



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2001

4 April 2001

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 2001

The Committee presents its Fifth 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:

Crimes Amendment (Age Determination) Bill 2001

Foreign Affairs and Trade (Application of Criminal Code) Bill 2000

Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000

Crimes Amendment (Age Determination) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2001*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 30 March 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. 4 of 2001

This bill was introduced into the House of Representatives on 7 March 2001 by the Parliamentary Secretary to the Minister for the Environment and Heritage. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Crimes Act 1914* to insert provisions to permit the carrying out of prescribed procedures, including X-rays, to determine a person's age where that person is suspected of having committed, or has been charged with, a Commonwealth offence and where it is not practicable to determine a person's age by other means. A prescribed procedure may only be carried out with the suspect's informed consent, or if ordered by a magistrate.

These measures are intended to assist in the identification of suspected offenders (particularly foreign nationals involved in people-smuggling offences) as adults or juveniles, so that they may be treated appropriately according to law.

The measures are designed to be consistent with existing provisions of the *Crimes Act 1914* governing forensic and identification procedures, in Parts 1D and 1AA, respectively.

Inappropriate delegation of legislative power

Proposed new section 3ZQA

Schedule 1 to this bill proposes to insert a new Division 4A in Part 1AA of the *Crimes Act 1914*. This proposed new Division will permit investigating officials to seek authority to carry out a "prescribed procedure" in certain circumstances.

Proposed new subsection 3ZQA(1) defines ***prescribed procedure*** as “a procedure specified by regulations made for the purposes of subsection (2) to be a prescribed procedure for determining a person’s age”. Proposed new subsection (2) states that regulations may specify a particular procedure, which may include the taking of an X-ray of a part of a person’s body, to be a prescribed procedure for determining a person’s age.

Proposed new subsection (4) states that, before making such a regulation, the relevant Minister must consult with the Minister responsible for administering the *Therapeutic Goods Act 1989*.

In discussing this definition, the Explanatory Memorandum notes that ‘prescribed procedure’ is “a neutral term to allow for future advances in age determining technology”. The EM goes on to argue that it is necessary to define the term in the regulations “because of the flexibility required to keep pace with anticipated technological developments”. Consultations at Ministerial level are seen as sufficient to ensure that “only relevant equipment is prescribed and that all appropriate safeguards apply to protect suspects from any health risks associated with the use of certain equipment”.

As defined in this bill, the term ‘prescribed procedure’ is clearly very wide in scope. Arguably, it could encompass the use of novel or experimental or invasive or potentially dangerous procedures. And such procedures are to be used not to determine guilt or innocence, but simply the question of age.

While the Committee acknowledges a need for flexibility, it considers that any new prescribed procedure should be provided for in primary legislation rather than in regulations, and **seeks the Minister’s advice** as to why such a significant term should not be defined in the bill itself, where it can be properly evaluated by the Parliament.

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

Relevant extract from the response from the Minister

In particular, the Standing Committee has sought advice regarding the proposed definition of ‘prescribed procedure’ in the Bill, which stipulates that regulations may specify a particular procedure to be a prescribed procedure for determining a person’s age. The Standing Committee considers that any new prescribed procedure should be provided for in primary legislation rather than in regulations.

As the Minister responsible for the Bill, I am pleased to provide an explanation of the approach taken with proposed section 3ZQA referred to in the Digest.

There is already express reference to x-rays in the description of 'prescribed procedure' in the Bill (see subsection 3ZQA(2)). This provisions states that:

The regulations may specify a particular procedure, which may include the taking of an X-ray of a part of a person's body, to be a prescribed procedure for determining a person's age.

This underlined reference was inserted in the interests of transparency, although the Standing Committee will note that it is broader than the particular wrist x-ray procedure referred to in the Explanatory Memorandum. The reference to a wrist x-ray in the Explanatory Memorandum was again included in the interests of accountability and transparency. It is envisaged that the regulations will provide considerable detail on the wrist x-ray procedure, including reference to appropriate medical standards and required safeguards. I consider that the technical description of a wrist x-ray, for example, is the very thing that should be prescribed in regulations.

The medical and scientific consensus at present suggests that alternative age determining technology will revolve around the taking of x-rays but of different parts of a person's body. These alternatives would be authorised by proposed subsection 3ZQA(2), which is specifically before the Parliament now.

In the unlikely event that novel or experimental or invasive or potentially dangerous procedures are contemplated as age determination procedures it is submitted that the proposed safeguards in the Bill ensure that this will not happen.

