
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## FIRST REPORT

## OF

## 2012

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## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

## 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

## FIRST REPORT OF 2012

The Committee presents its First Report of 2012 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:

# Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

Introduced into the House of Representatives on 3 November 2011
Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter received 31 January 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

The bill seeks to:

- abolish the Office of the Australian Building and Construction Commissioner and create a new agency, the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate) to regulate the building and construction industry;
- remove the existing building industry specific laws that provide:
  - higher penalties for building industry participants for breaches of industrial law, and
  - broader circumstances under which industrial action attracts penalties;
- include a capacity for the Director of the Building Inspectorate to obtain an examination notice authorising the use of powers to compulsorily obtain information or documents from a person whom the Director believes has information or documents relevant to an investigation;
- introduce the following safeguards in relation to the use of the power to compulsorily obtain information or documents:
  - use of the powers is dependent upon a presidential member of the Administrative Appeals Tribunal being satisfied a case has been made for their use and issuing an examination notice;

- persons summonsed to interview may be represented by a lawyer of their choice and their rights to refuse to disclose information on the grounds of legal professional privilege and public interest immunity will be recognised;

- people summonsed for examination will be reimbursed for their reasonable expenses, including reasonable legal expenses;

- all examinations are to be videotaped and undertaken by the Director or an SES officer;

- the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power; and

- the powers will be subject to a three year sunset clause. The decision on whether the coercive powers will be extended after three years will be made following a review of their use and ongoing need;

- create an office, the Independent Assessor, who, on application from stakeholders, may make a determination that the examination notice powers will not apply to a particular project; and

The bill does not affect the provisions that establish the Office of the Federal Safety Commissioner and its related OHS Accreditation Scheme.

**Insufficiently defined administrative powers**
**Schedule 1, item 72, section 59**

Item 72 of Schedule 1 proposes a new section 59 which provides for the appointment of Fair Work Building Industry Inspectors. Other than requiring inspectors to have been appointed or employed by the Commonwealth, by a State or Territory, or to hold an office or appointment under a law of a State or Territory, the only limitation on who may be appointed is that the Director must be satisfied that the person of good character (see proposed subsection 59(2)). The Committee generally prefers that as many guidelines as possible outlining qualifications and/or training procedures are included in primary legislation. Especially given that inspectors will have 'search and seizure' powers, the Committee **seeks the Minister's advice as to whether consideration has been given to whether any further qualifications should be required or the appropriateness of providing for the formulation of training procedures and guidelines for the exercise of these powers to be included in the primary legislation**.

*Pending the Minister's reply, the Committee draws Senators' attention to the 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.*

## *Minister's response - extract*

Specifically, the Committee has sought advice about whether consideration has been given to whether any further qualifications should be required of persons appointed as Fair Work Building Industry Inspectors, or the appropriateness of providing for the formulation of training procedures and guidelines for the exercise of the Inspectors' powers in the primary legislation.

I confirm that the Government has decided, consistent with the approach to appointing Fair Work Inspectors under the *Fair Work Act 2009*, not to codify this level of detail in the primary legislation. In relation to the selection of Inspectors, I believe being too prescriptive or requiring specific qualifications in the legislation could adversely limit the pool of potential applicants for these positions. Further, Inspectors will be appointed based on merit, using selection criteria determined by the Building Industry Inspectorate, after assessing the relevant skills, experience and qualifications of applicants. Any further general or specific training and development requirements for Inspectors once they are appointed will also be a matter for the Inspectorate.

Similarly, I expect the Building Industry Inspectorate will issue guidelines and procedures in relation to how its Inspectors will properly perform their functions and exercise their powers.

I trust the information provided is helpful.

### *Committee Response*

The committee thanks the Minister for this response. The committee understands that in these circumstances it is often not appropriate to be overly prescriptive in primary legislation and notes the intention that the BII will issue relevant guidelines and procedures. However, it is possible to provide broad parameters in a bill or for a bill to *require* the development of standards relating to training, qualifications or experience without having an adverse impact on potential applicants for the positions. **In light of the importance of this issue and the coercive powers that Fair Work Building Inspectors will be able to exercise, the committee requests that the Minister reconsiders the approach to this issue to include a requirement in the bill that guidelines and processes are issued by the appropriate authority.**

# Customs Amendment (Military End-Use) Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Home Affairs

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter received 7 February 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill amends the *Customs Act 1901* to provide measures to prohibit the export of 'non-regulated' goods that may contribute to a military end-use that may prejudice Australia's security, defence or international relations.

**Merits review**
**Parliamentary scrutiny**
**Paragraph 112BA**

The purpose of this bill is to amend the *Customs Act* so as to confer on the Defence Minister a broad discretionary power to prohibit the export of 'non-regulated' goods if the Minister suspects that the 'goods would or may be for a military end-use that would prejudice the security, defence or international relations of Australia' (proposed new paragraph 112BA(1)(a)). The exercise of the power is not subject to merits review given the 'high political content' and the fact that it is to be exercised personally by the Minister (see the explanatory memorandum at page 5). The Minister is required to give reasons to a person who receives a notice preventing them from exporting particular goods (subsection 112BA(2)), but this is not required if the Minister believes that this would prejudice the security, defence or international relations of Australia.

The Committee has a long-standing interest in the availability of appropriate merits review and notes the explanation given for excluding it in this case. In the absence of merits review, the Committee is not aware of any scrutiny mechanisms for the exercise of the power. The Committee is therefore of the view that it would be appropriate for the Minister to report to Parliament on the use of the power. The Committee **requests that the bill be amended to require annual reporting to Parliament on the exercise of the**

**discretionary power in paragraph 112BA and seeks the Minister's advice as to whether the bill can be amended to this effect.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## *Minister's response - extract*

In addition to issues relating to the DTC Bill, you have also requested that the Customs Amendment (Military End-Use) Bill be amended to require annual reporting to Parliament on the exercise of the discretionary power in paragraph 112BA.

I have written to the Minister for Home Affairs to seek his agreement with your recommendation to amend the Customs Amendment (Military End Use) Bill, and provided him with a copy of this letter.

### *Committee Response*

The Committee thanks the Minister for this response and for his action to implement the committee's recommendation.

# Defence Trade Controls Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Defence

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter received 7 February 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill implements the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation.* The bill also amends Australia's controls over activities involving defence and dual-use goods, and related technology and services. The explanatory memorandum contains a Regulation Impact Statement.

**Delegation of legislative power**
**Clause 10**

Clause 10 of the bill creates offences concerning the provision or supply of defence services in relation to the Defence and Strategic Goods List. The penalties (imprisonment for 10 years or 2500 units or both) are said to be consistent with 'the penalty in the *Customs Act 1901* for exporting goods listed in the DSGL without authorisation.' Subclauses 10(3)-(7) establish a number of defences to the offences. One of the subclauses (subclause 10(7)) provides that the offences do not apply in circumstances prescribed by the regulations. The explanatory memorandum states that the Government intends to propose regulations to cover a number of circumstances, but does not indicate why these matters cannot appropriately be dealt with in the primary legislation. As the Committee prefers that important matters are included in primary legislation as much as possible, the Committee's **seeks the Minister's advice as to the justification for the proposed approach.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## *Minister's response - extract*

***1. Clause 10 of the DTC Bill- Delegation of legislative power – justification for the approach that a number of exceptions to offences are to be covered in the regulations.***

Clause 10 of the Bill creates primary offences concerning the supply of technology, and provision of defence services relating to technology, where the technology is listed on the Defence and Strategic Goods List. Subclauses 10(3), 10(4) and 10(5) of the Bill contain exceptions to the offences. The Bill has been drafted to allow additional circumstances in which the offence provisions will not apply to be prescribed in regulations.

These additional exceptions have been included in the draft regulations at regulations 11, 12 and 13. The draft regulations have been released for public consultation. A copy of the regulations and the Explanatory Statement are enclosed for your reference.

I note that it is Commonwealth criminal law policy that the content of an offence, including exceptions, be contained wholly within the primary legislation, unless appropriate limitations apply. In respect of clause 10, the exceptions to the offences contained in the regulations are clearly defined and circumscribed in the Bill.

In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11 (2) of the draft regulations, which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In

addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

***Committee Response***

The Committee thanks the Minister for this detailed response and **requests that the key information is included in the explanatory memorandum.**

## *Alert Digest No. 14 of 2011 - extract*

**Wide discretion**
**Clauses 11, 14 and 16**

Clause 11 of the Bill confers a wide discretionary power on the Minister to grant or refuse a permit to supply technology or provide services related to DSGL goods. Subclause 11(4) provides that the Minister may give the person a permit if satisfied that the 'activity would not prejudice the security, defence or international relations of Australia'. The explanatory memorandum at page 48 outlines a list of possible criteria as permissible considerations, but these are not reflected in the bill.

Clauses 14 and 16 also include a requirement for the Minister to consider whether the relevant activities will 'prejudice the security, defence or international relations of Australia'.

Although it is accepted that the nature of the decisions may necessitate the breadth of the discretionary powers provided in the bill, the Committee **seeks the Minster's advice as to whether consideration has been given to including the criteria listed as permissible considerations on pages 48 and 54 of the explanatory memorandum in the legislation to provide some guidance for the exercise of the power**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the 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.*

## *Minister's response - extract*

***2. Clauses 11, 14 and 16 of the DTC Bill - Discretion – whether consideration has been given to including the possible criteria listed as permissible considerations in the Explanatory Memorandum in the legislation to provide some guidance for the exercise of the power.***

Australia's export control regime operates to ensure that defence and dual use goods are exported responsibly and that Australia meets its obligations under the major arms and dual use export control regimes of which Australia is a member.

Australia's legislative framework governing export control provides mechanisms that apply a necessary degree of scrutiny to proposed exports to assist in ensuring that the defence, security and international relations of Australia are not compromised.

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses II and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are

necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including Regulation BE of the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Preventions of Proliferation) Act 1995.*

***Committee Response***

The Committee thanks the Minister for this detailed response and **requests that the key information is included in the explanatory memorandum.**

## *Alert Digest No. 14 of 2011 - extract*

**Reversal of onus**
**Clause 31**

Clause 31 introduces a number of offences with substantial penalties. These penalties are justified as being consistent with penalties for similar offences in other Commonwealth legislation (see the explanatory memorandum at page 67).

Subclause 31(7) provides that the regulations may prescribe exceptions in relation to the offences and defendants bear an evidential burden of proof in relation to these exceptions. The explanatory memorandum states at page 68 that:

> …where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge'.

However, it is difficult to evaluate whether it is appropriate for a defendant to bear the evidential burden of proof without knowing the nature of the exceptions to be prescribed in the regulation. The Committee therefore **seeks further information from the Minister about the exceptions and whether they can be outlined in the primary legislation.**

*Pending the Minister's reply, 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.*

## *Minister's response - extract*

***3. Clause 31 of the DTC Bill- Reversal of onus - further information about the exceptions to the offences in clause 31 that will be proscribed in the regulations and whether those exceptions can be outlined in the primary legislation.***

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and

- in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.

These two provisions include a level of detail that should not be included in the primary legislation and for this reason, these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

***Committee Response***

The Committee thanks the Minister for this detailed response and **requests that the key information is included in the explanatory memorandum.**

# Deterring People Smuggling Bill 2011

Introduced into the House of Representatives on 1 November 2011
Portfolio: Home Affairs

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter received 7 February 2012. A copy of the letter is attached to this report.

### *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill amends the *Migration Act 1958* (the Act) to clarify the meaning of the words 'no lawful right to come to Australia' contained in the people smuggling offences in the Act commencing retrospectively from December 1999.

