, 87, 89, 91, 93, 95, 98, 101, 103, 108, 110-115, 117-118, 125, 127, 130-133, 135, 137, 140, 149, 151, 157, 159-161, 167, 169, 171, 174-176

This bill provides for the application of the Criminal Code to certain offences in legislation administered within the Environment and Heritage portfolio. As a result, many offences are now declared to be offences of strict liability, and an evidential burden is imposed on defendants in relation to the raising of various other matters. It is the Committee's practice to draw the Senate's attention to provisions which have this effect.

With regard to the imposition of an evidential burden, the Minister's Second Reading Speech notes that these amendments effectively change what is an existing legal burden on defendants to a lesser evidential one. Therefore, the bill reduces the burdens imposed on defendants.

With regard to the specification of strict liability offences, the Explanatory Memorandum observes that "these amendments are intended to ensure that when Chapter Two of the *Criminal Code Act 1995* is applied to pre-existing portfolio offence provisions, from 15 December 2001, those provisions will continue to operate in the same manner as they operated previously". While noting this observation, the Committee **seeks the Minister's confirmation** that the bill creates no new offences of strict liability.

Pending the Minister'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.

Relevant extract from the response from the Minister

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Environment and Heritage portfolio to expressly provide that they are offences of strict liability. This is made necessary by section 6.1 of the Criminal Code, which states that a criminal offence is a strict liability offence only if express provision is made to that effect. The converse will also apply, namely that any offence which is not expressly stated to bean offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments made by the Bill is to preserve the status quo in relation to strict liability. It is important to note that such amendments are only made to offences that are judged to be presently of a strict liability character, thus maintaining the status quo.

The operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences - and in particular those which have never been prosecuted - are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for officers of the Attorney-General's Department to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This has been done in consultation with a senior officer of the Commonwealth Director of Public Prosecutions and with the officers of my Department in each instance.

In determining whether an individual offence is one of strict liability, the Attorney-General's department followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523*,* which was stated by Brennan J at 566*:*

> "It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months' imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346*,* where he stated that the presumption of fault would be displaced:

> " ... if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Attorney-General's portfolio include those concerning failure to comply with reporting or record-keeping requirements, attendance before panels of inquiry, and failure to comply with conditions of permits or licences.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

The Committee thanks the Minister for this comprehensive and thorough response.

Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter received on 20 February 2001. 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. 1 of 2001

This bill was introduced into the Senate on 6 December 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to make consequential amendments to certain offence provisions contained in 50 Acts administered by the Attorney-General's portfolio. The amendments are intended to ensure that when Chapter 2 of the *Criminal Code Act 1995* (the Code) is applied to all Commonwealth criminal offences, from 15 December 2001, those provisions will continue to operate in the same manner as they operated previously.

Strict liability, absolute liability and reversals of the onus of proof
Various provisions

This bill applies the Criminal Code to all offence-creating and related provisions in legislation administered within the Attorney-General's portfolio. As a result, many offences are now declared to be offences of strict liability, absolute liability is applied to the elements of certain offences, and an evidential burden is imposed on defendants in relation to the raising of various other matters. It is the Committee's practice to draw the Senate's attention to provisions which have this effect.

The Explanatory Memorandum states that the aim of the bill is simply to "ensure that existing offences operate in much the same way as they do now … there will be occasions when the operation of existing offences will be uncertain. The amendments will therefore sometimes involve judgment about the likely effect of existing offences. Where this occurs it will provide much needed clarification of the meaning of the relevant provisions".

The Committee notes that, in the case of some provisions covered in this bill, there has been uncertainty as to whether they are currently offences of strict liability. Given this, the Committee **seeks the Minister's advice** as to which offences are uncertain; whether that uncertainty is as a result of any judicial consideration, and whether (and why) the bill has resolved that uncertainty by now declaring those offences to be offences of strict liability.

Pending the Minister'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.