First, the regulations would be drafted in consultation with the Minister for Health and Aged Care, who administers the *Therapeutic Goods Act 1989*. This will ensure that a new medical device would only be prescribed if it is approved by the Therapeutic Goods Administration. The Therapeutic Goods Administration is conservative about matters of this nature.

Secondly, the regulations are subject to review by the Senate Standing Committee on Regulations and Ordinances and are disallowable instruments. Notwithstanding the consultative step with the Minister for Health and Aged Care which will ensure only safe procedures are prescribed, the Parliament has the opportunity to reject regulations put up by the Minister for Justice and Customs.

The approach adopted in the Bill provides the necessary flexibility to cater quickly for technological and medical advancement, which may require the addition of a more accurate procedure altogether or alterations to prescribed safeguards (for example, if new medical risks come to light).

In view of the considerations enumerated above I believe the approach taken in proposed section 3ZQA is reasonable.

The Committee thanks the Minister for this response.

Foreign Affairs and Trade 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 Foreign Affairs has responded to those comments in a letter dated 2 April 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 6 December 2000 by the Minister for Foreign Affairs. [Portfolio responsibility: Foreign Affairs and Trade]

The bill proposes to make consequential amendments to certain offence provisions contained in 11 Acts administered by the Foreign Affairs and Trade 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 offences and reversals of the onus of proof **Schedule 1, items 4-7, 9, 12, 17, 21-23, 30, 41-42**

This bill provides for the application of the Criminal Code to certain offences in legislation administered within the Foreign Affairs and Trade 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.

In his Second Reading Speech, the Minister states that these amendments are "technical in nature" and their purpose is "merely to ensure that these offence-creating provisions will, after the commencement of the Criminal Code, be interpreted in that same manner as they are currently". 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

Thank you for your letter dated 8 February 2001 concerning the Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Bill 2000. Your letter identified the Alert Digest reference to the Bill which seeks my confirmation that the Bill creates no new offences of strict liability.

The Alert Digest specifies that the Bill provides for the application of the *Criminal Code* to certain offences in legislation administered within the Foreign Affairs and Trade portfolio. As stated in my Second Reading Speech, the purpose of the Bill is to ensure that the offence creating provisions will, after the commencement of the *Criminal Code*, be interpreted in that same manner as they are currently. 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 strict liability character, thus maintaining the status quo.

In determining whether a particular offence is one of strict liability, this Department considered the list of the Department's portfolio provisions identified by the Attorney-General's Department as possibly attracting strict liability, and took into account specific factors identified by the Attorney-General's Department as relevant in determining strict liability offences.

The Department's process for determining whether an offence is one of strict liability commenced with the presumption that proof of fault is generally required in all offences, that is that offences are not offences of strict liability. The process then required that certain factors be considered and satisfied before the above presumption could be displaced. These factors are outlined below.

The Department considered the subject matter of the particular statute in which the offence appeared. Offences that are wholly regulatory in nature are the clearest example of offences where it can be inferred that Parliament intended that strict liability should apply.

The Department considered the language used in the particular statute. All offences that expressly provided a fault element of any nature or necessarily implied a fault element were not considered as strict liability offences.

The Department considered whether the particular offence provided imprisonment as a consequence of conviction for the offence. Imprisonment is an indicator of the seriousness of an offence and the courts presume that Parliament would not want an offence to be strict liability if the consequence of conviction is imprisonment. It was acknowledged that Parliament has provided for strict liability offences in relation to a number of serious offences with significant imprisonment penalties. Accordingly,

it was advised that as a “benchmark”, strict liability should not apply to offences which have a maximum penalty of more than 6 months.

The Department considered whether there was an express defence. A defence of reasonable excuse is a good indicator that fault need not be proved and therefore that the offence is one of strict liability. The existence of a broadly-based defence 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.

All of the above factors were considered in assessing whether strict liability should apply to each particular offence. I therefore confirm that the Bill does not create any new offences of strict liability but merely expressly identifies existing strict liability offences.

The Committee thanks the Minister for this response.

Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Industry, Science and Resources has responded to those comments in a letter dated 2 March 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 6 December 2000 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

Introduced with the Petroleum (Submerged Lands) (Registration Fees) Amendment Bill 2000, the bill proposes to amend the *Petroleum (Submerged Lands) Act 1967* to:

- revise administrative arrangements between the Commonwealth, the States and the Northern Territory in relation to the management of offshore petroleum resources, including the transfer of certain powers from Commonwealth and State or Territory Joint Authorities to State or Territory Designated Authorities;
- provide a framework for the adoption of the Geocentric Datum of Australia;
- ensure consistency of liability of officials; and
- make technical corrections.