**Retrospective effect**
**Schedule 1, item 2**

The purpose of this bill is to clarify the meaning of a key phrase in the offences for people smuggling contained in the *Migration Act*. The application of these offences depends on the interpretation of the statutory words 'no lawful right to come to Australia': a person who is involved in particular ways with bringing to Australia persons with no lawful right to come to Australia contravenes the offence provisions. Item 1 of Schedule 1 of the bill would introduce a new section 228B into the *Migration Act*. This provision provides that non-citizens seeking protection or asylum who do not have a valid visa have 'no lawful right to come to Australia' unless they fall into one of the listed exemptions. As the explanatory memorandum notes at page 6, the amendment is not designed to directly affect the rights of individuals seeking protection or asylum or Australia's obligations in relation to those persons. Rather the amendments relate to the operation of people smuggling offences in the *Migration Act.*

Schedule 1 would give retrospective effect to the proposed changes to the operation of the people smuggling offences. The proposed amendment would apply to offences committed or alleged to have been committed from 16 December 1999, the date when the words being clarified were originally introduced into the *Migration Act*. The stated purpose of giving the amendment retrospective effect is to 'address doubt that may be raised about convictions that have already been made under [the existing provisions]' (see the

explanatory memorandum at page 1). Additionally, it is made clear that the amendments will apply in relation to proceedings commenced on or after the day the amendments will commence and also to proceedings which have not been finally determined but were commenced prior to the day the amendment commences.

The justification provided for the retrospective application of the amendment appears to rest on the claim that the amendments are consistent with both the original intent of the Parliament (see explanatory memorandum at pages 4 and 5, discussing the legislative history) and the consistent interpretation given to the people smuggling offences since 1999 which assumes that the offences apply where a person does not meet the requirements for coming to Australia under domestic law. Based on these assumptions, the amendment is characterised as an 'avoidance of doubt provision' (see page 6 of the explanatory memorandum).

Although there are situations where retrospective legislation is justified (most notably when there have been other failings of the legal system that need to be corrected), liberal and democratic legal traditions have long expressed strong criticisms of retrospective laws that impose criminal guilt. Although in Australia there is no constitutional prohibition on the use of such laws, there are such provisions in other legal systems and retrospectivity is generally considered to compromise basic 'rule of law' values. The core objection to retrospective laws is straightforward: persons should not be punished for acts that were not illegal at the time they acted. Not only may individuals be unfairly surprised by the *ex post facto* nature of their legal obligations, such laws show a basic disrespect for citizens insofar as they undermine the idea that law is a system of rules designed to guide conduct. Further, given that breaches of the criminal law may lead to deprivations of liberty, retrospective *criminal* laws carry added opprobrium.

Although the principles that underpin the rule of law (including the general requirement of retrospectivity in legislation) are not absolute, it is submitted that the case for retrospective changes to laws creating criminal liability should establish that exceptional circumstances exist (this approach is also consistent with paragraph 6.18 of the *Legislation Handbook*). As the proposed amendments pre-empt judicial interpretation of the existing provisions they cannot be considered as a mere exercise in clarification of the existing offence provisions for the 'avoidance of doubt'. If the courts were to authoritatively interpret the existing offence provision in a way that is contrary to the proposed amendments then clearly the amendments would constitute a substantive change to the law, albeit as a matter of construction rather than as an amendment to the elements of the offence. For these reasons it appears to the Committee that the justification for the retrospective operation of the amendments proposed in this bill, which are clearly intended to apply to proceedings which are already before the courts, requires further explanation. The Committee **expresses reservations about the use of retrospective legislation to confirm criminal guilt, and seeks the Minister's further explanation as to why it is considered that there are exceptional circumstances justifying retrospectivity to December 1999.**

*Pending the Minister's reply, 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.*

## *Minister's response - extract*

With regard to the Deterring People Smuggling Bill 2011 (the Bill), the Committee expressed reservations about the retrospective nature of the Bill, and sought further explanation as to the exceptional circumstances that justified retrospectivity to December 1999. My response to the Committee's concerns is below.

As you may be aware, the Bill was also referred to the Senate Standing Committee on Legal and Constitutional Affairs, which recommended on 21 November 2011 that the Bill be passed by the Senate, subject to the explanatory memorandum including further detail justifying the Bill's retrospective application. In response, the former Minister for Home Affairs, the Hon Brendan O'Connor MP, circulated a replacement explanatory memorandum on the Bill, which was tabled in the Senate on 25 November 2011. I have attached a copy of the replacement explanatory memorandum for your information.

Following the tabling and debate, the Senate passed the Bill on 25 November 2011. The *Deterring People Smuggling Act 2011* (the Act) received the Royal Assent on 29 November 2011.

*Justification for retrospectivity*

Under the Migration Act 1958 the offences of people smuggling and aggravated people smuggling are established inter alia where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person that is a non-citizen, and that non-citizen had, or has, no lawful right to come to Australia.

As stated in the explanatory memorandum, the purpose of the Act was to amend the Migration Act to make it clear that the words 'no lawful right to come to Australia' refer to the requirements for lawfully coming to Australia under domestic law. The amendments in the Act applies retrospectively from 16 December 1999 when the words 'lawful right to come to Australia' were first inserted into the people smuggling offences in the Migration Act.

Although the Act has retrospective application, it does not alter any of the elements of the existing people smuggling offences in the Migration Act, and does not extend criminal liability beyond the scope of what Parliament intended in 1999 in any way.

There are exceptional circumstances that justified retrospectivity for the Act. It was necessary to ensure the original intent of the Parliament when the offences were introduced was affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions. There was a risk large numbers of past convictions and current prosecutions of serious Commonwealth criminal offences would be defeated or overturned as a result of a previously unidentified technical argument in relation to the words 'no lawful right to come to Australia'.

Between 1999 and 25 November 2011 when the Act was passed by the Senate, there had been over 960 prosecutions for people smuggling offences in Australia. There are currently 258 persons before the courts and 196 prisoners serving sentences in Australia for people smuggling offences, including both organisers and facilitators of people smuggling activity. The retrospective application of the Act was important to remove the risk of undermining the administration of justice as a result of past convictions being overturned or prosecutions on foot at the time being defeated.

I trust this information is of assistance.

***Committee Response***

The Committee thanks the Minister for this detailed response. The committee accepts that prosecutions on foot may be affected if the bill does not apply retrospectively, but is not persuaded that convictions for which the appeal period had expired would be at risk. The committee remains generally concerned about the retrospective application of the provisions. **However, the committee notes that the bill has passed both Houses of Parliament.**

# Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011

Introduced into the Senate on 1 November 2011
By: Senator Waters

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Senator responded to the Committee's comments in a letter dated 31 January 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to require Commonwealth assessment and approval of mining operations likely to have a significant impact on water resources.

**Possible severe penalties**
**Various**

A number of clauses in the bill seek to impose civil and criminal penalties for specified conduct taken in the course of mining operations relating to water resources. The penalties include 5,000 penalty units for an individual and 50,000 penalty units for a body corporate and, in specified circumstances, imprisonment for 7 years or 420 penalty units, or both. The explanatory memorandum does not seek to justify the level of penalty to be imposed.

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4 of the *Guide* relates to 'framing an offence', and Part 5 contains a statement of the matters which should be considered in setting penalties. The Committee considers that penalties should be consistent across Commonwealth legislation, should take into account the principles outlined in the *Guide* and expects that reasons for the imposition of proposed penalties will be set out in the relevant explanatory memorandum. To ensure that there is no undue trespass on rights the Committee therefore **seeks the Senator's clarification as to why the level of penalties imposed by these provisions, which include**

**imprisonment, are appropriate and whether they are consistent with similar penalties in other Commonwealth legislation.**

*Pending the Senator's reply, 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.*

## *Senator's response - extract*

Regarding the penalties imposed by my bill, I am pleased to assure the Committee that such penalties are entirely consistent with the existing penalties in the EPBC Act for other matters of national environmental significance. The penalties of 5,000 penalty units for an individual and 50,000 penalty units for a body corporate, and in specified circumstances, imprisonment for 7 years or 420 penalty units, all mirror the provisions for protection for world heritage (sections 12 and 15A), national heritage (sections 15B and 15C), Ramsar wetlands (sections 16 and 17B), threatened species (sections 18 and 18A), migratory species (sections 20 and 20A), nuclear actions (sections 21 and 22A), commonwealth marine (sections 23 and 24A), Great Barrier Reef Marine Park (sections 24B and 24C) and for additional matters of national environmental significance which may be declared by regulation (section 25).

***Committee Response***

The Committee thanks the Senator for this response and notes that it would have been useful for this information to have been included in the explanatory memorandum.

## *Alert Digest No. 14 of 2011 - extract*

**Reversal of onus**
**Subclause 24G(7)**

Clause 24G proposes to introduce offences for specified conduct taken in the course of mining operations relating to water resources. The offences do not apply in circumstances outlined in subsection 24G(7), but the defendant bears the evidential burden in relation to these defences. The Committee expects that the explanatory memorandum to a bill should explain why the reversal of onus is appropriate, and this is also consistent with the

Commonwealth *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (see especially Part 4.6). As the explanatory memorandum does not comment on the reasons why the defendant should bear an evidential burden, the Committee **seeks the Senator's advice as to the justification for the proposed approach.**

> *Pending the Senator's reply, 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.*

## *Senator's response - extract*

Likewise the requirement that the defendant prove they may avail themselves of the defences in clause 24G(7) is also consistent with existing provisions of the EPBC Act (listed above) for all other matters of national environmental significance. On this point I may add that the mere production of a document would be all that was required to discharge that burden, and hence is no undue trespass on the personal rights and liberties.

***Committee Response***

The Committee thanks the Senator for this response and notes that it would have been useful for this information to have been included in the explanatory memorandum.

## *Alert Digest No. 14 of 2011 - extract*

**Retrospective commencement**
**Clause 2**

The amendments proposed by the Bill would commence on the day the Bill was introduced into the Senate, 1 November 2011. The explanatory memorandum at page 1 states:

> Under normal circumstances commencement on Royal Assent would apply, however this retrospective commencement is required to ensure approvals for mining operations are not fast-tracked following introduction of this Bill. The intention is to ensure all mining operations commencing after the day this Bill is introduced are

subject to Commonwealth assessment and approval where these operations are likely to have a significant impact on Australia's water resources.

The Committee notes these justifications for the proposed approach. However, given that the amendments impose a number of new offences and civil penalties the Committee **seeks the Senator's further advice as to the need for the retrospective operation of the amendments.**

*Pending the Senator's reply, 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.*

## *Senator's response - extract*

Regarding the retrospective commencement, I simply reiterate that the intention of the commencement of the bill on the day of introduction of the bill is to ensure that approvals for mining operations are not fast-tracked following introduction of the bill.

### *Committee Response*

The Committee thanks the Senator for this response and notes that it retains its concern about the retrospective commencement, but **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

# Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Justice

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 15 September 2011. The Committee requested further advice and the Minister responded in a letter dated 21 November 2011. A copy of the letter is attached to this report.

## *Alert Digest No. 8 of 2011 - extract*

**Background**

This bill amends the *Crimes Act 1914*, the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Schedule 1 contains general amendments which relate to both extradition and mutual assistance to:

- enable Federal Magistrates to perform functions under the *Extradition Act* and the *Mutual Assistance Act*; and
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes.

Schedule 2 contains amendments relating to extradition to:

- reduce delays in extradition processes by amending the early stages of the extradition process
- extend the availability of bail in extradition proceedings
- allow a person to waive the extradition process, subject to certain safeguards
- extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition
- allow a person to consent to being surrendered for a wider range of offences

- modify the definition of ‘political offence’ to clarify this ground of refusal does not extend to specified crimes such as terrorism, and
- require Australia to refuse to extradite a person if he or she may be prejudiced by reason of his or her sex or sexual orientation following surrender.