Relevant extract from the response from the Minister

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Attorney-General's portfolio to expressly provide that they are offences of strict liability. This is made necessary by section 6.1 of the Criminal Code, which states that a criminal offence is a strict liability offence only if express provision is made to that effect. The converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments made by the Bill is to preserve the status quo in relation to strict liability. It is important to note that such amendments are only made to offences that are judged to be presently of a strict liability character, thus maintaining the status quo.

The Alert Digest quotes from the Bill's Explanatory Memorandum, which relevantly states:

> "The application of the *Criminal Code* to all offences will improve Commonwealth criminal law by clarifying important element of offences, in particular, the fault elements. At present many hours of practitioners and court time are wasted in litigation about the meaning of particular fault elements or the extent to which the prosecution should have the burden of proving those fault elements . ... The aim of the Bill is to simply ensure that existing offences operate in much the same way as they do now. However, there will be occasions where the operation of existing offences will be uncertain. The amendments will therefore sometimes involve judgment

about the likely effect of existing offences. Where this occurs it will provide much needed clarification of the meaning of the relevant provisions."

This passage was intended to convey that the operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences - and in particular those which have never been prosecuted - are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for officers of the Attorney-General's Department to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This has been done in consultation with a senior officer of the Commonwealth Director of Public Prosecutions and with the relevant administering Division of the Department in each instance.

In determining whether an individual offence is one of strict liability, this office followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document (marked "A"). The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

"It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) creates an equitable public interest balance between

the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " ... if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Attorney-General's portfolio include those concerning failure to comply with reporting or record-keeping requirements, attendance before panels of inquiry, and failure to comply with conditions of permits or licences.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

The Committee thanks the Minister for this comprehensive and thorough response.

Migration Legislation Amendment Bill (No. 1) 2001
(previous citation: Migration Legislation Amendment Bill (No. 2) 2000)

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2000*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 13 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. 4 of 2000

This bill was introduced into the House of Representatives on 14 March 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

Migration Act 1958 in relation to judicial review of visa related matters to:

- prohibit class actions in migration litigation; and to
- limit those persons who may commence and continue proceedings in the courts.

Migration Act 1958 and *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* to:

- clarify the scope of the Minister's power to set aside non-adverse decisions of the delegate or the Administrative Appeals Tribunal in relation to the "character test" and to substitute the Minister's own adverse decision;
- rectify an omission from the Act which allows for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled; and
- correct three misdescribed amendments of the Act.

The bill also proposes a number of technical corrections and rectifications to the *Migration Act 1958*; the *Migration Legislation Amendment Act (No 1) 1998*; and the *Migration Legislation Amendment (Migration Agents) Act 1999*.

Retrospective application
Subclause 2(4) and Schedule 2, Part 1

A number of the amendments proposed in Part 1 of Schedule 2 to this bill concern section 501A of the *Migration Act 1958*. By virtue of subclause 2(4), these amendments are to be taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the Character and Conduct Act).

The Minister's Second Reading Speech states that the amendments to section 501A are intended to "clarify the original policy intention" behind the Character and Conduct Act, and "to put it beyond doubt that the Minister can, in the national interest, substitute his or her own section 501 decision for that of a delegate or the Administrative Appeals Tribunal".

Given the period of retrospectivity involved, and the history of Parliamentary consideration of the Character and Conduct Act, the Committee **seeks the Minister's advice** on how the doubts about the operation of section 501A arose and whether the proposed retrospective application of these amendments is likely to affect any existing or proposed litigation.

With regard to section 501A itself, the Committee remains concerned at its potential use as a device for administrative convenience, and notes the observation of the Administrative Appeals Tribunal that "if the Minister were to exercise the powers in proposed ss 501A and 501B more than infrequently the integrity of the Tribunal's decision-making process and public confidence in the independence of the Tribunal may be undermined".[1]

Pending the Minister'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.