The bill contains transitional and application provisions and makes technical corrections to the *Petroleum (Submerged Lands) Fees Act 1994* and *Primary Industries and Energy Legislation Amendment Act (No. 1) 1998*.

Retrospective commencement Subclauses 2(3) and (5)

Subclauses 2(3) of this bill provides that the amendments proposed to be made by Part 3 of Schedule 1 (which deal with the removal of property from the seabed) are to be taken to have commenced retrospectively on 7 March 2000.

To similar effect, subclause 2(5) provides that the amendment proposed to be made in Schedule 3 (which corrects a minor technical error which “thwarted the intention” of amendments made in a 1998 Amendment Act) are to be taken to have commenced retrospectively on 30 July 1998.

In each case, the Explanatory Memorandum states that these amendments do no more than correct earlier drafting errors, and make no change to the substantive law. The Committee **seeks the Minister’s confirmation** that no person will be adversely affected by the proposed retrospective commencement of these provisions.

Pending the Minister’s confirmation, 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

I am writing to respond to the entry in your 7 February 2001 Alert Digest about the Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000. You sought my confirmation that no person will be adversely affected by the proposed retrospective commencement of the amendments in Schedule 1 Part 3 and Schedule 3 of the Bill, as provided in subclauses 2(3) and 2(5).

Having been advised of your Committee’s concern about this issue, my Department asked the Attorney-General’s Department to re-examine the provisions in question. The Attorney-General’s Department advised it had earlier overlooked the significance of the offence provision in section 107 of the *Petroleum (Submerged Lands) Act* 1967. Specifically, a penalty of 100 penalty points applies to failure to comply with a direction given under the section to remove property from a relinquished or current title area or do certain other things to restore the area to a satisfactory state. As set out in sections 108 and 113 of the Act, certain civil liabilities can also follow from such a failure.

The Attorney-General’s Department has advised that retrospective application of an offence provision or civil liability is contrary to Commonwealth legal policy. The Department has therefore recommended that a Government amendment be moved making it clear that no criminal or civil liability will retrospectively fall on any person as a result of the Schedule 1 Part 3 amendments being backdated to 7 March 2000.

I have accepted this advice and have now sought the Prime Minister’s approval to move a Government amendment in the House of Representatives inserting in the Bill a new transitional item 28A. If the Government moves the amendment, my Department will be able to forward you a copy of it without delay. With this amendment, I can confirm that no person will be adversely affected by the proposed retrospective commencement of the amendments in Schedule 1 Part 3.

I am able to make the same confirmation about the proposed retrospective commencement of Schedule 3 of the Bill, specifically the technical correction to Schedule 1 clause 47 of the *Primary Industries and Energy Legislation Amendment Act (No. 1) 1998*. Legal advice indicates that, ever since the coming into effect of this clause in 1998, a court would have interpreted the reference to "items 39A to 39G" as a reference to "items 40 to 46". Moreover, the clause in question merely provides a benefit to the public in the form of a constitutional safety-net for persons to obtain compensation if the provisions in items 40 to 46 would result in the acquisition of property otherwise than on just terms. There is therefore no question of an adverse effect.

I am grateful to your Committee for its vigilance in examining the Bill and bringing this matter to my attention.

The Committee thanks the Minister for this response and for the amendment foreshadowed.

Barney Cooney
Chairman



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

RECEIVED

2 APR 2001

Senate Standing C'ttee
for the Scrutiny of Bills

30 MAR 2001

00/9315

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

Dear Senator Cooney *Barney*,

I refer to the Scrutiny of Bills Alert Digest No.4 of 2001 ('the Digest') where the Standing Committee seeks advice in relation to proposed section 3ZQA of the Crimes Amendment (Age Determination) Bill 2001 ('the Bill'). In particular, the Standing Committee has sought advice regarding the proposed definition of 'prescribed procedure' in the Bill, which stipulates that regulations may specify a particular procedure to be a prescribed procedure for determining a person's age. The Standing Committee considers that any new prescribed procedure should be provided for in primary legislation rather than in regulations.

As the Minister responsible for the Bill, I am pleased to provide an explanation of the approach taken with proposed section 3ZQA referred to in the Digest.

There is already express reference to x-rays in the description of 'prescribed procedure' in the Bill (see subsection 3ZQA(2)). This provisions states that:

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The medical and scientific consensus at present suggests that alternative age determining technology will revolve around the taking of x-rays but of different parts of a person's body. These alternatives would be authorised by proposed subsection 3ZQA(2), which is specifically before the Parliament now.

