



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**ELEVENTH REPORT**

**OF**

**2003**

**8 October 2003**



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**ISSN 0729-6258**



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## **MEMBERS OF THE COMMITTEE**

Senator T Crossin (Chair)  
Senator B Mason (Deputy Chairman)  
Senator G Barnett  
Senator D Johnston  
Senator J McLucas  
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**

## **ELEVENTH REPORT OF 2003**

The Committee presents its Eleventh Report of 2003 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 (Overseas) Amendment Bill 2003

Legislative Instruments Bill 2003

# Crimes (Overseas) Amendment Bill 2003

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 11 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 7 October 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

### ***Extract from Alert Digest No. 11 of 2003***

[Introduced into the House of Representatives on 11 September 2003. Portfolio: Attorney-General]

The bill amends the *Crimes (Overseas) Act 1964* to extend Australian criminal jurisdiction (ie. the criminal law of the Jervis Bay Territory) to Australians working in foreign countries in the following circumstances:

- when granted diplomatic or consular immunities, or a general immunity due to a relationship with an international organisation;
- when under an agreement or arrangement between the Commonwealth and the United Nations or a foreign country, and granted an immunity by a foreign country;
- when under a prescribed agreement or arrangement between the Commonwealth and the United Nations or a foreign country; or
- where a foreign country, or a part of a foreign country, has been declared by regulation to be a 'declared foreign country' for the purpose of the Act.

The bill also amends the way the criminal law applies to individuals covered by the Act and allows certain regulations to be made with retrospective application to 1 July 2003.

## **Retrospective commencement**

### **Subclause 2(1), item 2**

By virtue of item 2 in the table to subclause 2(1) to this bill, the amendments proposed in Schedule 1 would commence retrospectively on 1 July 2003. The Explanatory Memorandum states that the purpose of this retrospectivity is to enable regulations to be made which will (in effect) make the amendments in this bill apply to Australians in Iraq and the Solomon Islands since that date. However, the Explanatory Memorandum does not provide any reason for making those amendments retrospective. The Attorney-General hints at such a reason in his second reading speech, when he says that the “extension of Australian criminal jurisdiction ... will ensure that Australia is in the best position to protect Australians deployed in [foreign] countries.” That speech also indicates the reason for the date of 1 July 2003 being chosen as the commencement date is that the Attorney-General issued a media statement, jointly with the Minister for Justice and Customs and the Minister for Foreign Affairs, on 26 June 2003, “stating that Australian criminal jurisdiction would be extended to Australian civilians serving in Iraq from 1 July 2003.” It therefore appears that this legislation is another example of “legislation by press release”, a practice which the Committee has regularly commented on in the past. The Committee **seeks the Attorney-General’s advice** as to why it was considered necessary to extend Australian criminal jurisdiction retrospectively to Australian civilians working in foreign countries, and why the date of 1 July 2003 was chosen for that purpose.

*Pending the Attorney-General’s response, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

### ***Relevant extract from the response from the Attorney-General***

The Committee asked for advice on two areas of the Bill. These are the retrospective provisions in proposed item 2 in the table to subclause 2(1) and proposed new subsection 3C(5) of the Bill, which the Committee considered may ‘trespass unduly on personal rights and liberties’. Specifically, the Committee has asked for my advice as to why it was considered necessary to extend Australian criminal jurisdiction retrospectively to Australian civilians working in foreign countries and why the date of 1 July 2003 was chosen for that purpose.

The inclusion of a power to pass retrospective regulations for three months following Royal Assent to the Bill is intended to allow regulations to be made declaring Iraq

and the Solomon Islands to be 'declared foreign countries' for the purposes of the Act. The Government considers it necessary to extend Australian criminal jurisdiction over civilian personnel in these countries for different reasons.

In Iraq, a Coalition Provisional Authority Order was passed just prior to 1 July 2003 that determined immunity issues for coalition personnel deployed to Iraq. This Order provided that while personnel serving in Iraq would be generally immune from prosecution under the criminal laws of Iraq, in circumstances where a home country was unable to exercise jurisdiction over a national, the Coalition Provisional Authority may request the home country to waive jurisdiction and allow the national to be prosecuted by Iraqi courts.