Relevant extract from the response from the Minister

> Part 1 of Schedule 2 to the Bill amends section 501A of the *Migration Act 1958* ("the Act") and paragraph 33(1)(c) of Schedule 1 to the *Migration Legislation*

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1 Quoted in Senate Legal and Constitutional Legislation Committee, Report on Legislation Referred to the Committee: *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997*, March 1998, p 23.

Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 ("the Character Act").

Subclause 2(4) of the Bill provides that these amendments are to be taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the Character Act.

Given the period of retrospectivity involved, the Committee believes that the amendments may trespass unduly on personal rights and liberties. The Committee has sought my advice on how doubts about the operation of section 501A arose and whether the proposed retrospective application of these amendments is likely to affect any existing or proposed litigation**.**

However, before dealing with the Committee's specific concerns, I note that these amendments do not represent a policy change from that which was considered by the Parliament during deliberation of the Character Act. The amendments serve to remove uncertainties in the interpretation of section 501A and ensure that the Parliament's intent is given full effect in the legislation.

Operation of section 501A

Paragraph 501A(1)(c) and Paragraph 33(1)(c)

Currently, paragraph 501A(1)(c) suggests that the AAT has a power to *grant* a visa when reviewing a subsection 501(1) decision of a delegate when in fact it does not have such a power.

Section 501(1) only confers a power to *refuse to grant* a visa to a person, or not to refuse to grant a visa, depending on whether the original decision-maker is satisfied that the person passes the character test in subsection 501(6). In other words, subsection 501(1) does not confer a power to actually grant a visa - that power is contained in section 65 of the Act.

Under paragraph 500(1)(b) of the Act, the AAT may review a delegate's subsection 501(1) decision to refuse to grant a visa. However, the AAT's jurisdiction to review a subsection 501(1) decision does not include a power to actually grant a visa.

The proposed amendment to paragraph 501A(1)(c) removes any suggestion that the AAT has a power to grant a visa when a reviewing a delegate's subsection 501(1) decision.

The amendment will also ensure that the AAT's non-adverse subsection 501(1) decision can be set aside in the national interest under section 501A. This is within the original policy settings of the Character Act which inserted provisions, like section 501A, into the Act in order to enhance the Government's ability to effectively deal with non-citizens who are not of good character.

Subsection 501A(1)

Section 501A gives me the power to intervene where a delegate or the AAT has made a decision not to exercise the power in section 501. Under section 501, a delegate may refuse to grant a visa or to cancel a visa if satisfied that the person does not pass the character test in subsection 501(6).

It is reasonably clear from the terms of subsections 501A(2) and (3) that the power in section 501A is intended to be available to set aside decisions made by a delegate or the AAT that a person has passed the character test under section 501. If this was not the case, the only decisions that could be set aside under section 501A would be those where a delegate or the AAT has already reached the view that the person does not pass the character test.

In spite of this, there is some uncertainty as to whether the power in section 501A, as currently drafted, is available to set aside a non-adverse section 501 decision of a delegate or the AAT where that decision was reached because the person was found to have passed the character test.

The proposed amendment to subsection 501A(1) is intended to put it beyond doubt that I can intervene under section 501A where a delegate or the AAT makes a decision not to exercise the power in section 501 because:

- he or she is satisfied that the person passes the character test; or
- he or she is not satisfied that the person passes the character test but exercises his or her discretion not to refuse to grant the visa or to cancel the visa.

New subsection 501A(4A)

As Parliament was told during the second reading debate for the Character Act, the policy intention behind section 501A is that it should be possible, in the national interest, to set aside an AAT section 501 decision which is at odds with community standards and expectations.

However, as currently drafted, section 501A does not fully achieve the original policy intention because it does not give me the power to intervene where the AAT has set aside a delegate's section 501 decision and remitted the matter for reconsideration in accordance with directions. As it stands, section 501A only gives me the power to intervene after the section 65 delegate has decided to actually grant the visa.

Proposed new subsection 501A(4A) gives effect to the original policy intention by ensuring that section 501A allows me to intervene at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether the intervention occurs immediately or after a decision to grant has been made.

