



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2004

11 August 2004

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MEMBERS OF THE COMMITTEE

Senator G Marshall (Chair)
Senator B Mason (Deputy Chair)
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

TENTH REPORT OF 2004

The Committee presents its Tenth Report of 2004 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Anti-terrorism Bill (No. 2) 2004

Environment Protection and Biodiversity Conservation Act 1999

Anti-terrorism Bill (No. 2) 2004

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2004*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 10 August 2004. 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 2004

[Introduced into the House of Representatives on 17 June 2004. Portfolio: Attorney-General]

The bill amends various Acts to:

- create powers to demand, confiscate and seize foreign travel documents to ensure that those suspected of serious offences or harmful conduct are prevented from leaving Australia on a foreign travel document;
- insert new offences in relation to misrepresentation and misuse of foreign travel documents or false foreign travel documents;
- ensure that those subject to a request by the Director-General of the Australian Security Intelligence Organisation (ASIO) to the Minister for consent to apply for a questioning warrant are prevented from leaving Australia;
- strengthen counter-terrorism legislation by extending the application of offence provisions under Division 102 of the Criminal Code to individuals associating with a listed terrorist organisation, or individuals who are members or promote or direct the activities of such an organisation, or assist the organisation to continue to exist or to expand;
- exempt from the application of the *Administrative Decisions (Judicial Review) Act 1977* any decision of the Attorney-General under the Act on the grounds of security and decisions of the Attorney-General under Part IV of the *Transfer of Prisoners Act 1983*;

- include security as a third ground for transfer between State or Territory prisons for federal, State and Territory prisoners, as well as for persons charged with and remanded in custody for an offence; and
- amend the forensic procedure provisions to facilitate effective disaster victim identification in the event that a disaster causing mass casualties, such as a terrorist attack or an aircraft disaster, were to occur within Australia.

The bill also contains a regulation-making power and an application provision.

Excluding judicial review Schedule 4, item 1

By virtue of new paragraph (xb) and (xc) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*, to be inserted by item 1 of Schedule 4 to this bill, two types of decisions made by the Attorney-General relating to the transfer of prisoners would be removed from the purview of the 1977 Act. The Committee is concerned with bills that would reduce the review rights of defendants, specifically if they remove the right of defendants to access federal administrative law procedures and remedies. The Explanatory Memorandum describes the effect of these changes, but does not provide a reason for this denial of judicial review of administrative decisions. The Committee therefore **seeks the Attorney-General's advice** as to the reason for this proposed amendment.

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

Relevant extract from the response from the Attorney-General

The Committee is concerned that the exemption of certain decisions from review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

Subsection 3(1) of the ADJR Act defines 'decisions to which this Act applies'. These are decisions of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not) under a specified enactment or by a Commonwealth authority or officer under a specified enactment.

However, the definition excludes a decision in any of the classes of decisions set out in Schedule 1 to the ADJR Act.

The proposed amendments seek to exclude decisions made by me (or the Minister for Justice and Customs under portfolio arrangements) under the proposed amendments to the *Transfer of Prisoners Act 1983* (TP Act) from the application of the ADJR Act by including those decisions in Schedule 1 of the ADJR Act. The relevant decisions are made under:

- Part II (welfare transfers) or Part III (trial transfers) of the TP Act refusing applications or requests for such transfers, or refusing to give consent, on the ground that, or on grounds that include the ground that, refusal is necessary in the interests of security, and
- proposed Part IV of the TP Act to make a security transfer order or a return transfer order.

These decisions involve consideration of issues of ‘security’ as defined in the Bill. The proposed definition targets matters of national security and is consistent with the definition of ‘security’ in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

I consider it inappropriate for decisions about transfers on security grounds to be subject to review under the ADJR Act. These decisions will require consideration of national security issues and are likely to be of a sensitive nature. The threat to ‘security’ may arise, for example, from concerns about the prisoner’s actions or from concerns that someone may wish to harm a prisoner (for example, because he or she is going to give certain evidence in court). Disclosure of such information in proceedings may alert prisoners or suspects to activities of investigative authorities.