Extending Australian criminal jurisdiction retrospectively over Australian civilian personnel serving in Iraq would ensure that those personnel will not be subject to potentially unstable Iraqi courts for any offences committed while on deployment, but will be protected by the fairness and due process of the Australian court system. While the Government is not aware of any incidents of Australian civilian personnel committing offences in Iraq, it is important that Australia is able to exercise jurisdiction over Australian civilian personnel covered by the Order retrospectively for the maximum period possible.

Australian civilian personnel serving in the Solomon Islands have been guaranteed immunity from the criminal jurisdiction of the Solomon Islands for acts done in the course of official duties. However, Australian civilian personnel may be subject to the jurisdiction of the Solomon Islands for acts done outside the course of official duties unless Australia can claim jurisdiction itself. Without this amendment, Australia is not able to exercise criminal jurisdiction over deployed Australian civilian personnel. This means there is currently a jurisdictional gap over Australian civilian personnel serving in the Solomon Islands for acts done in the course of official duties. For acts done outside the course of official duties, Australian civilian personnel are at risk of facing Solomon Islands criminal jurisdiction and being dealt with under the Solomon Islands criminal justice system. This Bill proposes the extension of Australian criminal jurisdiction to Australian civilian personnel serving in the Solomon Islands, ensuring that Australia has capacity to claim criminal jurisdiction over those personnel.

When the Government decided to extend Australian criminal jurisdiction to Australian civilian personnel serving in the Solomon Islands, the contingent had not yet officially deployed. The decision to extend the Bill to this operation needed to be made urgently as the operation was about to commence. The date of 1 July 2003 was chosen to ensure that the Bill covered all Australian civilian personnel deployed to the Solomon Islands.

The date of 1 July 2003 was considered appropriate as it would allow Australia to extend criminal jurisdiction to Australian civilian personnel who were likely to be deployed to the Solomon Islands and to those who had already been deployed to Iraq and to whom the Coalition Provisional Authority Order applied.

In deciding to propose the power to make retrospective regulations, the Government wanted to ensure that Australians who were deployed to Iraq and the Solomon Islands were protected by Australian criminal jurisdiction for the maximum period possible. However, in the interests of fairness, the Government also wanted those Australians to be aware that criminal jurisdiction was to be extended to them. To address this, the Attorney-General, the Minister for Justice and Customs and the Minister for Foreign Affairs issued a media release on 26 June 2003, announcing that the amendments to the Act were to be introduced, and that Australian criminal jurisdiction would be applied retrospectively to Australian civilians deployed in certain operations overseas.

The Government does not introduce the retrospective elements of the Bill lightly. The circumstances in Iraq and the Solomon Islands that led to the inclusion of retrospective provisions in the Bill are exceptional cases, aimed at protecting Australian civilian personnel on these Commonwealth deployments.

The Committee has expressed concerns that this is an example of 'legislation by press release'. The Government believes that it is undesirable for criminal jurisdiction to be applied to a person without their knowledge. The Government had two choices. Either to issue the press release notifying the Australian public that the Bill may apply to Australians deployed overseas in Iraq and the Solomon Islands from 1 July 2003, or not to apply the provisions retrospectively, leaving Australians deployed to the Solomon Islands and Iraq liable to potential instabilities in the Iraqi and Solomon Islands' criminal justice systems.

I trust this information addresses the Committee's concerns.

The Committee thanks the Attorney-General for this response. The Committee notes, however, that it would have been useful if the reasons for the retrospectivity had been explained in the Explanatory Memorandum to the bill.

### **Retrospective effect**

#### **Proposed new subsection 3C(5)**

Proposed new subsection 3C(5) of the *Crimes (Overseas) Act 1964*, to be inserted by item 16 of Schedule 1 to this bill, would permit regulations to be made having effect retrospectively to 1 July 2003, provided that they are made within 3 months of this bill being assented to. This provision implements the proposal referred to above, to extend Australian criminal jurisdiction to some Australian civilians working in some foreign countries. The Committee again **seeks the Attorney-General's advice** as to the reason for the retrospective effect of this provision, and why the date of 1 July 2003 was chosen for that purpose.

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

### ***Relevant extract from the response from the Minister***

Response same as above for Subclause 2(1), item 2.

The Committee thanks the Attorney-General for this response. The Committee notes, however, that it would have been useful if the reasons for the retrospectivity had been explained in the Explanatory Memorandum to the bill.

# Legislative Instruments Bill 2003

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 8 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 23 September 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

### ***Extract from Alert Digest No. 8 of 2003***

[Introduced into the House of Representatives on 26 June 2003. Portfolio: Attorney-General]

The bill establishes a regime for the registration, tabling and scrutiny of Commonwealth legislative instruments. Key elements of the proposed regime include:

- defining the term 'legislative instrument';
- encouraging rule-makers to consult before instruments are made and to apply high standards in the drafting of legislative instruments;
- establishing the Federal Register of Legislative Instruments;
- parliamentary scrutiny through tabling and disallowance provisions;
- gazettal and registration requirements;
- delegation of certain ministerial powers;
- automatic repeal (sunset) of legislative instruments after a period of approximately ten years, except for a limited range of instruments; and
- review of the operation of the legislation (3 years after commencement) and of the sunset provisions (12 years after commencement).

The bill also contains a regulation-making power.

## **Commencement**

### **Subclause 2(4)**

By virtue of subclause 2(4), the whole of the bill (other than clauses 1 and 2) is to commence, at the latest, on the first day of January or of July after the period ending 12 months after Assent. The Committee notes that the Explanatory Memorandum does not comply with paragraph 18 of Drafting Direction 2002, No. 2 and explain the reason for the period of delayed commencement being longer than 6 months. The Committee therefore **seeks the Attorney-General's advice** as to the reason for the delayed commencement.

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

### ***Relevant extract from the response from the Attorney-General***

The Committee's comments, which are set out in Alert Digest No. 8 of 2003, include a request for my advice as to the reasons for the delayed commencement of provisions of the Bill.

As far as is relevant, clause 2 of the Bill has the effect that if the substantive provisions of the Bill have not been proclaimed to commence within the 12 month period from Royal Assent, then those provisions will automatically commence on the first day of January or July, whichever next follows the end of that period.

Delayed commencement is necessary to:

- provide adequate time for the establishment of the information technology and infrastructure necessary to support the Federal Register of Legislative Instruments
- enable departments and agencies to identify and locate existing legislative instruments which must be registered to remain enforceable under the new regime. Time is also needed to allow those departments and agencies to identify redundant instruments that will not be registered, and
- enable any necessary Regulations to be made under clause 62 of the Bill.

In addition, the Attorney-General's Department intends to conduct educational programs for departments and agencies to make them aware of their obligations under the Bill and the practical operation of the new regime before it commences.

I trust that this is sufficient information for the Committee's purposes.

The Committee thanks the former Attorney-General for this response. The third justification advanced – ‘to ... enable any necessary Regulations to be made’ – is not ordinarily accepted by the Committee, which has previously taken the position that 6 months suffices for the drafting of regulations. The Committee notes, however, that the combination of reasons advanced in the response are of the kind the Committee routinely accepts as justifying the extension of the period of delayed commencement.

The Committee again emphasises the need for Ministers to be aware of the contents of the explanatory material they present to the Parliament. If the Explanatory Memorandum had explained the reasons for seeking delayed commencement, in accordance with legislative drafting directions, there would have been no need for the Committee to engage in correspondence over this issue.

Trish Crossin  
Chair



ATTORNEY-GENERAL  
THE HON PHILLIP RUDDOCK MP

RECEIVED

7 OCT 2003

Senate Standing Committee  
for the Scrutiny of Bills

03/8601

- 7 OCT 2003

Senator Trish Crossin  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Crossin

Thank you for the Senate Standing Committee for the Scrutiny of Bills' consideration of the Crimes (Overseas) Amendment Bill 2003 (the Bill) in the Scrutiny of Bills Alert Digest Number 11 of 17 September 2003.

The Committee asked for advice on two areas of the Bill. These are the retrospective provisions in proposed item 2 in the table to subclause 2(1) and proposed new subsection 3C(5) of the Bill, which the Committee considered may 'trespass unduly on personal rights and liberties'. Specifically, the Committee has asked for my advice as to why it was considered necessary to extend Australian criminal jurisdiction retrospectively to Australian civilians working in foreign countries and why the date of 1 July 2003 was chosen for that purpose.

The inclusion of a power to pass retrospective regulations for three months following Royal Assent to the Bill is intended to allow regulations to be made declaring Iraq and the Solomon Islands to be 'declared foreign countries' for the purposes of the Act. The Government considers it necessary to extend Australian criminal jurisdiction over civilian personnel in these countries for different reasons.

In Iraq, a Coalition Provisional Authority Order was passed just prior to 1 July 2003 that determined immunity issues for coalition personnel deployed to Iraq. This Order provided that while personnel serving in Iraq would be generally immune from prosecution under the criminal laws of Iraq, in circumstances where a home country was unable to exercise jurisdiction over a national, the Coalition Provisional Authority may request the home country to waive jurisdiction and allow the national to be prosecuted by Iraqi courts.

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of any incidents of Australian civilian personnel committing offences in Iraq, it is important that Australia is able to exercise jurisdiction over Australian civilian personnel covered by the Order retrospectively for the maximum period possible.

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When the Government decided to extend Australian criminal jurisdiction to Australian civilian personnel serving in the Solomon Islands, the contingent had not yet officially deployed. The decision to extend the Bill to this operation needed to be made urgently as the operation was about to commence. The date of 1 July 2003 was chosen to ensure that the Bill covered all Australian civilian personnel deployed to the Solomon Islands.

The date of 1 July 2003 was considered appropriate as it would allow Australia to extend criminal jurisdiction to Australian civilian personnel who were likely to be deployed to the Solomon Islands and to those who had already been deployed to Iraq and to whom the Coalition Provisional Authority Order applied.

In deciding to propose the power to make retrospective regulations, the Government wanted to ensure that Australians who were deployed to Iraq and the Solomon Islands were protected by Australian criminal jurisdiction for the maximum period possible. However, in the interests of fairness, the Government also wanted those Australians to be aware that criminal jurisdiction was to be extended to them. To address this, the Attorney-General, the Minister for Justice and Customs and the Minister for Foreign Affairs issued a media release on 26 June 2003, announcing that the amendments to the Act were to be introduced, and that Australian criminal jurisdiction would be applied retrospectively to Australian civilians deployed in certain operations overseas.

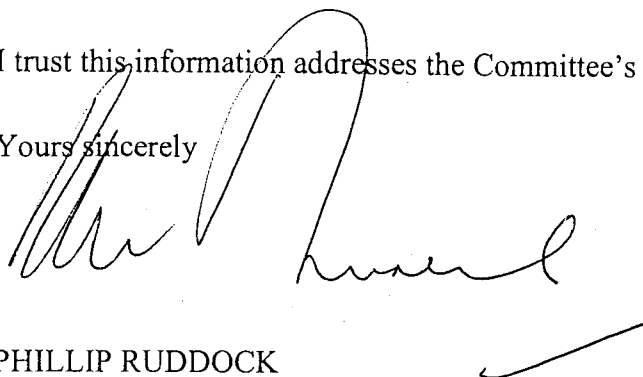
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retrospectively, leaving Australians deployed to the Solomon Islands and Iraq liable to potential instabilities in the Iraqi and Solomon Islands' criminal justice systems.

I trust this information addresses the Committee's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Phillip Ruddock', with a long horizontal flourish extending to the right.

PHILLIP RUDDOCK



ATTORNEY-GENERAL  
THE HON DARYL WILLIAMS AM QC MP

RECEIVED

24 SEP 2003

Senate Standing Committee  
for the Scrutiny of Bills

03/234122 CJD MC

23 SEP 2003

Senator P Crossin  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Crossin

I refer to the letter from Richard Pye dated 14 August 2003, in which he drew my senior adviser's attention to the comments on the Legislative Instruments Bill 2003 (the Bill) made by the Senate Standing Committee for the Scrutiny of Bills (the Committee).

The Committee's comments, which are set out in Alert Digest No. 8 of 2003, include a request for my advice as to the reasons for the delayed commencement of provisions of the Bill.

As far as is relevant, clause 2 of the Bill has the effect that if the substantive provisions of the Bill have not been proclaimed to commence within the 12 month period from Royal Assent, then those provisions will automatically commence on the first day of January or July, whichever next follows the end of that period.

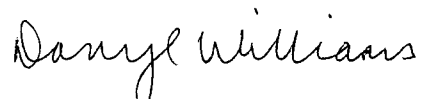
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- enable any necessary Regulations to be made under clause 62 of the Bill.

In addition, the Attorney-General's Department intends to conduct educational programs for departments and agencies to make them aware of their obligations under the Bill and the practical operation of the new regime before it commences.

I trust that this is sufficient information for the Committee's purposes.

Yours sincerely

A handwritten signature in cursive script that reads "Daryl Williams". The signature is written in dark ink and is positioned above the printed name.

DARYL WILLIAMS