Whether the retrospective application of these amendments is likely to affect existing or proposed litigation

The retrospective commencement of the provisions in Part 1 of Schedule 2 to the Bill is not likely to affect existing or proposed litigation. This is because the amendments seek to clarify, rather than change, the original policy intention behind section 501A.

Exercise of the power in section 501A

I note the Committee's concern about the use of the power in section 501A. However, the proposed amendments to section 501A are technical amendments only which give legislative effect to the original policy intention of the legislation and put beyond doubt my powers in this area. This was fully described in both my second reading speech on 30 October 1997, when I originally introduced the Character Act in the House of Representatives, and in the explanatory memorandum for that Act.

The Committee thanks the Minister for this response which suggests that the amendments to section 501A are technical in nature, and clarify the original policy intent.

It seems that the law as it exists is unclear. Under the current provisions, it seems that the Minister may intervene to overturn a decision by the AAT to refuse to grant a visa on character grounds. However, it is arguable that the Minister cannot intervene to overturn a decision by the AAT to grant a visa to an applicant of good character. In addition, where the AAT remits a matter to a delegate for reconsideration, it seems the Minister cannot intervene until after the delegate makes a decision to actually grant the visa. It is not clear whether this uncertainty is as a result of legal advice received by the Minister, or as a result of comments made by a court or tribunal.

The amendments proposed in this bill address this uncertainty by apparently giving the Minister a complete discretion to intervene at any point after a favourable decision is made by a delegate or the AAT. While the law is clarified, it is clarified by once again increasing the discretion available to the Minister. The Committee, therefore, **seeks the Minister's further advice** as to whether the effect of these amendments will be to disadvantage persons seeking review, and whether the amendments have been proposed in response to legal advice or judicial or tribunal comment.

Pending the Minister's further advice, the Committee continues to draw 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.

Retrospective application
Schedule 1, item, 7

Item 7 of Schedule 1 to this bill provides that the amendments proposed by Part 2 of this Schedule are to apply to proceedings if the application to commence that proceeding was lodged on or after 14 March 2000. This is the date on which the bill was introduced into the Parliament.

The Explanatory Memorandum observes that the purpose of this retrospective application is "to prevent the commencement of large class actions which may have occurred if the amendments made by this Part only operated after Proclamation".

The Explanatory Memorandum goes on to note that, since October 1997, 14 class actions have been commenced "allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter". Since October 1997, 10 of these actions had been decided, all of which had been dismissed.

Provisions which make legislation operative from the date of its introduction, rather than the date of its ultimate passage, raise many of the same issues as provisions which make legislation operative from the date of a press release. In each case, a legislative proposal is to be treated as enacted legislation. As the Committee has previously stated with regard to legislation by press release, such an approach "carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with laws passed by the Parliament".

Making a bill operative from its introduction rather than its passage may place Parliament in the invidious position of either having to agree to the legislation without significant amendment or bearing the odium of overturning arrangements which may have been made in reliance on the proposal.

In its *Tenth Report of 1999*, the Committee considered the Migration Legislation Amendment Bill (No 2) 1998 – a bill which contained a similar commencement clause. In discussing that clause, the Committee observed that, in essence, "a bill has been introduced and its provisions are being applied even though it has not been passed … and, indeed, may never be passed. Such an approach permits legislation to be introduced and enforced without Parliament ever being required to vote on the matter".

Similar comments might be made in relation to the operation of this bill. The Committee, therefore, **seeks the Minister's advice** as to the effect of Item 7 of Schedule 1 should this bill not be passed, or not be passed in the form in which its was introduced.

The Committee also notes that 10 class actions seem to have been determined over the past 29 months, with only 4 others pending. In the context of general litigation delays, the Committee **also seeks the Minister's advice** as to what in these statistics raises concerns that class actions are being abused to such an extent that they ought be prohibited.

Pending the Minister'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.