Schedule 3 contains amendments relating to mutual assistance which:

- increase the range of law enforcement tools available to assist other countries with their investigations and prosecutions, subject to particular safeguards
- amend existing processes for providing certain forms of assistance to other countries
- strengthen protections against providing assistance where there are death penalty or torture concerns in the requesting country
- amend other grounds on which Australia can refuse to provide mutual assistance to other countries, and
- amend the process for authorising proceeds of crime action, and allow registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

Schedule 4 contains technical contingent amendments.

**Possible trespass on personal rights and liberties**
**Schedule 3, Part 4, item 103, subsections 23YQC and 23YQD**

These items will allow the provision of forensic material obtained by consent to be provided police-to-police in certain circumstances. The Committee seeks **the Minister's advice about whether, in the process of volunteering or providing informed consent, a person will be advised that it could be possible for the forensic material obtained to be shared with police from other countries.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

Items 79 and 93 of Schedule 3 of the Bill propose to insert new paragraphs 23WJ(I)(ib) and 23XWR(2)(da) into the *Crimes Act 1914*. These paragraphs would provide that in all cases where a suspect or volunteer undergoes a forensic procedure because of a request by a foreign law enforcement agency, the suspect or volunteer must be informed of:

- the name of the foreign law enforcement agency that has made the request
- that forensic evidence obtained from the procedure will be provided to that agency
- that the evidence may be used in proceedings in the foreign country
- that the retention of the evidence will be governed by the laws of the foreign country and undertakings given by the foreign law enforcement agency, and
- the content of undertakings given by-the foreign law enforcement agency relating to the retention of the evidence.

This will ensure that a person who provides forensic material is aware that he or she is consenting to the information obtained from the procedure being made available to foreign law enforcement authorities for a foreign offence.

***Committee First Response***

The Committee thanks the Minister for this response and notes that if a forensic procedure *is carried out in response to* a request from a foreign country then a person will be informed as outlined above. However, the Committee was particularly interested to understand the effect of Schedule 3, Part 4, item 103, subsections 23YQC and 23YQD and specifically whether forensic material that has already been obtained for Australian domestic purposes could later be provided to a foreign country in response to a request from that foreign country. If so, the Committee is interested to know whether section 23WJ of the *Crimes Act 1914* should be amended to require a suspect to be informed that the information could subsequently be provided to a foreign country. The Committee therefore **seeks the Minister's further advice about this issue**.

## *Further response from the Minister - extract*

**Schedule 3, Part 4, item 103, subsections 23YQC and 23 YQD**

New subsection 23YQC outlines the application of subdivision B of Division 9A, which would be inserted into the *Crimes Act* 1914 by item 103 in Part 4 of Schedule 3 of the Bill. New subsection 23YQC states that the subdivision applies if a request is made by a foreign law enforcement agency for a forensic procedure to be carried out on a suspect or volunteer in relation to a foreign serious offence and the suspect or a volunteer has consented to the procedure. That is, this subdivision will cover the voluntary provision of forensic evidence for foreign purposes obtained as a result of police-to-police assistance without the need for a formal mutual assistance request.

New subsection 23YQD sets out the process for providing forensic evidence under this subdivision. These requirements are that the Commissioner must be satisfied that the foreign law enforcement agency has given appropriate undertakings in relation to the retention, use and destruction of forensic evidence, and it is appropriate, in all the circumstances, to provide the forensic evidence. If the forensic evidence is provided to the foreign country, then a copy of the tape recording or the written record of the person's informed consent may also be provided. This is necessary as the fact that the person provided informed consent to the forensic procedure may be relevant to the admissibility of forensic material as evidence in foreign court proceedings. Where an audio or video recording is made of the forensic procedure and provided to the suspect, then a copy can also be provided to the foreign law enforcement agency. This will ensure that the foreign country can receive a record of the carrying out of the forensic procedure and may be relevant to the admissibility of forensic material as evidence in foreign court proceedings.

Sections 23YQC and 23YQD are proposed to provide for the carrying out of a forensic procedure at the request of the foreign law enforcement agency. Forensic material which has already been obtained for domestic purposes and, therefore, in the possession of an enforcement agency in Australia can currently be provided to a foreign country under section 13A of the *Mutual Assistance in Criminal Matters Act 1987*. However, the Department is not aware that this has ever occurred. If such forensic material is requested by a foreign country, there is currently no requirement to inform the suspect or the person who provided the forensic material for domestic purposes that the forensic material has been requested by or is being provided to a foreign country.

Section 23WJ of the *Crimes Act 1914* requires a suspect to be informed, prior to giving consent, that the forensic procedure (carried out for domestic purposes) may produce evidence against the suspect that might be used in a court of law. The provision does not specify that the suspect must be informed that the evidence may later be provided to a foreign country for use in a foreign court of law. These current arrangements would not be

affected by the Bill, and are outside the scope of its proposed reforms. Given the infrequency of forensic material already obtained for domestic purposes being provided to a foreign country, I consider it is not necessary to require the suspect to be informed of this possibility when providing the forensic material for domestic purposes under the Crimes Act. However, I will ask my Department to consider the issue of whether the suspect should be informed if and when the forensic material is later requested by a foreign country.

***Committee Response***

The Committee thanks the Minister for this detailed response and notes that he will request the department to consider the issue relating to the provision of forensic material to a foreign country.

## *Alert Digest No. 8 of 2011 - extract*

**Possible trespass on personal rights and liberties**
**Schedule 3, Part 4, item 112, subsection 28A(3) and 28B**

The explanatory memorandum states at paragraphs 3.467 and 3.468 that:

> Subsection 28A(3) will clarify that Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out by using processes similar to those used in the foreign country.
>
> This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

The Bill also seeks to provide that the material obtained is not inadmissible as evidence and is not precluded from being used for the purposes of the investigation simply on the ground that it was obtained otherwise than in accordance with Australia's request.

It appears to the Committee that the intention is that Australia could only request a forensic procedure that is already permitted under Australian law, but as this is inferred from the

wording of the provision rather than clearly stated, the Committee **seeks the Minister's confirmation about whether this is intended, and if so, whether it can be clearly stated in the legislation**.

> *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.*

## *Minister's response - extract*

The intention is *not* that Australia could only request a forensic procedure that is already permitted under Australian law. The wording of proposed subsection 28A(3) states that Australia may request that a forensic procedure be carried out in the foreign country even if that forensic procedure is not permitted under Australian law.

This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements.

### *Committee First Response*

The Committee thanks the Minister for this response. It is not as clear to the Committee that the wording of subsection 28A(3) clearly states "that Australia may request that a forensic procedure be carried out in the foreign country even if that forensic procedure is not permitted under Australian law." However, in view of this interpretation the Committee is concerned that Australia can request forensic procedures which would not be lawful in Australia because some procedures may be considered to trespass unduly on personal rights and liberties. The Committee notes that paragraph 3.468 of the Revised Explanatory Memorandum refers to the wording of section 28A(3) and states that:

> [This approach] is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

The Committee can understand that it is a matter for a foreign country to carry out a forensic procedure in accordance with its applicable domestic procedures, but the Committee is concerned that the intention of the provision is that Australia can actually request a forensic procedure that could not be authorised in Australia (regardless of the type or range of processes that could be used to carry out the procedure). The Committee remains unclear about the difference between a *forensic procedure* and a *forensic process* and is concerned about the intention that Australia can request procedures that are not authorised domestically. The Committee therefore **requests the Minister's further advice on the scope of this provision and whether it could have the effect of trespassing unduly on personal rights and liberties.**

## *Further response from the Minister - extract*

Subsection 28A(3) provides that 'to avoid doubt, Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out using processes similar to those used in the foreign country.' This provision is intended to encompass both the procedure carried out and the processes used to carry out the procedure. The procedure is the action taken to obtain forensic material, for example taking finger prints or making a dental impression. The process is the steps which need to be followed in order to carry out a forensic procedure, for example the requirements to inform a person of certain matters and seek their consent.

Australia's general position is to seek assistance in international crime cooperation matters even if Australia is unable to reciprocate and provide the same assistance to the foreign country. Australia's inability to reciprocate in such circumstances would be indicated in the request. Subsection 28A(3) makes it clear that this existing general position applies in relation to the new forensic procedure provisions. It is modelled on subsection 12(2) of the Mutual Assistance Act which similarly provides that, to avoid doubt, evidence may be taken and any document or article may be obtained in a foreign country pursuant to a request from Australia, even if the evidence could not have been obtained under Australian law using processes similar to those used in the foreign country.

Preventing Australia from seeking assistance where a foreign country's forensic procedure laws differ from Australia's may frustrate the investigation and prosecution of a wide range of serious criminal matters by Australian law enforcement authorities. Imposing a requirement to undertake a comprehensive assessment about whether the requesting country has similar laws for undertaking forensic procedures would also impose a significant burden on Australia.

***Committee Response***

The Committee thanks the Minister for this detailed response, but remains concerned that the provision will allow *Australia to request* that a foreign country carry out a procedure that could not be requested *in Australia* (although the committee notes that the process for obtaining it may be different overseas). The committee's focus is on ensuring that a request by Australia could not obtain forensic material that cannot be obtained domestically by any process. The committee does not anticipate that an assessment of the foreign country's laws for undertaking forensic procedures would need to be undertaken. **The committee remains concerned about this issue and seeks the Minister's further advice as to whether the ability to obtain forensic material from a foreign country would result in types of material being obtained from overseas that could not be obtained within Australia.**

## *Alert Digest No. 8 of 2011 - extract*

**Possible inappropriate delegation**
**Schedule 2, Part 3, item 33, section 5(c)**

This item seeks to amend section 5 of the *Extradition Act* to expressly exclude an offence prescribed by regulations from being a political offence in relation to one or more countries (see paragraph 2.67 of the explanatory memorandum). This means that a person is not exempt from extradition for an offence listed in the regulations. The explanatory memorandum notes (at paragraph 2.68) that:

> These amendments will streamline the 'political offence' definition by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. The amendments are consistent with the United Nations Model Extradition Treaty, which states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person.

The fact that some offences are to be excluded from the definition is not an issue of specific concern to the Committee. However, the Committee does prefer that important matters are included in primary legislation rather than in regulations whenever possible.

At paragraph 2.69 the explanatory memorandum notes that Australia implements relevant treaty obligations to ensure that certain offences are extraditable offences by providing that such offences are excluded from the definition of political offence in the Extradition Act. However, it appears to the Committee that the extent to which the proposed power in

Section 5(c) is to enable Australia to implement bilateral and multilateral treaties the regulation power is framed in terms which are broader than necessary.

The explanatory memorandum at paragraph 2.69 also describes a justification for the use of regulations as being that it will 'ensure the extradition regime can be dept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act'.

In light of the serious nature of this regulation-making power the Committee **seeks the Minister's further advice about the provision, and in particular, how often it has been necessary to amend the *Extradition Act* to ensure that the extradition regime meets Australia's international obligations, whether the scope of the subclause 5(c) can be narrowed, and whether the statement that the amendments are consistent with the United Nations Model Treaty applies specifically to subclause 5(c) or just more generally to section 5.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## *Minister's response - extract*

Section 7 of the *Extradition Act* 1988 requires Australia to refuse an extradition request where it relates to the prosecution or punishment of a person for a political offence. A political offence is defined in section 5 of the Extradition Act as an offence against the law of the foreign country that is of a political character. The definition excludes a number of offences, such as terrorism offences, genocide, torture, and the taking of hostages, in order for Australia to be compliant with international conventions to which Australia is a party. Currently, section 5 of the Extradition Act excludes these offences from the definition of 'political offence' by reference to a list of specified multilateral treaties (for example, Article 2 of the *International Convention/or the Suppression o/the Financing a/Terrorism).*

### *(i) Further advice on amendments to the 'political offence' definition*

The Bill proposes to streamline the definition of 'political offence' in section 5 of the Extradition Act by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. Providing for exceptions to the political offence definition to be set out in Regulations, rather than the Extradition Act, will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.