In the unlikely event that novel or experimental or invasive or potentially dangerous procedures are contemplated as age determination procedures it is submitted that the proposed safeguards in the Bill ensure that this will not happen.

First, the regulations would be drafted in consultation with the Minister for Health and Aged Care, who administers the *Therapeutic Goods Act 1989*. This will ensure that a new medical device would only be prescribed if it is approved by the Therapeutic Goods Administration. The Therapeutic Goods Administration is conservative about matters of this nature.

Secondly, the regulations are subject to review by the Senate Standing Committee on Regulations and Ordinances and are disallowable instruments. Notwithstanding the consultative step with the Minister for Health and Aged Care which will ensure only safe procedures are prescribed, the Parliament has the opportunity to reject regulations put up by the Minister for Justice and Customs.

The approach adopted in the Bill provides the necessary flexibility to cater quickly for technological and medical advancement, which may require the addition of a more accurate procedure altogether or alterations to prescribed safeguards (for example, if new medical risks come to light).

In view of the considerations enumerated above I believe the approach taken in proposed section 3ZQA is reasonable.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Ellison', with a stylized, cursive script.

CHRIS ELLISON
Senator for Western Australia



RECEIVED

2 APR 2001

THE HON ALEXANDER DOWNER MP

Senate Standing Committee
for the Scrutiny of Bills
MINISTER FOR PARLIAMENTS
PARLIAMENT HOUSE
CANBERRA ACT 2600

02 APR 2001

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
SG-49
Parliament House
CANBERRA ACT 2600

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The Alert Digest specifies that the Bill provides for the application of the *Criminal Code* to certain offences in legislation administered within the Foreign Affairs and Trade portfolio. As stated in my Second Reading Speech, the purpose of the Bill is to ensure that the offence creating provisions will, after the commencement of the *Criminal Code*, be interpreted in that same manner as they are currently. 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 strict liability character, thus maintaining the status quo.

In determining whether a particular offence is one of strict liability, this Department considered the list of the Department's portfolio provisions identified by the Attorney-General's Department as possibly attracting strict liability, and took into account specific factors identified by the Attorney-General's Department as relevant in determining strict liability offences.

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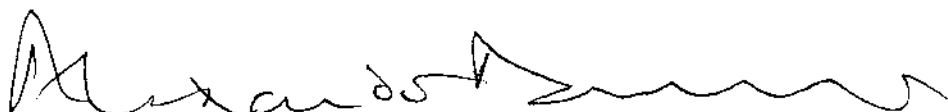
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All of the above factors were considered in assessing whether strict liability should apply to each particular offence. I therefore confirm that the Bill does not create any new offences of strict liability but merely expressly identifies existing strict liability offences.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alexander Downer', with a stylized, wavy line extending from the end.

Alexander Downer



RECEIVED

5 MAR 2001

Senate Standing Committee
for the Scrutiny of Bills

SENATOR THE HON NICK MINCHIN

Minister for Industry, Science and Resources

- 2 MAR 2001

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

I am writing to respond to the entry in your 7 February 2001 Alert Digest about the Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000. You sought my confirmation that no person will be adversely affected by the proposed retrospective commencement of the amendments in Schedule 1 Part 3 and Schedule 3 of the Bill, as provided in subclauses 2(3) and 2(5).

Having been advised of your Committee's concern about this issue, my Department asked the Attorney-General's Department to re-examine the provisions in question. The Attorney-General's Department advised it had earlier overlooked the significance of the offence provision in section 107 of the *Petroleum (Submerged Lands) Act 1967*. Specifically, a penalty of 100 penalty points applies to failure to comply with a direction given under the section to remove property from a relinquished or current title area or do certain other things to restore the area to a satisfactory state. As set out in sections 108 and 113 of the Act, certain civil liabilities can also follow from such a failure.

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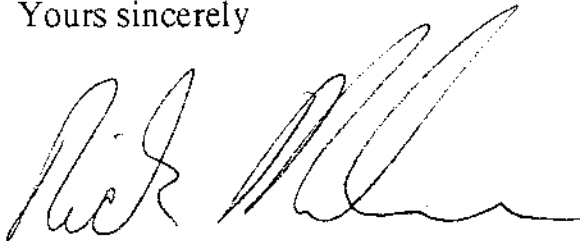
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The contact officer in my Department in relation to this matter is Mr Ilkka Aaltonen, tel 6213 7972.

I am grateful to your Committee for its vigilance in examining the Bill and bringing this matter to my attention.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Minchin', with a stylized, flowing script.

Nick Minchin