Relevant extract from the response from the Minister

Item 7 of Schedule 1 to the Bill provides that the amendments in Part 2 of the Schedule apply to a proceeding if the application to commence the proceeding is filed in court on or after 14 March 2000. This is the date on which the Bill was introduced into the Parliament.

The Bill seeks to prohibit class actions in migration litigation from the date of introduction (when the proposed amendments became public) to avoid the real possibility that people could be encouraged to become involved in a class action prior to the enactment of the amendments for no other reason than to obtain the benefits which flow from litigation such as obtaining a bridging visa. The possibility of large numbers of people being encouraged to do this is not unrealistic given the advertisements that have appeared in newspapers in the past. An example of such an advertisement is at Annexure 1.

The Committee believes that the retrospective application of these amendments may trespass unduly on personal rights and liberties. The Committee has sought my advice as to the effect of Item 7 of Schedule 1 should the Bill not be passed, or not be passed in the form in which it was introduced.

The Committee has also sought my advice as to what are the statistics in relation to class actions that give rise to concerns that class actions are being abused to such an extent that they ought to be prohibited.

Non passage of the Bill

Should the Bill not be passed any actions commenced in either the Federal Court or the High Court on or after 14 March 2000, that would otherwise have breached proposed new section 486B for being a multiple party action, will be able to continue.

Item 7 of Schedule 1 also needs to be considered in conjunction with the transitional arrangements included in the Bill. Items 8 and 10 of Schedule 1 mean that applicants do not have to alter their position in contemplation of the proposed amendments. A person involved in a multiple party action (in relation to which a substantive hearing has not begun prior to Proclamation), which a court will not have jurisdiction to hear after the commencement of the amendments, will have 28 days to bring an individual action (provided they comply with the Act as amended by Part 2 of Schedule 1 to the Bill and all other laws relating to such proceedings such as standing and fees). The Commonwealth will refund any fee paid in relation to the multiple party proceeding.

Thus, if a person has an interest in a multiple party action on or after 14 March 2000 they will either be able to proceed with that action because the Bill is not passed, or

they will have time to recommence the action as an individual action if the Bill is passed.

Recommencing an action will not prejudice the person as the provisions of proposed new section 486B only apply to proceedings commenced on or after 14 March 2000 where there has been no substantive hearing of the matter before proclamation.

Passage of Bill in a form other than as it was introduced into the Parliament

I am unable to comment on this matter, as the answer would depend on the nature of the change or changes to the Bill after introduction.

What are the statistics in relation to class actions that give rise to the concern that class actions are being abused to such an extent that they ought to be prohibited?

I am of the view that class actions are not appropriate in the context of migration decisions. Most applicants in the class actions have been passive participants only brought into the process by virtue of advertisements by lawyers and migration agents, such as the advertisement at Annexure 1.

The main incentive for joining a class action is that an eligible non-citizen unlawfully in Australia may be granted a bridging visa.

The nature of the recent issues forming the basis of the class actions go to the framework of the legislation and procedural issues. It is unlikely that applicants would bring such challenges other than in a class and often the same legal issue is the subject of more than one class action. Some applicants also move from one class action to another. Brief details of the cases, the issues, the number of people involved and the outcomes are at Annexure 2.

In relation to the *Muin* class action only 3% of the members of that class would have been in time to make individual applications to the Federal Court in relation to their own visa decisions.

An examination of almost 50% of the members of the *Macabenta* class action failed to identify any of those members who, at the time of opting into the action, would have been in time to make a valid application under Part 8 of the Act in respect of the last substantive visa decision made in relation to them. In fact, in 25% of cases more than 3 years had elapsed since the last visa refusal decision in relation to them.

In examining the *Macabenta* class action, it was also found that 40% of members were identified as moving between class actions.

I believe that this demonstrates the use being made of class action litigation by persons, desperate to remain in Australia by any means, who under the Act would not otherwise be able to litigate in their particular circumstances.

The Committee thanks the Minister for this comprehensive response.