Previously, amendments to the 'political offence' definition in section 5 of the Extradition Act have been required to be made by four amending Acts (No. 139 of 1991, No. 182 of 1994, No. 58 of 2002 and No. 66 of 2002). The process for enacting legislation is often very lengthy and it is important to ensure that the 'political offence' definition in the Extradition Act can be kept up-to-date with Australia's international obligations under future conventions.

***(ii) Scope of proposed paragraph (c) of the definition of 'political offence''***

Proposed paragraphs (b) and (c) of the definition of 'political offence' would create an exception to the 'political offence' definition for offences prescribed by regulations to be an extradition offence or not to be a political offence for the purpose of the *Extradition Act 1988.* Regulations would prescribe those offences which Australia is required to ensure are extraditable offences or not considered to be political offences for the purposes of extradition under bilateral and multilateral treaties.

The Committee suggests narrowing the scope of proposed paragraphs (b) and (c) to ensure that only those offences which Australia is required to exclude from the definition of 'political offence' under international treaties are prescribed in regulations. I am advised that various options for drafting paragraphs (b) and (c) were explored by the Department, and the paragraphs in their current form are the most appropriate for achieving the objective of avoiding frequent amendments to the Extradition Act as Australia becomes a party to additional treaties. Regulations made under these paragraphs would still require the approval of the Executive Council.

***Consistency with the United Nations Model Treaty on Extradition***

The explanatory memorandum to the Bill states that the amendments are consistent with the United Nations Model Treaty on Extradition. This statement applies generally to section 5. Article 3(a) of the United Nations Model Treaty on Extradition states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person. This is consistent with proposed paragraph (a) of the definition of 'political offence' which will exclude from the definition of 'political offence' - offences that involve an act of violence against a person's life or liberty.

Article 3(a) of the United Nations Model Extradition Treaty also states that reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition. This is consistent with proposed paragraphs (b) and (c) of the definition of 'political offence', which will exclude from the "political offence' definition, offences prescribed by regulations to be an extradition offence or not a political offence.

***Committee First Response***

The Committee thanks the Minister for this detailed response. The Committee notes the information provided about the use of regulations, the need to amend the Act four times since 1988 and the relevance of the United Nations Model Treaty. The Committee remains unclear about the justification for retaining the proposed drafting of paragraphs (b) and (c). **In the circumstances the Committee is concerned that this provision has the capacity to trespass unduly on personal rights and liberties and leaves the question of whether it is appropriate to the consideration of the Senate as a whole.**

## *Further response from the Minister - extract*

Paragraphs (b) and (c) in their current form are the most appropriate for achieving the objective of avoiding frequent amendments to the Extradition Act as Australia becomes a party to additional treaties. A long list of multilateral treaties to which Australia is a party require Australia to exclude certain offences, such as terrorism offences, from falling within the 'political offence' ground for refusing extradition. The legislative process can be very lengthy. Requiring amendments to the Extradition Act every time Australia becomes a party to relevant treaties could jeopardise Australia's ability to meet its international obligations. Regulations made under these paragraphs would still require the approval of the Executive Council, and this would safeguard against the inclusion of exceptions to the 'political offence' definition which may tress unduly on personal rights and liberties.

***Committee Response***

The Committee thanks the Minister for this response.

# Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011

Introduced into the House of Representatives on 21 September 2011
Portfolio: Immigration and Citizenship

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011*. The Minister responded to the Committee's comments in a letter dated 7 February 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 12 of 2011 - extract*

**Background**

This bill amends the *Migration Act 1958* (the Migration Act) and the *Immigration (Guardianship of Children) Act 1946* (the IGOC Act) to:

- replace the existing framework in the Migration Act for taking offshore entry persons to another country for assessment of their claims to be refugees as defined by the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*; and

- clarify that provisions of the IGOC Act do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia.

**Insufficient Parliamentary scrutiny**
**Subsection 198AC(5)**

Proposed section 198AC imposes an obligation on the Minister to lay before each House of the Parliament (within 2 sitting days of making a designation that a country is an offshore processing country) the following: a copy of the designation; a statement of reasons referring to the matters the Minister is obliged to consider; a copy of any written agreement between Australia and the country relating to the taking of persons to that country; a statement concerning consultations with the Office of the UNHCR; a summary of advice received from that office; and a statement about any arrangements in place for the treatment of persons in the designated country. Subsection 198AC(5) provides that the validity of the designation is not affected by a failure to comply with these requirements. Given that (1) the clear intention for the exercise of the broad discretionary power to make

a designation be subject to Parliamentary scrutiny, (2) the limited effectiveness of legal forms of accountability, and (3) the procedural nature of the requirements imposed by proposed section 198AC, the Committee **seeks the Minister's further information as to why subsection 198AC(5) is considered necessary**.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## *Minister's response - extract*

**Under the heading "Insufficient Parliamentary scrutiny" on page 19 of the Alert Digest the Committee sought "the Minister's further information as to why subsection 198AC(5) is considered necessary.**

New subsection 198AC(5) provides that a failure to comply with new section 198AC does not affect the validity of the designation of a country as an "offshore processing country". This subsection is considered necessary to remove any doubt about the interaction between new sections 198AB and 198AC. The only condition intended for the exercise of the Minister's power under new section 198AB is that the Minister thinks that it is in the national interest to so designate a country. While new section 198AC requires the Minister to cause to be laid before each House of Parliament a copy of the designation and other related documents, the requirement to so lay these documents before Parliament is not intended to be interpreted as a legal precondition to the validity of a designation under new section 198AB.

### *Committee Response*

The committee thanks the Minister for this response. The committee's concern with the proposed approach arises because the very broad discretionary power is unlikely to be subject to meaningful judicial review. The committee is unclear why a strict requirement to table documents in Parliament is problematic or undesirable. **The committee's view is that a failure to comply with the requirements may undermine the efficacy of parliamentary scrutiny and leaves the matter to the consideration of the Senate as a whole.**

## *Alert Digest No. 12 of 2011 - extract*

**Trespass on personal rights and liberties**
**Subsections 198AB(7), 198AD(9), and 198E(3)**

Proposed subsections 198AB(7), 198AD(9), and 198E(3) all state that 'the rules of natural justice do not apply' to an exercise of the power or to the performance of the duty to which each provision refers. The first relates to the Minister's power to make or revoke a designation of a country as an offshore processing country; the second to the Minister's obligation to direct an officer to take an offshore entry person (or class of such persons) to a particular offshore processing country where there are two or more such countries; and the third relates to the power to determine that section 198AD does not apply to an offshore entry person. The explanatory memorandum merely states, in relation to each of these provisions, that the Minister is not required to give a right to be heard to affected individuals in relation to the power or duty being exercised (see pages 14, 17 and 19). The Committee therefore **seeks the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them**.

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

**Under the heading "Trespass on personal rights and liberties" on page 19 of the Digest the Committee sought "the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them.**

Natural justice would involve seeking and taking into consideration the comments of potentially affected individuals:

- before any country was designated to be a offshore processing country (under the new section 198AB); and

- before the Minister directed an officer to take a person to a specified country (when there is more than one country designated to be an offshore processing country).

If natural justice were not excluded as a ground of review it would in effect mean that the Minister could not designate an offshore processing country or direct an officer to take a person to a specified country without seeking and taking into consideration comments in relation to every individual offshore entry person affected or likely to be affected. This would negate the policy objective to arrange for persons to be taken quickly for processing offshore in order to break the people smugglers guarantee that asylum seekers would have their refugee claims processed in Australia.

***Committee Response***

The Committee thanks the Minister for this response, but is not persuaded that it is necessary to exclude natural justice in order to achieve the policy outcomes sought. The committee notes the High Court's decision in *Kioa* v *West* (1985) 159 CLR 550, which has the effect that a policy decision that affects people generally, or a class of people in an undifferentiated way, will not be subject to the natural justice fair hearing rule. However, there may be instances in which the powers are exercised in circumstances where matters pertaining to individuals are taken into account and in these exceptional cases it would be consistent with the common law for a fair hearing to be available. **The committee therefore remains concerned about the proposed approach and requests the Minister's further advice about this issue.**

## *Alert Digest No. 12 of 2011 - extract*

**Possible trespass on personal rights and liberties**
**Schedule 2**

The purpose of amendments in Schedule 2 of the bill is to overcome that part of the High Court's decision in *Plaintiff M70* which held that an unaccompanied minor who is subject to the *Immigration (Guardianship of Children) Act 1946* cannot be removed from Australia under the *Migration Act* unless the Minister, in the exercise of a separate statutory power as guardian of that minor, gives written consent to the removal or taking from Australia of the minor, having regard to the minor's interests. The explanatory memorandum states at page 29 that the High Court's decision 'does not align with the Government's policy intention, namely, that the Minister's consent under the IGOC Act is not required for a non-citizen child to be removed from Australian under the *Migration Act*.

However, other than stating that prior to the High Court's decision the law was understood such that the *Migration Act* is not subject to the *IGOC Act*, the explanatory memorandum does not say anything to further explain the reasons for the amendments or explain why

they should not be considered as unduly restricting rights of children to have their individual interests considered prior to them being removed from Australia.

The second reading speech does state that ‘a blanket inability of the government of the day to transfer unaccompanied minors to a designated country provides an invitation to people smugglers to send boatloads of children to Australia’ and that ‘no government can stand for the gaming of the system and risking children’s lives in this way’.

Thus, although the amendments may be thought to diminish protection to the rights of children extended by the IGOC Act, the Minister’s argument that children’s lives may be protected by implementing the amendments is noted. Further, the second reading speech notes that the Minister will retain the power to personally intervene to determine that a minor should not be taken to a designated processing country. This is said to be ‘an important safety valve to be used in individual cases’.

Given the importance of this issue and the absence of an explanation for the approach in the explanatory memorandum which accompanies the bill, the Committee seeks the Minister's advice as to **whether the proposed amendments, including the discretionary ‘safety valve’ power, unduly encroaches upon a child’s right to have their best interests considered in making decisions which affect them.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

**Under the heading "Possible trespass on personal rights and liberties" on page 20 of the Digest the Committee sought "the Minister's advice as to whether the proposed amendments, including the discretionary 'safety valve' power, unduly encroaches upon a child's right to have their best interests considered in making decisions which affect them."**

The proposed amendments to the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) reflect the policy intention that the functions, duties and powers under the *Migration Act* 1958 are not fettered by the Minister's separate role as a guardian under the IGOC Act.

The proposed amendments will ensure that, in his or her capacity as guardian, the Minister will have the same rights, powers, duties, obligations and liabilities as natural parents. Further to this, it ensures that the Minister is not given special powers that cannot be

accessed by other persons in a parental role, and of which other children do not have the benefit.

This policy intention reflected in the proposed amendments does not unduly encroach upon a child's right to have their best interests considered in making decisions which affect them. Rather, the proposed amendments have the affect of ensuring that all relevant considerations in the decision to transfer a child (including best interests of the child considerations) rest with the relevant officer under section 198A of the Migration Act.

Prior to any possible transfer there would be an assessment by the section 198A officer of the individual circumstances of the case. This includes an assessment of the best interests of the child and assessments to ensure compliance with Australia's international obligations.