Exclusion of decisions of this type from ADJR review is consistent with the exemption in Schedule 1 of the ADJR Act of other decisions involving national security considerations (for example, decisions made under the ASIO Act, the *Intelligence Services Act 2001* and the *Telecommunications (Interception) Act 1979*).

My power to make decisions of this nature cannot be delegated. Similarly, the power of State and Territory Ministers to make decisions under the Act cannot be delegated either. Before making a transfer order, I must believe on reasonable grounds that it is necessary in the interests of security. That belief can be reviewed in the Federal Court under section 39B of the *Judiciary Act 1903*.

I cannot make the order unless the appropriate Ministers in the sending and receiving jurisdictions have consented to the transfer in writing. I must also review the order within 3 months of the day on which it was made or last reviewed in order to ensure the appropriateness of order continuing.

The Committee thanks the Attorney-General for this response.

The Committee will always seek an explanation for provisions in legislation which propose to exclude judicial review of administrative decisions. Where judicial review under the AD(JR) is excluded, the Committee would generally expect other safeguards or constraints on the exercise of the power to be strongly evident. The Minister's response notes four such safeguards: review by the Federal Court under section 39B of *the Judiciary Act 1903*; the fact that the power is personal to the Minister and cannot be delegated; the requirement for the consent of the responsible ministers in sending and receiving jurisdictions; and the necessity to review the order, at a minimum, every 3 months.

The seriousness of excluding judicial review increases over time. In particular, each time such an order is reviewed and a decision on the continued appropriateness of the order is made, the potential exists for the denial of rights and liberties implicit in the exclusion of judicial review may be compounded.

The Committee notes that the proposal is based on a policy relating to the judicial review of decisions which "require consideration of national security issues and are likely to be of a sensitive nature." The Committee considers that the amendment may make rights and liberties dependent upon non-reviewable decisions, but whether it does so *unduly* is a matter for the Senate as a whole.

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

Environment Protection and Biodiversity Conservation Act 1999

Introduction

The Committee dealt with this Act in *Alert Digest No. 2 of 2004*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 9 August 2004. 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. 2 of 2004

The Act implements the 1997 Council of Australian Governments Agreement relating to the Commonwealth's role by reference to certain matters of national environmental significance. The bill for the Act was previously considered by the Committee in *Alert Digest No. 10 of 1998* in which it made various comments. The Minister for Environment and Heritage responded to those comments in the Committee's *Seventh Report of 1999*. Since the publication of that *Report*, the following issue has come to the Committee's attention.

Delegation of legislative power **Subsection 515(3)**

Subsection 515(3) of this Act authorises the Director of National Parks to delegate all or any of his or her powers or functions under the Act 'to 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 offices or to members of the Senior Executive Service. The Committee **seeks the Minister's advice** as to the reason for this completely unfettered discretion being vested in the Director, and to inquire whether it would not be possible to limit the categories of persons or bodies to whom (or which) such a delegation may be made.

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

Commonwealth reserves and conservation zones managed by the Director under the EPBC Act are located throughout Australia's jurisdiction. Many of these areas are remote and the issues faced in their administration and management are numerous and varied. These issues include joint management arrangements with Indigenous communities and the possibility of having local people rapidly respond to emergency situations.

Confining delegations to holders of nominated offices or to members of the Senior Executive Service would not provide the Director with sufficient capacity to appropriately and effectively authorise the exercise of his powers and functions. Naturally, the Director keeps a tight rein on all delegations.

The Committee thanks the Minister for this response. While noting that the response provides ample justification for providing the Director a broad power to delegate, the question of whether a completely unfettered discretion is justified remains unanswered.

The Committee accepts that it will not always be possible to delegate powers to nominated officers or to SES level employees, but reiterates its general principle that a discretion to delegate ought be limited to a particular class of persons (for instance, persons with particular expertise) or limited to a particular range of powers and functions. It may be appropriate for the Act to be amended at some stage to reflect this principle. That, of course, is a question best left to the Parliament.

Accordingly, the Committee continues to draw 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.