Therapeutic Goods Amendment Bill (No. 4) 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Aged Care has responded to those comments in a letter dated 19 February 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 1 of 2000

This bill was introduced into the Senate on 7 December 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Therapeutic Goods Act 1989* to introduce a redeveloped system for electronically listing medicines, except those to be listed for export-only, on the Australian Register of Therapeutic Goods. The new refined listing system seeks to assure the safety, quality of, and consumer confidence in listable medicines whilst facilitating quicker market access by applicants (sponsors). Listable, or listed, medicines are considered to be of low risk based on their ingredients and therapeutic indications and claims. Most complementary medicines and some over the counter medicines fall into this category.

The bill will also impose a greater responsibility on the sponsors of listable medicines in relation to pre-market assessment of the medicines they wish to list and the Therapeutic Goods Administration (TGA) will assume greater post-market monitoring responsibilities in relation to these medicines. Penalty provisions for the provision of false or misleading information have been increased and the Secretary's power to take action to cancel the listing of a medicine have also been expanded.

Retrospective application
Schedule 1, subitems 36(2) and (3)

Subitems 36(2) and (3) in Schedule 1 to the bill provide that the amendments proposed by items 5 and 31, respectively, in that Schedule will apply to therapeutic goods and medicines that were listed prior to the commencement of the bill. However, the Explanatory Memorandum does not indicate the reason for this apparent retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why these provisions operate retrospectively.

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

Relevant extract from the response from the Parliamentary Secretary

In the Report the Committee sought advice as to why Subitems 36(2) and (3) in Schedule 1 to the **Therapeutic Goods Amendment Bill (No.4) 2000** (the Bill) will apply to medicines that were listed prior to the commencement of the Bill.

Subitem 36(2)

Subitem 36(2) in Schedule 1 to the Bill has the effect of allowing listed medicines (other than export only medicines) already included in the Australian Register of Therapeutic Goods (the Register) to benefit from the new criteria for establishing what constitutes "separate and distinct" therapeutic goods for the purposes of the *Therapeutic Goods Act 1989*.

Under Part 3 of the Act, it is an offence for a sponsor of therapeutic goods to import, export, manufacture or supply such goods if they are not included in the Register. Section 16 of the Act establishes what is deemed to be "separate and distinct" therapeutic goods for the purposes of Part 3 of the Act. This provision provides the basis for determining what goods must be included in the Register because they are different goods to goods that are already listed or registered in the Register.

The amendment effected by Item 5 of the Bill will reduce the criteria that would make listable medicines different from each other. For example, as a result of the amendment made by Item 5, two or more listable medicines that are identical to each other except for the container in which they are supplied will be treated as the same product, and not "separate and distinct" products because of a difference in container type. Therefore, unless regulations are made to provide otherwise, where listable medicines have the same active ingredients, differences in container type will no longer render the products "separate and distinct" from each other.

The intended effect of Subitem 36(2) is to enable sponsors of goods already listed in the Register as "separate and distinct" to apply to have these goods treated as the

"same" goods, based upon the new criteria inserted by Item 5 of Schedule 1 of the Bill. This will, for example, enable existing sponsors of certain listed goods to take advantage of the new criteria and reduce the number of listings they may have in the Register. A reduction in the number of listings also means a reduction in the amount of information that a sponsor would need to supply to the Secretary about each sponsor's products included in the Register. This information may be required by the Secretary from time to time to establish that a listable medicine remains eligible for inclusion in the Register.

Subitem 36(3)

Subitem 36(3) refers to amendments made by Item 31 of Schedule 1 of the Bill. Item 31 inserts new grounds for immediately cancelling listable medicines from the Register. The effect of cancellation is that the goods may not be imported, manufactured, exported or supplied for use in humans in Australia. These new grounds for immediate cancellation correspond with the new arrangements for entering goods in the Register by sponsors themselves, rather than by the Secretary. One of these new grounds for immediate cancellation [paragraph 31(1A)(c)] is where there is a serious breach of the advertising requirements applicable to the goods, and the Secretary is satisfied that the breach is significant and would lead to the presentation of the medicine being misleading to a significant extent.