Paragraph 3(1) of the Convention on the Rights of the Child (CROC) provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

All decisions affecting children made in the immigration portfolio include a consideration of the child's best interests, and the proposed amendments to the IGOC Act do not change this - they simply ensure that the best interests are being considered by the appropriate decision maker, which is the officer exercising the power under section 198A rather than the Minister (or his or her delegate) in his or her role as guardian under the IGOC Act.

***Committee Response***

The Committee thanks the Minister for this detailed response and notes that the best interests of the child will still be considered in making a transfer decision.

# Telecommunications Universal Service Management Agency Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Broadband, Communications and the Digital Economy

## *Introduction*

The Committee dealt with amendment to the bill in *Alert Digest No. 14 of 2011*. The Minister responded to the Committee's comments in a letter dated 5 January 2012. A copy of the letter is attached to this report.

## *Alert Digest No. 14 of 2011 - extract*

**Background**

This bill is part of a package of three bills relating to the delivery of universal service and other public interest services. This bill provides:

- for the establishment of the Telecommunications Universal Service Management Agency (TUSMA) as the statutory agency that will have the responsibility for the effective implementation and administration of service agreements or grants that deliver universal service and other public policy telecommunications outcomes;

- for the setting out of TUSMA's corporate governance structure and reporting and accountability requirements;

- power for the Minister to, by legislative instrument, set the standards, rules and minimum benchmarks for TUSMA's contracts and grants; and

- for the setting out of arrangements for consolidating the two current Universal Service Obligation and National Relay Service industry levy regimes into a single regime to contribute funding towards TUSMA's costs.

**Determination of important matters by delegated legislation**
**Various**

This Bill introduces reforms designed to change the regulatory approach in relation to 'public interest telecommunications services', including universal service obligations (USOs). Currently such obligations are enforceable by ACMA through standard regulatory enforcement mechanisms. The fundamental change in regulatory approach is that under the

arrangements proposed in this Bill, Ministerial determinations (made by legislative instruments) will be enforceable through contract law. The explanatory memorandum explains that the need for change is driven by a change in the structure of the market associated with the rollout of the NBN.

The Bill establishes a new statutory agency (TUSMA) whose main role will be to enter into and administer contracts or grants of financial assistance (on the behalf of the Commonwealth) for the USO and other public interest services. Under this arrangement, policy objects associated with public interest requirements will be set out in regulations and these will then be deemed to be conditions of the universal service components of the existing agreement with Telstra and any future contracts and grants entered into by TUSMA. By subclause 15(11) of the bill, TUSMA would be required to take all reasonable steps to ensure that a contractor or grant recipient complies with such requirements.

The explanatory memorandum states at page 7 that it is the 'Government's intention that, as USO regulatory obligations are progressively lifted from Telstra under the measures in the Universal Service Reform Bill, the existing USO safeguards will form the basis of contract standards in relation to the provision of standard telephone services and payphones. However, the Bill gives the Minister a broad power to make contract standards, rules or performance benchmarks to enable the Government to set requirements in relation to all future TUSMA contracts and grants' (described at page 7 of the explanatory memorandum).

The Committee is concerned that this enables important matters to be determined by a legislative instrument. However, the explanatory memorandum (also at page 6) states that this approach provides flexibility where there is a need for TUSMA to cover future public interest requirements in the terms of contracts and grants and emphasises that the requirements of the *Legislative Instruments Act* (which include arrangements for publication, Parliamentary scrutiny and possible disallowance) will apply. Given the change in regulatory approach, which is based on enforcing public interest obligations through contract, the Committee **leaves the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole.**

> *In the circumstances, the Committee makes no further comment on the proposed approach.*

## *Minister's response - extract*

***Determination of important matters by delegated legislation***

I note the Committee's concern regarding the use of Ministerial determinations, which are made by legislative instrument, and which will be enforceable through contract law.

While the Committee leaves the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole, it is important to note that in order to promote accountability, such determinations would be disallowable by the Parliament. Furthermore, as the Minister's determinations would be legislative instruments, they would also be subject to the public consultation and publication requirements of the *Legislative Instruments Act 2003.* The proposed determinations would be made in a similar way to current performance standards/benchmarks and consumer safeguards made under existing telecommunications legislation, such as legislative instruments concerning the Customer Service Guarantee and Universal Service Obligation (USO) requirements.

***Committee Response***

The Committee thanks the Minister for this response.

## *Alert Digest No. 14 of 2011 - extract*

**Merits review**
**Various**

The Bill imposes a number of 'planning and reporting obligations' on TUSMA and these enable the Parliament, industry and consumers to remain informed of its activities (see the explanatory memorandum at page 8). In relation to the performance of contractors and grant recipients, reports must detail any notifications of breaches and actions taken in relation to breaches. However, the fact that public interest requirements are to be enforced through contract law raises a question about whether persons aggrieved by a breach of public interest requirements (who are not privy to the contract) are able to have these obligations enforced or decisions concerning them reviewed. For example, decisions taken to enter into contracts or pursuant to existing contracts are unlikely to be considered as having been 'made under an enactment' for the purposes of *ADJR Ac*t review. Given that the terms in the contracts and grant agreements will include matters which are considered to be in the public interest, the Committee **seeks the Minister's advice as to what review mechanisms are available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce these obligations through contract law.**

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

***Merits Review***

The Committee queried the review mechanisms available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce these obligations through contract law.

The proposed removal of the USO legislated obligations is not intended to diminish the safeguard that the USO has so far provided with respect to public interest telecommunication services for consumers. Instead, moving to a competitive contractual regime is intended to benefit consumers as it promotes more innovative, effective and efficient service delivery arrangements. I note that the National Relay Service has been successfully delivered through contractual arrangements since 2000.

Under the proposed new arrangements, consumers will continue to have access to existing compensation and dispute resolution schemes, including compensation under the Customer Service Guarantee (CSG).

The performance standards in the CSG also provide an incentive for a carriage service provider to improve its service performance, and to provide some redress to customers when performance standards are not met. The CSG requires a carriage service provider to pay financial compensation to customers if it does not meet certain minimum performance standards. These include the time within which new services must be connected, faults must be rectified, and appointments must be kept. I note that under the measures proposed in the Bill, the CSG will remain subject to enforcement by the Australian Communications and Media Authority (ACMA).

More generally, the Telecommunications Industry Ombudsman (TIO) will continue to provide a free and independent dispute resolution forum for complaints made by residential and small business consumers of telecommunications services. The TIO has the authority to investigate complaints about telephone and internet services, and has the authority to make legally binding decisions up to the value of $30,000 and recommendations up to a value of $80,000.

***Committee Response***

The Committee thanks the Minister for this detailed response and notes that the information would have been useful in the explanatory memorandum.

## *Alert Digest No. 14 of 2011 - extract*

**Strict liability**
**Part 6, Division 7, clause 120**

Clause 120 proposes to introduce a strict liability offence of failing to lodge an eligible revenue return. As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case there is no explanation of the application of strict liability to this offence in the explanatory memorandum. The Committee therefore **seeks the Minister's advice about the justification for this approach**.

> *Pending the Minister's reply, 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.*

## *Minister's response - extract*

***Strict Liability***
***Part 6, Division 7, clause 120***

Subclause 120(1) provides that a person commits an offence if the person is a 'participating person' for an eligible revenue period and fails to lodge an eligible revenue return as required under clause 91. Subclause 120(2) provides that an offence against subclause (1) is an offence of strict liability. If the offence is proven, the participating person will be liable to pay a fine of 50 penalty units.

The Committee queried the justification for the application of strict liability to this offence. I accept the Committee's comment that further explanation could have been provided in the explanatory memorandum to the Bill. Under the Bill, the current enforcement framework that applies to the USO levy and the NRS levy is being carried forward to promote certainty for industry. Proposed clause 120 therefore reproduces the existing section 23C of the *Telecommunications (Consumer Protection and Service Standards) Act 1999.*

The Committee highlighted the principles of Commonwealth criminal law policy outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). Part 4.5 provides that application of strict or absolute liability to all physical elements of an offence has generally only been considered appropriate where the following considerations are applicable:

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment;

- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences; and

- There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

The strict liability offence in clause 120 accords with these principles. The offence is not punishable by imprisonment, and is less than 60 penalty units for an individual. The punishment of offences not involving fault will also enhance the effectiveness of the enforcement regime by impressing upon participating persons the importance ascribed to the lodgement of their eligible revenue returns given their integral role in the USO funding process.

The ACMA uses the information contained in the eligible revenue return to determine each participating person's levy contribution, which levy is used to pay contractors and grant recipients of public interest telecommunications services, and to meet TUSMA's administrative costs. Any delay by a participating person in submitting an eligible revenue return will inevitably delay the ACMA's administrative processes, possibly impose further administrative burden on the ACMA in the event it is required to estimate the person's eligible return (in the absence of the person lodging their own return) and may cause disruption to TUSMA's funding.

I note that strict liability has been adopted in other communications legislation concerning the reporting obligations of communications companies. For example, subsection 139(1 A) of the *Broadcasting Services Act 1992* makes non-compliance with section 205B of that Act a strict liability offence. Section 205B requires broadcasting licensees to keep accounts and provide audited accounts to the ACMA.

As the Government has committed to minimising compliance costs for smaller industry participants, arrangements will be put in place once the Bill is enacted to continue the existing regulatory measures that provide for carriers earning less than $25 million in eligible revenue to not contribute to the URO and NRS levies. This means that smaller companies will not be subject to potential strict liability.

I trust this information is of assistance.

***Committee Response***

The Committee thanks the Minister for this detailed response.

Senator Mitch Fifield
Chair

**MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS**
**MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Mitch

Dear Senator

I refer to a letter dated 24 November 2011 from Ms Toni Dawes, Committee Secretary, Senate Scrutiny of Bills Committee, which sought the former Minister's advice about an issue identified by the Committee in relation to the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the Bill). I am responding as this matter now falls within my portfolio responsibilities as Minister for Employment and Workplace Relations.

Specifically, the Committee has sought advice about whether consideration has been given to whether any further qualifications should be required of persons appointed as Fair Work Building Industry Inspectors, or the appropriateness of providing for the formulation of training procedures and guidelines for the exercise of the Inspectors' powers in the primary legislation.

I confirm that the Government has decided, consistent with the approach to appointing Fair Work Inspectors under the *Fair Work Act 2009*, not to codify this level of detail in the primary legislation. In relation to the selection of Inspectors, I believe being too prescriptive or requiring specific qualifications in the legislation could adversely limit the pool of potential applicants for these positions. Further, Inspectors will be appointed based on merit, using selection criteria determined by the Building Industry Inspectorate, after assessing the relevant skills, experience and qualifications of applicants. Any further general or specific training and development requirements for Inspectors once they are appointed will also be a matter for the Inspectorate.

Similarly, I expect the Building Industry Inspectorate will issue guidelines and procedures in relation to how its Inspectors will properly perform their functions and exercise their powers.

I trust the information provided is helpful.

Regards

Bill Shorten

BILL SHORTEN

Parliament House Canberra ACT 2600 Telephone (02) 6277 7320 Fax (02) 6273 4115

# Stephen Smith MP
## Minister for Defence

7 FEB 2012

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Mitch

Dear ~~Chair~~

I write in response to a letter from the Committee Secretary on 24 November 2011, which drew my attention to the Committee's request for further information regarding the issues identified in the Alert Digest 14/11 relating to the Defence Trade Controls Bill 2011 (the DTC Bill).

The Alert Digest raises three issues that require further explanatory material:

- justification for offence circumstances being covered in the regulations instead of the primary legislation;
- my discretionary powers under certain provisions; and
- the reversal of the onus of proof in certain circumstances.