Gavin Marshall
Chair



ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

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10 AUG 2004

Senate Standing C'ttee
for the Scrutiny of Bills

10 AUG 2004

04/8226, MC04/7558

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

Dear Senator Crossin

I am writing in response to the comments of the Senate Standing Committee for the Scrutiny of Bills about the Anti-terrorism Bill (No. 2) 2004 (Scrutiny of Bills Alert Digest No. 8 of 2004). The Committee is concerned that the exemption of certain decisions from review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

Subsection 3(1) of the ADJR Act defines 'decisions to which this Act applies'. These are decisions of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not) under a specified enactment or by a Commonwealth authority or officer under a specified enactment. However, the definition excludes a decision in any of the classes of decisions set out in Schedule 1 to the ADJR Act.

The proposed amendments seek to exclude decisions made by me (or the Minister for Justice and Customs under portfolio arrangements) under the proposed amendments to the *Transfer of Prisoners Act 1983* (TP Act) from the application of the ADJR Act by including those decisions in Schedule 1 of the ADJR Act. The relevant decisions are made under:

- Part II (welfare transfers) or Part III (trial transfers) of the TP Act refusing applications or requests for such transfers, or refusing to give consent, on the ground that, or on grounds that include the ground that, refusal is necessary in the interests of security, and
- proposed Part IV of the TP Act to make a security transfer order or a return transfer order.

These decisions involve consideration of issues of 'security' as defined in the Bill. The proposed definition targets matters of national security and is consistent with the definition of 'security' in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

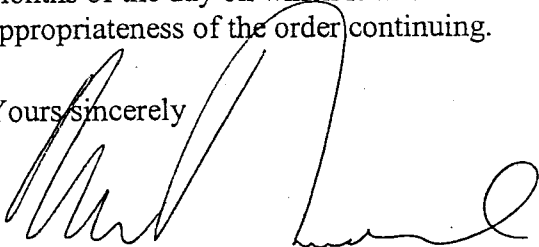
I consider it inappropriate for decisions about transfers on security grounds to be subject to review under the ADJR Act. These decisions will require consideration of national security issues and are likely to be of a sensitive nature. The threat to 'security' may arise, for example, from concerns about the prisoner's actions or from concerns that someone may wish to harm a prisoner (for example, because he or she is going to give certain evidence in court). Disclosure of such information in proceedings may alert prisoners or suspects to activities of investigative authorities.

Exclusion of decisions of this type from ADJR review is consistent with the exemption in Schedule 1 of the ADJR Act of other decisions involving national security considerations (for example, decisions made under the ASIO Act, the *Intelligence Services Act 2001* and the *Telecommunications (Interception) Act 1979*).

My power to make decisions of this nature cannot be delegated. Similarly, the power of State and Territory Ministers to make decisions under the Act cannot be delegated either. Before making a transfer order, I must believe on reasonable grounds that it is necessary in the interests of security. That belief can be reviewed in the Federal Court under section 39B of the *Judiciary Act 1903*.

I cannot make the order unless the appropriate Ministers in the sending and receiving jurisdictions have consented to the transfer in writing. I must also review the order within 3 months of the day on which it was made or last reviewed in order to ensure the appropriateness of the order continuing.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Philip Ruddock', written over the 'Yours sincerely' text.

Philip Ruddock



SENATOR THE HON IAN CAMPBELL

Minister for the Environment and Heritage
Manager of Government Business in the Senate
Senator for Western Australia

RECEIVED

9 AUG 2004

Senate Standing C'ttee
for the Scrutiny of Bills

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

- 9 AUG 2004

Dear Senator ~~Crossin~~ *Trish*,

I refer to the letter of 4 March 2004 from Ms Janice Paull, Acting Secretary of the Standing Committee for the Scrutiny of Bills to my predecessor's office (the Hon Dr David Kemp MP) regarding the delegation of functions and powers of the Director of National Parks under section 515(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Commonwealth reserves and conservation zones managed by the Director under the EPBC Act are located throughout Australia's jurisdiction. Many of these areas are remote and the issues faced in their administration and management are numerous and varied. These issues include joint management arrangements with Indigenous communities and the possibility of having local people rapidly respond to emergency situations.

Confining delegations to holders of nominated offices or to members of the Senior Executive Service would not provide the Director with sufficient capacity to appropriately and effectively authorise the exercise of his powers and functions. Naturally, the Director keeps a tight rein on all delegations.

Yours sincerely

IAN CAMPBELL