The advertising constraints applying to medicines is principally designed to prevent patients from self-diagnosing serious or major medical conditions (for example asthma, cancer, depression) and to discourage self-treatment of such conditions. For this reason, advertising to consumers of prescription medicines, which are registrable rather than listable therapeutic goods, is prohibited but advertising of listable medicines, such as complementary and traditional herbal medicines, is permitted providing the advertisements do not make certain claims about the prevention, treatment or cure of major medical conditions. The restrictions for advertising listable medicines are mainly set out in the Therapeutic Goods Advertising Code, adopted under the Act. A claim or suggestion that a medicine can treat or cure a major medical condition such as asthma or depression would render the medicine a registrable medicine, requiring a more rigorous evaluation of safety, efficacy and quality by the Secretary before such a medicine is permitted by the Secretary to be marketed.

Under the new listing process to be introduced by the Bill, sponsors are required to certify, among other things, that the presentation of their listable goods meets with all applicable advertising requirements before the sponsors may list their products in the Register. Where a sponsor should incorrectly or falsely certify that the sponsor's products meet with advertising requirements, Item 31 will enable the Secretary to immediately remove the goods from the Register in the circumstances set out in that provision to stop the supply of the goods.

This discretion has been extended, under subitem 36(3), to cover all listable medicines included in the Register. This will ensure as far as possible that **any** sponsor who has had its medicines included in the Register by incorrectly or falsely certifying that its goods comply with applicable advertising requirements, may have its products immediately remove from the Register in the circumstances set out in new Item 31(1A)(c). Under the existing section 26A of the Act, the Secretary is required to include listable medicines in the Register where, among other things, the sponsor certifies that the sponsor's goods meet with advertising requirements. In the event that the Secretary finds that the sponsor has incorrectly or falsely certified this,

the Secretary is not able to take immediate action in the manner provided for in new Item 31 of Schedule 1 of the Bill.

Subitem 36(3) is necessary not only for the protection of the public, but to ensure that the same regulatory measure will apply to all listable medicines that have been included in the Register, where their inclusion is based upon incorrect or false certification that advertising requirements have been met.

The other 2 grounds allowing immediate cancellation of listable medicines by the Secretary set out in Item 31(1A)(a) and (b) of the Bill are where the goods listed by a sponsor are not eligible for listing, or where the medicine is not required to be listed at all. These provisions will apply, because of the operation of subitem 36(3) of Schedule 1 of the Bill, to all listable medicines but the effect of these provisions should not disadvantage any sponsor. This is because where a listable medicine need not be included in the Register, the Secretary should be able to remove it from the Register with no legal effect on the sponsor's business. Likewise, where goods are listed or have been listed in the Register, whether by the sponsor under the new listing process introduced by the Bill or by the Secretary under the existing s.26A of the Act, and the goods are not eligible for listing but should instead be registered, the goods should be immediately removed from the Register.

As the Act stands now, sponsors who have already had their medicines listed in the Register under s.26A of the Act because they have certified that their medicines are eligible for listing may have these goods removed from the Register by the Secretary where it appears to the Secretary that the sponsor has incorrectly certified this. The effect of Item 36(3) therefore should not disadvantage any sponsor as it re-enforces an existing provision in the Act.

I hope this explanation meets with the requirements of the Committee.

The Committee thanks the Parliamentary Secretary for this detailed response and notes that subitem 36(2) allows sponsors of listed medicines to benefit from the new criteria for 'separate and distinct' therapeutic goods, and that the effect of subitem 36(3) should not disadvantage any sponsor as it reinforces an existing provision in the Act. Retrospectivity in these circumstances is unexceptionable and it assists the Committee if circumstances such as these are set out in the Explanatory Memorandum accompanying a bill.

Barney Cooney
Chairman