I note that the Alert Digest also addressed the Customs Amendment (Military End-Use) Bill 2011 and that the Committee has requested an amendment to require annual reporting to Parliament on the exercise of my discretionary power under paragraph 112BA. I will also provide a response to that proposal.

**1.** ***Clause 10 of the DTC Bill – Delegation of legislative power*** *- justification for the approach that a number of exceptions to offences are to be covered in the regulations.*

Clause 10 of the Bill creates primary offences concerning the supply of technology, and provision of defence services relating to technology, where the technology is listed on the Defence and Strategic Goods List. Subclauses 10(3), 10(4) and 10(5) of the Bill contain exceptions to the offences. The Bill has been drafted to allow additional circumstances in which the offence provisions will not apply to be prescribed in regulations.

These additional exceptions have been included in the draft regulations at regulations 11, 12 and 13. The draft regulations have been released for public consultation. A copy of the regulations and the Explanatory Statement are enclosed for your reference.

I note that it is Commonwealth criminal law policy that the content of an offence, including exceptions, be contained wholly within the primary legislation, unless appropriate limitations apply. In respect of clause 10, the exceptions to the offences contained in the regulations are clearly defined and circumscribed in the Bill.

In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11(2) of the draft regulations, which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

**2.** ***Clauses 11, 14 and 16 of the DTC Bill - Discretion*** *– whether consideration has been given to including the possible criteria listed as permissible considerations in the Explanatory Memorandum in the legislation to provide some guidance for the exercise of the power.*

Australia's export control regime operates to ensure that defence and dual use goods are exported responsibly and that Australia meets its obligations under the major arms and dual use export control regimes of which Australia is a member.

Australia's legislative framework governing export control provides mechanisms that apply a necessary degree of scrutiny to proposed exports to assist in ensuring that the defence, security and international relations of Australia are not compromised.

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses 11 and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including Regulation 13E of the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Preventions of Proliferation) Act 1995*.

**3.** ***Clause 31 of the DTC Bill - Reversal of onus*** *– further information about the exceptions to the offences in clause 31 that will be proscribed in the regulations and whether those exceptions can be outlined in the primary legislation.*

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and

- in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.

These two provisions include a level of detail that should not be included in the primary legislation and for this reason, these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

**4.** ***The Customs Amendment (Military End-Use) Bill***

In addition to issues relating to the DTC Bill, you have also requested that the Customs Amendment (Military End-Use) Bill be amended to require annual reporting to Parliament on the exercise of the discretionary power in paragraph 112BA.

I have written to the Minister for Home Affairs to seek his agreement with your recommendation to amend the Customs Amendment (Military End Use) Bill, and provided him with a copy of this letter.

Yours sincerely

Best Wishes

Stephen Smith
Encl

**THE HON JASON CLARE MP**
Minister for Home Affairs
Minister for Justice

11/25119-04; 12/158

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Mitch

The purpose of this letter is to reply to issues raised by the Senate Scrutiny of Bills Committee in Alert Digest No. 14 of 2011 in relation to the Deterring People Smuggling Bill 2011. This Alert also refers to the Customs Amendment (Military End-Use) Bill 2011, which I understand will be responded to by the Minister for Defence, the Hon Stephen Smith MP.

With regard to the Deterring People Smuggling Bill 2011 (the Bill), the Committee expressed reservations about the retrospective nature of the Bill, and sought further explanation as to the exceptional circumstances that justified retrospectivity to December 1999. My response to the Committee's concerns is below.

As you may be aware, the Bill was also referred to the Senate Standing Committee on Legal and Constitutional Affairs, which recommended on 21 November 2011 that the Bill be passed by the Senate, subject to the explanatory memorandum including further detail justifying the Bill's retrospective application. In response, the former Minister for Home Affairs, the Hon Brendan O'Connor MP, circulated a replacement explanatory memorandum on the Bill, which was tabled in the Senate on 25 November 2011. I have attached a copy of the replacement explanatory memorandum for your information.

Following the tabling and debate, the Senate passed the Bill on 25 November 2011. The *Deterring People Smuggling Act 2011* (the Act) received the Royal Assent on 29 November 2011.

*Justification for retrospectivity*

Under the *Migration Act 1958* the offences of people smuggling and aggravated people smuggling are established *inter alia* where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person that is a non-citizen, and that non-citizen had, or has, no lawful right to come to Australia.

As stated in the explanatory memorandum, the purpose of the Act was to amend the Migration Act to make it clear that the words 'no lawful right to come to Australia' refer to the requirements for lawfully coming to Australia under domestic law. The amendments in the Act applies retrospectively from 16 December 1999 when the words 'lawful right to come to Australia' were first inserted into the people smuggling offences in the Migration Act.

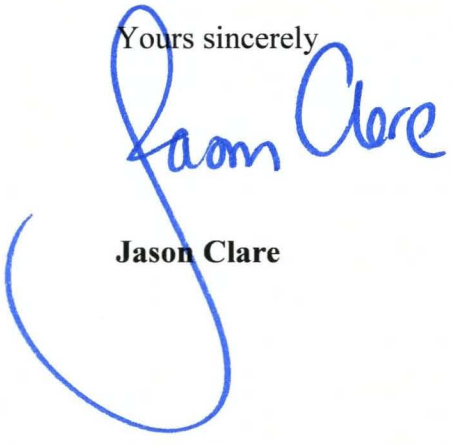
Although the Act has retrospective application, it does not alter any of the elements of the existing people smuggling offences in the Migration Act, and does not extend criminal liability beyond the scope of what Parliament intended in 1999 in any way.

There are exceptional circumstances that justified retrospectivity for the Act. It was necessary to ensure the original intent of the Parliament when the offences were introduced was affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions. There was a risk large numbers of past convictions and current prosecutions of serious Commonwealth criminal offences would be defeated or overturned as a result of a previously unidentified technical argument in relation to the words 'no lawful right to come to Australia'.

Between 1999 and 25 November 2011 when the Act was passed by the Senate, there had been over 960 prosecutions for people smuggling offences in Australia. There are currently 258 persons before the courts and 196 prisoners serving sentences in Australia for people smuggling offences, including both organisers and facilitators of people smuggling activity. The retrospective application of the Act was important to remove the risk of undermining the administration of justice as a result of past convictions being overturned or prosecutions on foot at the time being defeated.

I trust this information is of assistance.

Yours sincerely



**Jason Clare**

2010 - 2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

# DETERRING PEOPLE SMUGGLING BILL 2011

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs,
the Honourable Brendan O'Connor MP)

THIS MEMORANDUM TAKES ACCOUNT OF RECOMMENDATIONS MADE BY THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE REPORT TABLED ON 21 NOVEMBER 2011

**DETERRING PEOPLE SMUGGLING BILL 2011**

**GENERAL OUTLINE**

This Bill will amend the *Migration Act 1958* (the Migration Act) to clarify the meaning of the words 'no lawful right to come to Australia' contained in the people smuggling offences in the Migration Act.

The amendments relate to the serious crimes of people smuggling and aggravated people smuggling, and do not affect the rights of individuals seeking protection or asylum in Australia. They also do not affect Australia's international obligations in respect of those persons.

The words 'lawful right to come to Australia' were originally inserted in the Migration Act in December 1999 by the *Border Protection Legislation Amendment Act 1999* (the Border Protection Legislation Amendment Act). These words were not defined at the time. The *Anti-People Smuggling and Other Measures Act 2010*, which commenced on 1 June 2010, made changes to the people smuggling offences, including by inserting the word 'no' at the beginning of the words 'lawful right to come to Australia'.

Existing sections 233A and 233C, within Subdivision A of Division 12 in Part 2 of the Migration Act, establish a primary people smuggling offence and an aggravated people smuggling offence. Both of these offences are established *inter alia* where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person that is a non-citizen, and that non-citizen had, or has, no lawful right to come to Australia.

The people smuggling offences in the Migration Act have been consistently interpreted since 1999 as applying where a person does not meet the requirements for lawfully coming to Australia under domestic law.

To avoid doubt and to ensure the original intent of the Parliament is affirmed, these amendments clarify the meaning of the words 'no lawful right to come to Australia'. This clarification will be applied retrospectively to 16 December 1999 to address doubt that may be raised about convictions that have already been made under sections 233A and 233C of the Migration Act, and previous section 232A of the Migration Act as in force before 1 June 2010.

This Bill does not have any other impact.

## PURPOSE

**Schedule 1** contains amendments relating to people smuggling and aggravated people smuggling. The purpose of the amendments in this Schedule is to:

- clarify the meaning of the words 'no lawful right to come to Australia', and
- provide that the clarification of the words 'no lawful right to come to Australia' applies to all conduct which occurred on or after 16 December 1999.

## FINANCIAL IMPACT STATEMENT

The Bill has no financial impact on Government revenue.

## NOTES ON CLAUSES

### Clause 1: Short Title

This clause provides that when the Bill is enacted, it is to be cited as the *Deterring People Smuggling Act 2011*.

### Clause 2: Commencement

This clause sets out when the various parts of the Act are to commence.

### Clause 3: Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

## Schedule 1

***Migration Act 1958***

**Item 1 – After section 228A**

This item inserts a new section 228B into the Migration Act after existing section 228A. The new section is titled, '*Circumstances in which a non-citizen has no lawful right to come to Australia*'.

This item is an amendment which clarifies the operation of the people smuggling and aggravated people smuggling provisions in Subdivision A of Division 12 in Part 2 of the Migration Act.

New section 228B will make it clear that, for the purposes of Subdivision A of Division 12 in Part 2 of the Migration Act, a non-citizen has, at a particular time, no lawful right to come to Australia if at that time the person does not meet requirements for lawfully coming to Australia under domestic law.

*Outline of existing offences*

The words 'no lawful right to come to Australia' are used in paragraphs 233A(1)(c) and 233C(1)(c) of the Migration Act, but are not currently defined. Sections 233A and 233C form part of Subdivision A of Division 12 in Part 2 of the Migration Act.

Existing section 233A establishes a primary people smuggling offence. Under that section it is an offence for a person to organise or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person if that other person is a non-citizen and had, or has, no lawful right to come to Australia. Section 233C establishes an aggravated people smuggling offence where a person, in committing a primary offence of people smuggling, organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least five persons who had or have no lawful right to come to Australia.

These offences are consistent with Australia obligations to criminalise people smuggling and aggravated people smuggling under the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime*.

*Legislative history*

The words 'lawful right to come to Australia' were originally inserted in the Migration Act in December 1999 by the Border Protection Legislation Amendment Act. That Act amended the aggravated people smuggling offence under previous paragraph 232A(b) which was in force at the time by repealing the words '... does so knowing the people would become, upon entry into Australia, unlawful non-citizens', and replacing them with 'does so reckless as to whether the people had, or have, a lawful right to come to Australia'.

The explanatory memorandum to the Border Protection Legislation Amendment Bill explains that the words were introduced to avoid a defence to the offence of people smuggling based on knowledge of what constitutes an 'unlawful non-citizen'. However, the explanatory memorandum does not explain why the language of entry was replaced with 'lawful right to come to Australia'. The explanatory memorandum states:

> *Paragraph 232A(b)*
>
> *This item amends paragraph 232A(b) to replace the element of knowledge with the element of recklessness. Section 232A currently provides that a person who organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people and who does so knowing the people would become, upon entry into Australia, unlawful non-citizens. By replacing the knowledge element with an element of recklessness as to whether the people in question had, or have, a lawful right to come to Australia, this amendment will ensure that a person cannot avoid liability under section 232A on the basis that they did not have technical knowledge that the people being trafficked would become, in Australia, "unlawful non-citizens".*

The *Anti-People Smuggling and Other Measures Act 2010,* which commenced on 1 June 2010, repealed section 232A and replaced it with current section 233C. The words 'lawful right to come to Australia' were retained in section 233C, but the reference to section 42 was removed. In addition, the word 'no' was inserted at the beginning of the words 'lawful right to come to Australia'. The explanatory memorandum to the Anti-People Smuggling and Other Measures Bill stated, in relation to section 233C:

> *Paragraph 233C(1)(c) sets out the physical element of a circumstance that the persons referred to in paragraph (b) have or had no lawful right to come to Australia - that the bringing or coming, or entry or proposed entry does not or would not comply with the entry requirements under Australian law. This section is now aligned with the primary people smuggling offence in the Migration Act. The physical element in paragraph 233C(1)(c) has not altered from the current section 232A.* (emphasis added)

*Proposed amendments*

Proposed new subsection 228B(1) provides that, for the purposes of Subdivision A of Division 12 in Part 2 of the Migration Act, a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time, the non-citizen does not hold a visa that is in effect, and is not covered by an exception referred to in existing subsections 42(2), 42(2A), or 42(3) of the Migration Act. These exceptions allow non-citizens to come to Australia without a visa that is in effect in certain circumstances (such as where a New Zealand citizen who holds and produces a New Zealand passport that is in effect comes to Australia). The proposed new section 228B will make it clear that non-citizens not covered in those subsections require a visa that is in effect to come lawfully to Australia. This is the way the provisions have been consistently interpreted since their introduction in 1999.

Proposed subsection 228B(2) is an avoidance of doubt provision that makes it clear that references to 'non-citizens' in proposed subsection 228B(1) include a reference to a non-citizen who is seeking protection or asylum (however that may be described). Proposed subsection 228B(2) also makes it clear that it does not matter, for the purposes of the people smuggling offence in section 233A and the aggravated people smuggling offence in section 233C, whether or not Australia has, or may have, protection obligations in respect of the non-citizen. The provision applies irrespective of whether the non-citizen has sought protection.

Proposed paragraphs 228B(2)(a) and 228B(2)(b) provide that the 'protection obligations' referred to in subsection 228B(2) are those arising under the *1951 Convention Relating to the Status of Refugees*, as amended by the *1967 Protocol Relating to the Status of Refugees*, as well as other protection obligations arising for any other reason (such as those that may arise under different international instruments to which Australia is a party).

*Retrospectivity*

As a result of item 2 in column 1 of the table in clause 2 of this Bill, the clarification in this item would operate retrospectively, and apply to offences committed or alleged to have been committed on or after the commencement of item 51 of Schedule 1 to the Border Protection Legislation Amendment Act.

People smuggling and aggravated people smuggling offences in the Migration Act were intended to apply, and have been consistently interpreted since 1999 as applying, where a person brought into Australia does not meet the requirements for lawfully coming to Australia under domestic law. The amendments will apply retrospectively from 16 December 1999 when the words 'lawful right to come to Australia' were first inserted into the people smuggling offences in the Migration Act.

Although the Bill will have retrospective application, it does not alter any of the elements of the existing people smuggling offences in the Migration Act, and does not extend criminal liability beyond the scope of what Parliament intended in 1999 in any way.

Retrospective application is necessary to ensure the original intent of the Parliament is affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions. There are exceptional circumstances that justify retrospectivity for this Bill. There is a risk large numbers of past convictions and current prosecutions of serious Commonwealth criminal offences may be defeated or overturned as a result of a recent technical argument that has been raised in legal proceedings in relation to the words 'no lawful right to come to Australia'.

Since 1999, there have been over 960 prosecutions for people smuggling offences. Currently, there are 258 persons before the courts and 196 prisoners serving sentences in Australia for people smuggling offences. The most commonly prosecuted people smuggling offence is the aggravated offence involving smuggling five or more persons under section 233C of the Migration Act. Convictions under this offence have been made in respect of both organisers and facilitators of people smuggling. Under section 233B of the Migration Act, a person also commits an aggravated people smuggling offence where they commit the crime of people smuggling, reckless

as to whether they have placed one of the smuggled persons in danger of death or serious harm.

The retrospective application of this Bill is important to remove the risk of potentially undermining the administration of justice as a result of past convictions being overturned or current prosecutions being defeated. Retrospectivity is also important to ensure the people smuggling offences in the Migration Act continue to operate as they have since they were amended in 1999.

*No impact on individuals seeking protection or asylum*

The amendments expressly clarify the operation of people smuggling and aggravated people smuggling offences in the Migration Act. The offences deal with the serious crimes of people smuggling and aggravated people smuggling, and do not affect the treatment of individuals seeking protection or asylum in Australia. As such, the amendments are consistent with Australia's obligations under international law and do not affect the rights of individuals seeking protection or asylum, or Australia's obligations in respect of those persons.

**Item 2 – Application**

Item 2 of Schedule 1 determines the way that the amendments made by Schedule 1 apply. Sub-item 2(1) provides that proposed section 228B of the Migration Act, as inserted by this Bill, will apply in relation to an offence committed, or alleged to have been committed, on or after the commencement of Schedule 1 to this Bill.

Sub-item 2(2) provides that proposed section 228B of the Migration Act, as inserted by this Bill, will apply to particular proceedings. Paragraph 2(2)(a) provides that proposed section 228B will apply to original and appellate proceedings that were commenced on or after the date on which the Bill receives the Royal Assent. Paragraph 2(2)(b) provides that proposed section 228B will apply to original and appellate proceedings commenced before the date on which the Bill receives the Royal Assent, if those proceedings have not been finally determined before the date of Royal Assent.

As a result of sub-item 2(2), item 1 will apply where a person convicted of a people smuggling or aggravated people smuggling offence appeals that conviction or their sentence.

As a result of item 2 in column 1 of the table in clause 2 of this Bill, this item will operate retrospectively, and apply to offences committed or suspected to have been committed on or after the commencement of item 51 of Schedule 1 to the Border Protection Legislation Amendment Act. This will allow retrospective application from 16 December 1999.

This item does not affect the rights of individuals seeking protection or asylum, or Australia's international obligations in respect of those persons.

Parliament of Australia
The Senate

# Senator Larissa Waters

Australian Greens Senator for Queensland

Senator Mitch Fifield
Committee Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

31 January 2012

Dear Senator Fifield,

**Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011**

I write in response to the issues raised by the Standing Committee for the Scrutiny of Bills with various clauses of my bill, the *Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011*, as outlined in the Committee's Alert Digest of 23 November 2011 (No.14 of 2011).

Regarding the penalties imposed by my bill, I am pleased to assure the Committee that such penalties are entirely consistent with the existing penalties in the EPBC Act for other matters of national environmental significance. The penalties of 5,000 penalty units for an individual and 50,000 penalty units for a body corporate, and in specified circumstances, imprisonment for 7 years or 420 penalty units, all mirror the provisions for protection for world heritage (sections 12 and 15A), national heritage (sections 15B and 15C), Ramsar wetlands (sections 16 and 17B), threatened species (sections 18 and 18A), migratory species (sections 20 and 20A), nuclear actions (sections 21 and 22A), commonwealth marine (sections 23 and 24A), Great Barrier Reef Marine Park (sections 24B and 24C) and for additional matters of national environmental significance which may be declared by regulation (section 25).

Likewise the requirement that the defendant prove they may avail themselves of the defences in clause 24G(7) is also consistent with existing provisions of the EPBC Act (listed above) for all other matters of national environmental significance. On this point I may add that the mere production of a document would be all that was required to discharge that burden, and hence is no undue trespass on the personal rights and liberties.

Regarding the retrospective commencement, I simply reiterate that the intention of the commencement of the bill on the day of introduction of the bill is to ensure that

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Parliament of Australia
The Senate

# Senator Larissa Waters

Australian Greens Senator for Queensland

approvals for mining operations are not fast-tracked following introduction of the bill.

Yours sincerely,

Senator Larissa Waters
Australian Greens Senator for Queensland

*Copy by email to Committee Secretariat via scrutiny.sen@aph.gov.au*

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THE HON BRENDAN O'CONNOR MP
Minister for Home Affairs
Minister for Justice

11/19031

21 NOV 2011

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 13 October 2011 on behalf of the Senate Standing Committee for the Scrutiny of Bills, requesting further response to issues identified in the Committee's Report No. 12 of 2011 (12 October 2011) concerning the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

My further advice on matters as requested by the Committee is attached for your consideration. I thank the Committee for providing me with this further opportunity to address these issues.

If you wish to discuss this matter further, please phone Kathryn McMullan in my office on (02) 6277 7290.

Yours sincerely

**Brendan O'Connor**

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**Response to Senate Standing Committee for the Scrutiny of Bills**

*12th Committee Report of 2011, 12 October 2011*

Further comments on Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

**Schedule 3, Part 4, item 103, subsections 23YQC and 23 YQD**

The Committee is interested to understand the effect of Schedule 3, Part 4, item 103, sections 23YQC and 23YQD and specifically whether forensic material that has already been obtained for Australian domestic purposes could later be provided to a foreign country in response to a request from that foreign country. If so, the Committee is interested to know whether section 23WJ of the *Crimes Act 1914* should be amended to require a suspect to be informed that the information could subsequently be provided to a foreign country. The Committee therefore seeks the Minister's further advice about this issue.

**Response**

New subsection 23YQC outlines the application of subdivision B of Division 9A, which would be inserted into the *Crimes Act 1914* by item 103 in Part 4 of Schedule 3 of the Bill. New subsection 23YQC states that the subdivision applies if a request is made by a foreign law enforcement agency for a forensic procedure to be carried out on a suspect or volunteer in relation to a foreign serious offence and the suspect or a volunteer has consented to the procedure. That is, this subdivision will cover the voluntary provision of forensic evidence for foreign purposes obtained as a result of police-to-police assistance without the need for a formal mutual assistance request.

New subsection 23YQD sets out the process for providing forensic evidence under this subdivision. These requirements are that the Commissioner must be satisfied that the foreign law enforcement agency has given appropriate undertakings in relation to the retention, use and destruction of forensic evidence, and it is appropriate, in all the circumstances, to provide the forensic evidence. If the forensic evidence is provided to the foreign country, then a copy of the tape recording or the written record of the person's informed consent may also be provided. This is necessary as the fact that the person provided informed consent to the forensic procedure may be relevant to the admissibility of forensic material as evidence in foreign court proceedings. Where an audio or video recording is made of the forensic procedure and provided to the suspect, then a copy can also be provided to the foreign law enforcement agency. This will ensure that the foreign country can receive a record of the carrying out of the forensic procedure and may be relevant to the admissibility of forensic material as evidence in foreign court proceedings.

Sections 23YQC and 23YQD are proposed to provide for the carrying out of a forensic procedure at the request of the foreign law enforcement agency. Forensic material which has already been obtained for domestic purposes and, therefore, in the possession of an enforcement agency in Australia can currently be provided to a foreign country under section 13A of the *Mutual Assistance in Criminal Matters Act 1987*. However, the Department is not aware that this has ever occurred. If such forensic material is requested by a foreign country, there is currently no requirement to inform the suspect or the person who

provided the forensic material for domestic purposes that the forensic material has been requested by or is being provided to a foreign country.

Section 23WJ of the *Crimes Act 1914* requires a suspect to be informed, prior to giving consent, that the forensic procedure (carried out for domestic purposes) may produce evidence against the suspect that might be used in a court of law. The provision does not specify that the suspect must be informed that the evidence may later be provided to a foreign country for use in a foreign court of law. These current arrangements would not be affected by the Bill, and are outside the scope of its proposed reforms. Given the infrequency of forensic material already obtained for domestic purposes being provided to a foreign country, I consider it is not necessary to require the suspect to be informed of this possibility when providing the forensic material for domestic purposes under the Crimes Act. However, I will ask my Department to consider the issue of whether the suspect should be informed if and when the forensic material is later requested by a foreign country.

**Schedule 3, Part 4, item 112, subsection 28A(3) and 28B**

The Committee understands that it is a matter for a foreign country to carry out a forensic procedure in accordance with its applicable domestic procedures, but the Committee is concerned that the intention of the provision is that Australia can actually request a forensic procedure that could not be authorised in Australia (regardless of the type or range of processes that could be used to carry out the procedure). The Committee remains unclear about the difference between a forensic procedure and a forensic process and is concerned about the intention that Australia can request procedures that are not authorised domestically. The Committee therefore requests the Minister's further advice on the scope of this provision and whether it could have the effect of trespassing unduly on personal rights and liberties.

**Response**

Subsection 28A(3) provides that 'to avoid doubt, Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out using processes similar to those used in the foreign country.' This provision is intended to encompass both the procedure carried out and the processes used to carry out the procedure. The procedure is the action taken to obtain forensic material, for example taking finger prints or making a dental impression. The process is the steps which need to be followed in order to carry out a forensic procedure, for example the requirements to inform a person of certain matters and seek their consent.

Australia's general position is to seek assistance in international crime cooperation matters even if Australia is unable to reciprocate and provide the same assistance to the foreign country. Australia's inability to reciprocate in such circumstances would be indicated in the request. Subsection 28A(3) makes it clear that this existing general position applies in relation to the new forensic procedure provisions. It is modelled on subsection 12(2) of the Mutual Assistance Act which similarly provides that, to avoid doubt, evidence may be taken and any document or article may be obtained in a foreign country pursuant to a request from Australia, even if the evidence could not have been obtained under Australian law using processes similar to those used in the foreign country.

Preventing Australia from seeking assistance where a foreign country's forensic procedure laws differ from Australia's may frustrate the investigation and prosecution of a wide range of

serious criminal matters by Australian law enforcement authorities. Imposing a requirement to undertake a comprehensive assessment about whether the requesting country has similar laws for undertaking forensic procedures would also impose a significant burden on Australia.

**Schedule 2, Part 3, item 33, section 5(c)**

The Committee remains unclear about the justification for retaining the proposed drafting of paragraphs (b) and (c). In the circumstances the Committee is concerned that this provision has the capacity to trespass unduly on personal rights and liberties and leaves the question of whether it is appropriate to the consideration of the Senate as a whole.

**Response**

Paragraphs (b) and (c) in their current form are the most appropriate for achieving the objective of avoiding frequent amendments to the Extradition Act as Australia becomes a party to additional treaties. A long list of multilateral treaties to which Australia is a party require Australia to exclude certain offences, such as terrorism offences, from falling within the 'political offence' ground for refusing extradition. The legislative process can be very lengthy. Requiring amendments to the Extradition Act every time Australia becomes a party to relevant treaties could jeopardise Australia's ability to meet its international obligations. Regulations made under these paragraphs would still require the approval of the Executive Council, and this would safeguard against the inclusion of exceptions to the 'political offence' definition which may tress unduly on personal rights and liberties.

**The Hon Chris Bowen MP**
Minister for Immigration and Citizenship

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA

Dear Senator Fifield

Thank you for your letter dated 13 October 2011 in relation to the comments made in the Committee's *Alert Digest No. 12 of 2011* (12 October 2011) concerning the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011.

I would like to provide the following information to the Committee as a result of the comments made in the Alert Digest.

**Under the heading "Insufficient Parliamentary scrutiny" on page 19 of the Alert Digest the Committee sought "the Minister's further information as to why subsection 198AC(5) is considered necessary."**

New subsection 198AC(5) provides that a failure to comply with new section 198AC does not affect the validity of the designation of a country as an "offshore processing country". This subsection is considered necessary to remove any doubt about the interaction between new sections 198AB and 198AC. The only condition intended for the exercise of the Minister's power under new section 198AB is that the Minister thinks that it is in the national interest to so designate a country. While new section 198AC requires the Minister to cause to be laid before each House of Parliament a copy of the designation and other related documents, the requirement to so lay these documents before Parliament is not intended to be interpreted as a legal pre-condition to the validity of a designation under new section 198AB.

**Under the heading "Trespass on personal rights and liberties" on page 19 of the Digest the Committee sought "the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them."**

Natural justice would involve seeking and taking into consideration the comments of potentially affected individuals:

- before any country was designated to be a offshore processing country (under the new section 198AB); and
- before the Minister directed an officer to take a person to a specified country (when there is more than one country designated to be an offshore processing country).

If natural justice were not excluded as a ground of review it would in effect mean that the Minister could not designate an offshore processing country or direct an officer to take a person to a specified country without seeking and taking into consideration comments in relation to every individual offshore entry person affected or likely to be affected. This would negate the policy objective to arrange for persons to be taken quickly for processing offshore in order to break the people smugglers guarantee that asylum seekers would have their refugee claims processed in Australia.

**Under the heading "Possible trespass on personal rights and liberties" on page 20 of the Digest the Committee sought "the Minister's advice as to whether the proposed amendments, including the discretionary 'safety valve' power, unduly encroaches upon a child's right to have their best interests considered in making decisions which affect them."**

The proposed amendments to the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) reflect the policy intention that the functions, duties and powers under the *Migration Act 1958* are not fettered by the Minister's separate role as a guardian under the IGOC Act.

The proposed amendments will ensure that, in his or her capacity as guardian, the Minister will have the same rights, powers, duties, obligations and liabilities as natural parents. Further to this, it ensures that the Minister is not given special powers that cannot be accessed by other persons in a parental role, and of which other children do not have the benefit.

This policy intention reflected in the proposed amendments does not unduly encroach upon a child's right to have their best interests considered in making decisions which affect them. Rather, the proposed amendments have the affect of ensuring that all relevant considerations in the decision to transfer a child (including best interests of the child considerations) rest with the relevant officer under section 198A of the Migration Act.

Prior to any possible transfer there would be an assessment by the section 198A officer of the individual circumstances of the case. This includes an assessment of the best interests of the child and assessments to ensure compliance with Australia's international obligations.

Paragraph 3(1) of the Convention on the Rights of the Child (CROC) provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

All decisions affecting children made in the immigration portfolio include a consideration of the child's best interests, and the proposed amendments to the IGOC Act do not change this – they simply ensure that the best interests are being considered by the appropriate decision maker, which is the officer exercising the power under section 198A rather than the Minister (or his or her delegate) in his or her role as guardian under the IGOC Act.

Yours sincerely

**CHRIS BOWEN**

- 7 FEB 2012

SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
MINISTER ASSISTING THE PRIME MINISTER ON DIGITAL PRODUCTIVITY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE



Senator Mitch Fifield
Chair
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S1.111
Parliament House
CANBERRA ACT 2600

05 JAN 2012

Dear Senator Fifield Mitch

**Telecommunications Universal Service Management Agency Bill 2011**

I refer to the letter from the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee), dated 24 November 2011, seeking advice on issues relating to the Telecommunications Universal Service Management Agency Bill 2011 (the Bill).

My response to the three issues of concern raised in the Committee's *Alert Digest No.14 of 2011* (23 November 2011) in relation to the Bill follows.

***Determination of important matters by delegated legislation***

I note the Committee's concern regarding the use of Ministerial determinations, which are made by legislative instrument, and which will be enforceable through contract law.

While the Committee leaves the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole, it is important to note that in order to promote accountability, such determinations would be disallowable by the Parliament. Furthermore, as the Minister's determinations would be legislative instruments, they would also be subject to the public consultation and publication requirements of the *Legislative Instruments Act 2003*. The proposed determinations would be made in a similar way to current performance standards/benchmarks and consumer safeguards made under existing telecommunications legislation, such as legislative instruments concerning the Customer Service Guarantee and Universal Service Obligation (USO) requirements.

***Merits Review***

The Committee queried the review mechanisms available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce these obligations through contract law.

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The proposed removal of the USO legislated obligations is not intended to diminish the safeguard that the USO has so far provided with respect to public interest telecommunication services for consumers. Instead, moving to a competitive contractual regime is intended to benefit consumers as it promotes more innovative, effective and efficient service delivery arrangements. I note that the National Relay Service has been successfully delivered through contractual arrangements since 2000.

Under the proposed new arrangements, consumers will continue to have access to existing compensation and dispute resolution schemes, including compensation under the Customer Service Guarantee (CSG).

The performance standards in the CSG also provide an incentive for a carriage service provider to improve its service performance, and to provide some redress to customers when performance standards are not met. The CSG requires a carriage service provider to pay financial compensation to customers if it does not meet certain minimum performance standards. These include the time within which new services must be connected, faults must be rectified, and appointments must be kept. I note that under the measures proposed in the Bill, the CSG will remain subject to enforcement by the Australian Communications and Media Authority (ACMA).

More generally, the Telecommunications Industry Ombudsman (TIO) will continue to provide a free and independent dispute resolution forum for complaints made by residential and small business consumers of telecommunications services. The TIO has the authority to investigate complaints about telephone and internet services, and has the authority to make legally binding decisions up to the value of $30,000 and recommendations up to a value of $80,000.

***Strict Liability***
***Part 6, Division 7, clause 120***

Subclause 120(1) provides that a person commits an offence if the person is a 'participating person' for an eligible revenue period and fails to lodge an eligible revenue return as required under clause 91. Subclause 120(2) provides that an offence against subclause (1) is an offence of strict liability. If the offence is proven, the participating person will be liable to pay a fine of 50 penalty units.

The Committee queried the justification for the application of strict liability to this offence. I accept the Committee's comment that further explanation could have been provided in the explanatory memorandum to the Bill. Under the Bill, the current enforcement framework that applies to the USO levy and the NRS levy is being carried forward to promote certainty for industry. Proposed clause 120 therefore reproduces the existing section 23C of the *Telecommunications (Consumer Protection and Service Standards) Act 1999.*

The Committee highlighted the principles of Commonwealth criminal law policy outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). Part 4.5 provides that application of strict or absolute liability to all physical elements of an offence has generally only been considered appropriate where the following considerations are applicable:

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment;

- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences; and

- There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention.

The strict liability offence in clause 120 accords with these principles. The offence is not punishable by imprisonment, and is less than 60 penalty units for an individual. The punishment of offences not involving fault will also enhance the effectiveness of the enforcement regime by impressing upon participating persons the importance ascribed to the lodgement of their eligible revenue returns given their integral role in the USO funding process.

The ACMA uses the information contained in the eligible revenue return to determine each participating person's levy contribution, which levy is used to pay contractors and grant recipients of public interest telecommunications services, and to meet TUSMA's administrative costs. Any delay by a participating person in submitting an eligible revenue return will inevitably delay the ACMA's administrative processes, possibly impose further administrative burden on the ACMA in the event it is required to estimate the person's eligible return (in the absence of the person lodging their own return) and may cause disruption to TUSMA's funding.

I note that strict liability has been adopted in other communications legislation concerning the reporting obligations of communications companies. For example, subsection 139(1A) of the Broadcasting Services Act 1992 makes non-compliance with section 205B of that Act a strict liability offence. Section 205B requires broadcasting licensees to keep accounts and provide audited accounts to the ACMA.

As the Government has committed to minimising compliance costs for smaller industry participants, arrangements will be put in place once the Bill is enacted to continue the existing regulatory measures that provide for carriers earning less than $25 million in eligible revenue to not contribute to the USO and NRS levies. This means that smaller companies will not be subject to potential strict liability.

I trust this information is of assistance.

Yours sincerely

Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy