SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

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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

SECOND REPORT OF 2012

The Committee presents its Second 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:

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 the bill in *Alert Digest No. 8 of 2011*. The Committee requested further advice to issues raised in the *First Report of 2012* and the Minister responded in a letter dated 23 February 2012. 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.

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.*

First response from the Minister - 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.

First Committee 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.**

Second 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.

Second 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.**

Third response from the Minister - extract

In the Report, the Committee has expressed concern that the proposed amendment in the Bill to allow Australia to make a request to a foreign country for forensic material may result in types of material being obtained from overseas that could not be obtained within Australia.

Proposed section 28A allows Australia to make requests to foreign countries for forensic procedures to be carried out on a person if the procedure may result in evidence relevant to an Australian criminal proceeding. Items 108 and 109 of the Bill will insert definitions of both 'forensic procedure' and 'forensic material' into the *Mutual Assistance in Criminal Matters Act* 1987. These definitions will have the same meaning as 'forensic procedure' and 'forensic material' in Part ID of the *Crimes Act 1914.*

'Forensic material' refers to the actual thing that is taken from or of a person's body by a forensic procedure. 'Forensic procedure' refers to the method by which the thing is collected from the person's body for the purpose of the criminal investigation. Under section 23WA of the Crimes Act, 'forensic material' can include for example samples, hand

prints, finger prints, foot prints, photographs or video recordings, or casts or impressions that have been taken from or of a person's body. Part ID of the Crimes Act allows for both intimate and non-intimate forensic procedures to be used for the purposes of collecting forensic material. Intimate forensic procedures are defined under section 23WA of the Crimes Act to include taking blood or saliva samples, taking a dental impression and examining the genital area of the body. Non-intimate forensic procedures are defined under section 23WA to include taking fingerprints or hand prints, taking a hair sample or taking a photograph. It is unlikely that Australia would make a request for a forensic procedure to be conducted or forensic material to be obtained that does not fall within the Crimes Act definitions of these terms. In addition, under proposed subsections 28A(1) and 28A(2), a request will only be made where a proceeding or investigation related to a criminal matter has commenced in Australia and there are reasonable grounds to believe carrying out the forensic procedure on the person in the foreign country may result in evidence relevant to the proceeding or investigation.

I thank the Committee for providing me an opportunity to respond to these further issues.

Third Committee Response

The Committee thanks the Minister for this further response and notes the assurance provided that it is unlikely that the provision would be used to authorise procedures beyond the scope of the *Crimes Act*. **However, the Committee remains concerned that the provision leaves open the possibility that it could be used to authorise such a request, but leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Government Investment Funds Amendment (Ethical Investments) Bill 2011

Introduced into the Senate on 24 November 2011
By: Senators Di Natale and Ludlam

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. Senator Di Natale responded to the Committee's comments on behalf of both senators in a letter dated 23 February 2012. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2012 - extract

Background

This bill amends the *Future Fund Act 2006* and the *Nation-Building Funds Act 2008* to require Ministers responsible for Australian sovereign funds to develop ethical investment guidelines for each fund and directs the Future Fund Board to have regard to these guidelines when making investment policies.

Delegation of legislative power – legislative instrument
Various

This bill has the purpose of imposing a requirement for the Future fund and various other nation building funds to make their investments according to a set of ethical investment guidelines. From a scrutiny perspective, the issue which arises is whether the approach of requiring the guidelines to be developed by legislative instrument is justified. As this matter is not addressed in the explanatory memorandum and the committee prefers that important matters be included in primary legislation whenever this is appropriate, the committee **seeks the Senators' advice as to the rationale for the proposed approach.**

> *Pending the Senators' 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.*

Senator's response - extract

I would like to respond to the Committee's request for a rationale regarding the development of the ethical investment guidelines by legislative instrument. In particular, we have three reasons for this decision:

1. The bill specifies the minimum requirements for the guidelines in sections 20A (2) and (3), but does not specify the guidelines in full detail. We consider this level of policy detail is more appropriately achieved by regulation. A complete set of ethical investment guidelines – particularly for an organisation as large as the Future Fund – will be a lengthy, detailed and technical document. It will also be a "living document"; one that is regularly updated to reflect world's best practice and the circumstances of the day. We seek to avoid the requirement for legislative change each time, for instance, a labour rights or environmental concern affects a particular industry, though such an event might be a trigger for an update in the Guidelines.

2. The development of the Guidelines by the Ministers is similar to the development of the Investment Mandate. The Investment Mandate is provided for but not detailed in legislation, and was written based on the exigencies of the day and can be updated without legislative change to reflect changes in economic circumstances and other relevant requirements. There is therefore a strong argument, based on a clear, recent and relevant precedent for the Ethical Investment Guidelines to follow the same process.

3. Concerns around excessive delegation of powers to the Executive are valid and we share those concerns in general. However, we consider that the development of the Ethical Investment Guidelines raises few issues concerning potential abuse of executive power. There is some risk that the guidelines would be too weak (minimum standards are specified in the bill to address this), but Government has no incentive to make guidelines that are overly restrictive and adversely affect the returns of the Funds.

Thank you for considering this response in any future reports on the bill.

Committee Response

The Committee thanks the Senator for this detailed response and **requests that the key information above be included in the explanatory memorandum.**

Stronger Futures in the Northern Territory Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2012*. The Minister responded to the Committee's comments in a letter received on 27 February 2012. A copy of the letter is attached to this report.

Background

This bill implements three measures relating to Aboriginal people in the Northern Territory by:

- providing for alcohol management plans to be approved by the Minister for Indigenous Affairs, and for the minister and the relevant Northern Territory minister to undertake a review within three years on whether alcohol-related harm among aboriginal people has reduced;

- enabling the Commonwealth to amend Northern Territory legislation by regulation relating to community living areas and town camps to enable private ownership in town camps and flexible long term leasing arrangements for business in community living areas; and

- providing for a community store licensing scheme to operate for a ten-year period to provide food security for Aboriginal communities.

The bill also requires the Minister for Indigenous Affairs to facilitate an independent review of the operation of the Act after seven years.

Alert Digest No. 1 of 2012 - extract

Reversal of onus
Item 1, subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75(C)1

Proposed subsection 75B(2) provides for a defence to a prosecution for an offence against subsection 75B(1) where the defendant was in a boat that was on waters and engaged in recreational boating or commercial fishing activities. The *Guide to Framing Commonwealth Offences* states (at pages 28 to 29) that a matter should be included in a defence, thereby placing an evidential burden of proof on the defendant, 'only where the

matter is peculiarly within the knowledge of the defendant' and 'is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish'. The explanatory memorandum does not address why it is considered that each element of the defence falls within these criteria.

A similar issue arises in relation for the reversal of the onus of proof in relation to the defences in proposed subsections 75B(4), 75B(5) and 75B(7). In addition, identical issues arise in relation to the defences attached to the offence in proposed subsection 75C(1).

In relation to the approach to these defences, it is noted that the explanatory memorandum states at page 8 that, while the approach 'seems contrary to usual principles, it is consistent with similar provisions in the Liquor Act.' Further, 'that it is not intended that it should be easier or harder, for a person to raise defence to the offences in new Division 1AA of Part VIII than it is for similar offences already existing in the Liquor Act.' However, in the context of the overall purpose of the Bill to introduce what are considered special measures for the purposes of the RDA, it would be helpful for the explanatory memorandum to set out why the factors which are generally thought to justify placing an evidential burden on defendants (as set out in the *Guide to Framing Commonwealth Offences*) apply or why other factors justify the approach. It is suggested that the fact that a similar approach is taken in existing provisions of the *Liquor Act* is not, of itself, a complete justification for the approach. **Therefore, the committee's seeks the Minister's advice as to the further justification for the reversal of onus in these provisions.**

> *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

Tackling alcohol abuse

Reversal of onus (Item 1, subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(1))

The Committee has noted that the Guide to Framing Commonwealth Offences (the Guide) states that a matter should be included in a defence, thereby placing an evidential burden of proof on the defendant, 'only where the matter is peculiarly within the knowledge of the defendant' and 'is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish'. The Committee notes that this reverse onus of proof issue is in relation to the following defences in subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(I) of the NT's *Liquor Act.*

In relation to the approach to these defences, the Committee has noted that it would be helpful for the explanatory memorandum to set out why the factors which are generally thought to justify placing an evidential burden on defendants (as set out in the Guide) apply or why other factors justify the approach.

The Committee has sought my advice, beyond what is already provided in the explanatory memorandum, as to the justification for the reversal of the onus of proof in subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(l) of the NT *Liquor Act* in the SFNT Bill.

The approach to including specific defences in sections 75B and 75C, as noted in the explanatory memorandum, mirror the structure of similar offence and defence provisions in the NT *Liquor Act* and because these provisions are inserted into that Act this approach was considered appropriate to ensure consistency. These defences relate to whether a person is engaging in conduct that would provide for a defence under these provisions (i.e. conduct relating to recreational boating activities, commercial fishing activities, tours and tourist activities (including in national parks or NT parks) and emergency situations) and these are matters peculiarly within the knowledge of the defendant which is consistent with the Guide. To illustrate, fishing and tourism takes place in remote areas in the NT where there is limited policing available and these defences are included to cover these types of activities. The NT encourages these types of activities for economic development (including Indigenous economic development) and therefore such defences cater for these circumstances unique to the NT. I consider that including these specific defences in the NT *Liquor Act* is appropriate in the circumstances.

Committee Response

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

Alert Digest No. 1 of 2012 - extract

Insufficiently defined administrative powers
Subclauses 12(4), 12(5) and 13

These clauses provide that the Commonwealth Minister can prohibit the sale of alcohol by a person holding an NT liquor licence and may vary the conditions of such a licence. The provisions do not elaborate any criteria by reference to which such decisions may be made—they are very broadly framed discretions. Similar issues also arise in relation the modification of NT liquor permits pursuant to clause 13.

As the explanatory memorandum merely repeats the effect of the provisions and does not provide guidance as to guidelines or examples the committee **seeks the Minister's advice about how it is intended such provisions be administered and whether criteria can be included in primary or subordinate 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

Insufficiently defined administrative powers (Subclauses 12(4), 12(5) and 13)

The Committee has requested further advice as to how subclauses 12(4), 12(5) and 13, which allow the Minister to make determinations modifying liquor licences and permits, intend to be administered and whether criteria can be included in primary or subordinate legislation.

There is a limitation on the powers in that they must be exercised consistent with the object of Part 2, being to reduce alcohol-related harm to Aboriginal people in the NT. The same principle applies for the NT *Liquor Act.* In effect alcohol-related harm is the criterion under which such decisions and determinations would be made. Alcohol consumption levels in the NT are 1.5 times higher than in other jurisdictions and the resultant level of alcohol related harm is unacceptable. Aboriginal people consulted on the Stronger Futures package were clear that they wanted action to reduce alcohol abuse and reduce alcohol-related harm. I further note that determinations made under these provisions would be subject to merits review in the Administrative Appeals Tribunal (AAT) under clause 31 of the SFNT Bill. I am therefore of the view that including criteria about how determinations modifying liquor licences and permits in the primary or subordinate legislation is not necessary.

Committee Response

The Committee thanks the Minister for this response and notes that the power must be exercised consistently with the objects of Part 2 of the bill and that merits review is available in the AAT. **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 1 of 2012 - extract

Delegation of legislative power
Insufficiently defined administrative powers
Clauses 17 and 23

Clause 17 requires the Minister to determine whether to approve or refuse an alcohol management plan after an application has been lodged. Although clause 17(2) sets out considerations that must be taken into account, they lack precision and it appears that it is intended that the relevant matters that must be considered will be prescribed in the rules. A similar issue also arises in relation to clause 23, which provides for approvals in relation to applications for alcohol management plans to be varied.

As there are no statements explaining why these delegations of legislative power are appropriate**, the committee 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference and they may also 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

Delegation of legislative power
Insufficiently defined administrative powers (Clauses 17 and 23)

Clause 17 provides for the approval or refusal of an alcohol management plan whereas clause 23 provides for the approval of variations of alcohol management plans. The Committee has requested my advice regarding subclause 17(2) and clause 23 as to why matters that the Minister is to have regard to in relation to these decisions can be prescribed in the rules and the justification for the proposed approach.

Alcohol management plans will apply to communities and localities. There will be a wide range of local circumstances that alcohol management plans will need to address. Given the specific and detailed nature of these local circumstances, it was considered that specifying these matters in legislation was impractical. The preferred approach is to have these matters set out in a legislative instrument which balances the need for both

transparency and flexibility. The ability to prescribe matters to which the Minister must have regard in subclauses 17(2) and 23(2) when approving, refusing or varying an alcohol management plan will enable the Minister to identify and indicate to applicants what will be considered a relevant matter in those decisions. This will enable applicants to clearly know what matters will be relevant and considered by the Minister when making a decision to approve, refuse or vary an alcohol management plan. I note that any rules prescribed by the Minister under these provisions will be subject to parliamentary scrutiny and disallowance as they are legislative instruments. Consultation on proposed legislative instruments can be undertaken in accordance with *Legislative Instruments Act 2003* requirements. The Department is also developing a web-based consultation process which will enable people to comment on draft legislative instruments before they are made. I further note that determinations made under these provisions would be subject to merits review in the AAT under clause 31 of the SFNT Bill.

Committee Response

The Committee thanks the Minister for this detailed response and notes her advice, including that the power will need to be exercised in a wide range of specific and detailed local circumstances; that the Minister has the ability to prescribe relevant matters, which will inform applicants about considerations in the decision making process; that consultation on draft legislative instruments will be undertaken before they are made; and that AAT review is available. The Committee **requests that the key information outlined above be included in the explanatory memorandum.**

Alert Digest No. 1 of 2012 - extract

Trespass on personal rights and liberties
Delegation of legislative power
Part 3, clauses 34 and 35

Part 3 of the Bill implements land reform measures which give the Commonwealth power to make regulations to amend NT legislation relating to community living areas and town camps to facilitate voluntary dealings in land, including the granting of individual rights or interest and the promotion of economic development. The explanatory memorandum at page 20 explains that this Part also constitutes a special measure for the purposes of the RDA, affording 'Aboriginal people opportunities for home ownership and economic development'.

Clause 34 gives the Commonwealth the power to make regulations that would amend various relevant NT laws. The purpose of the power is to overcome restrictions and

impediments relating to dealing, planning and developing land in town camps for the benefit of Aboriginal people. The need to achieve this purpose through a regulation making power (rather than primary legislation) is not explicitly addressed in the explanatory memorandum. It is noted that any 'future models' for the stated purposes would be developed in consultation with relevant stakeholders (see the explanatory memorandum at page 21)—though failure to consult will not result in the invalidity of any regulations which are made (subclause 34(9)). The explanatory memorandum also notes at page 22 that it may not be necessary for regulations to be made if the NT reforms its own laws in a manner consistent with the Commonwealth's commitment to more flexible land tenure arrangements.

The same issues also arise in relation to clause 35, which confers a regulation-making power to modify NT laws in relation to 'community living areas'.

The committee notes the discussion in the explanatory memorandum about the provisions, but prefers that important information is contained in primary legislation as much as possible. The committee therefore seeks the Minister's advice as to the justification for the use of regulations.

> *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

Land reform

Trespass on personal rights and liberties
Delegation of legislative power (Clauses 34 and 35)

Part 3 of the SFNT Bill is the land reform measure which gives the Commonwealth power to make regulations that modify relevant NT law in relation to community living areas and town camps. Further to the explanation provided in the explanatory memorandum, the Committee seeks my advice as to the justification for the use of regulations in relation to community living areas and town camps (clauses 34 and 35 of the SFNT Bill).

The Committee acknowledges the broad objectives of the land reform measures which are designed to overcome NT legislative restrictions and impediments relating to residential and economic development in town camps and community living areas. A regulation enabling power provides a practical way of being able to implement, in both town camps and community living areas, appropriate, sustainable and community supported residential and economic models designed in consultation with, and supported by, relevant

stakeholders, including the relevant interest holders in the land and the NT Government. Given the complex nature of the relevant NT legislation, restrictions and impediments in NT legislation must be identified through a thorough analysis of the relevant models developed in consultation with stakeholders.

The proposed land reform regulation powers allows implementation of models to commence once this analysis has been completed and also ensures that appropriate safeguards in relation to dealings in land can be maintained where necessary or relevantly modified under NT legislation. I note that the submission from the Northern Land Council to the Senate Standing Committee on Community Affairs inquiry into this Bill shares this particular view with regard to community living areas.

The requirement for consultation with relevant stakeholders under subclauses 34(9) and 35(5) is compatible with this approach. Subclauses 34(9) and 35(5) are wholly consistent with provisions under the *Legislative Instruments Act 2003* governing consultation requirements in relation to legislative instruments. While it is clear that the failure to consult will not invalidate a relevant regulation, this is a provision that applies to all legislative instruments. Subclauses 34(9) and 35(5) also prevent uncertainty that the validity of any regulations made could be challenged due to non-compliance with the consultation requirements years later or after significant investments have been made in certain communities. Subclauses 34(8) and 35(4) make clear that consultation is, nevertheless, a requirement under the proposed legislation. The Department is also developing a web-based consultation process which will enable people to comment on draft legislative instruments before they are made.

As legislative instruments, any regulation made under these measures would be subject to Parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003.*

Committee Response

The Committee thanks the Minister for this detailed response, notes the points made in support of the provisions and **leaves consideration of whether proposed approach is appropriate to the consideration of the Senate as a whole**.

Alert Digest No. 1 of 2012 - extract

Trespass on personal rights and liberties
Clause 54

Clause 54 provides that it is a condition of all community store licences that the owner and the manager of the store must allow authorised officers to enter the premises for the purposes of auditing or monitoring compliance with licence conditions, to inspect things on the premises. Further, the owner and manager must give authorised officers documents relevant to auditing and compliance. Although, it may be accepted that a person who obtains a licence can be taken to accept entry to their licensed premises for the purpose of ensuring compliance with licence conditions, authorised officers should be accountable for the exercise of such powers (see the *Guide* at page 79), be appropriately qualified (see the *Guide* at page 80), and be subject to appropriate internal guidelines and training procedures relating to the implementation of such powers (*Guide* at 77).

Although the powers to be exercised by authorised officers do not include seizure powers, clause 69 enables the Secretary to appoint 'any other persons', in addition to APS employees, 'engaged by the Department, under contract or otherwise, to exercise powers, or perform duties or functions', including to enter premises, inspect things and require information and documents. The explanatory memorandum does not address these matters. **Therefore, the Committee seeks the Minister's further advice as to why the Bill does not require guidelines for the exercise of these powers to be developed and whether these can be subjected to Parliamentary scrutiny (either by inclusion in the primary legislation or by their inclusion in subordinate legislation). Further, the Committee seeks advice as to how the Minister will ensure that persons who exercise the powers will be appropriately qualified, especially given that they need not be APS employees.**

> *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

Food Security
Trespass on personal rights and liberties (Clause 54)

The Committee notes that clause 54 of the SFNT Bill provides that it is a condition of all community store licences that the owner and the manager of the store must allow

authorised officers to enter the premises for the purposes of auditing or monitoring compliance with licence conditions and to inspect things at the premises. Further, the owner and manager must give authorised officers documents relevant to auditing and compliance. Clause 69 enables the Secretary to appoint APS employees or other persons to exercise powers, or perform duties or functions' under Part 4.

The Committee seeks my advice as to why the SFNT Bill does not require guidelines for the exercise of these powers to be developed and whether these powers can be subjected to Parliamentary scrutiny (either by inclusion in the primary legislation or by their inclusion in subordinate legislation). Further, the Committee seeks advice as to how I will ensure that persons who exercise the powers will be appropriately qualified, given that they do not need to be APS employees.

It is important that the community stores licensing scheme is supported by appropriate powers enabling effective auditing of and monitoring compliance with licences. The condition enabling authorised officers to enter premises, inspect things and receive documents is constrained in that the powers must be exercised for the purpose of auditing and monitoring compliance of licences and the requirement to give documents does not apply if it would tend to incriminate the person or expose them to a penalty. The powers can only be used in relation to a community store that is already licensed. Before the Secretary appoints an authorised officer, who is charged with exercising these powers, the Secretary must be satisfied that the authorised officer is 'appropriately qualified', My Department is developing publicly available policy guidelines regarding the appointment of authorised officers and the exercise of their powers. In these circumstances it is unnecessary for the SFNT Bill to require guidelines for the exercise of these powers.

Committee Response

The Committee thanks the Minister for this response and notes her advice that guidelines are being prepared that will address these matters. However, the Committee notes that it prefers that matters of importance like these are statutory requirements rather being left to details of policy. **In the circumstances the Committee leaves to the Senate as a whole the question of whether the proposed approach is appropriate.**

Alert Digest No. 1 of 2012 - extract

Trespass on personal rights and liberties
Clause 73

Clause 73 confers a power to compel information relating to assessments of community stores in relation to licensing. Subparagraph 73(2)(a) provides that a person must give compellable information to the Secretary within 'a specified period of time'. As the *Guide to Framing Commonwealth Offences* suggests that a person should generally 'be given at least 14 days to produce information or documents' **the Committee seeks the Minister's advice as to whether this minimum period can be included in the Bill.**

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

Minister's response - extract

Trespass on personal rights and liberties (Clause 73)

Clause 73 provides for a power to compel information relating to assessments. Subparagraph 73(2)(a) provides that the Secretary may require a person to give compellable information within a specified period of time.

The Committee seeks my advice as to whether a minimum period of 14 days to provide compellable information can be included in the Bill, consistent with the Guide. While the Secretary has the power under this provision to require a person to give compellable information within a specified period of time and that this specified period of time would need to be reasonable given that failure to comply may attract a criminal penalty, I agree that the time period in this provision should be framed consistently with the Guide. I therefore undertake to include a minimum period of 14 days to provide compellable information under clause 73 after the scheme under guidelines to support the food security legislation in the Bill. In these circumstances, I do not consider it necessary to amend the legislation to include this period.

Committee Response

The Committee thanks the Minister for this response and thanks her for agreeing to include a minimum 14 day period in guidelines being prepared to support the food security legislation in the bill. However, the Committee notes that it prefers that a matter of importance, such as the 14 day timeframe, is a statutory requirement rather being left to details of policy. **In the circumstances the Committee leaves to the Senate as a whole the question of whether the proposed approach is appropriate.**

Alert Digest No. 1 of 2012 - extract

Reversal of onus
Subclause 72(3) and clause 73

Failure to comply with the requirement in clause 73 to produce information is an offence. There are, however, defences if a person has a 'reasonable excuse' or in relation to self-incrimination. The defendant has an evidential burden in relation to both defences. The same issue also arises in relation to subclause 72(3). The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the *Guide to framing Commonwealth Offences*. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach**.

> *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

Reversal of onus (Subclause 72(3) and clause 73)

In relation to subclause 72(3) and clause 73, the Committee notes that a failure to produce information is an offence. There are, however, defences if a person has a 'reasonable excuse' or in relation to self-incrimination. The defendant has an evidential burden in relation to both defences. The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the Guide.
The Committee has sought my advice as to the rationale for the proposed approach.

It is important that the community stores licensing scheme is supported by appropriate powers to gather information relevant to assessments and therefore decision-making under the scheme. The requirement to obtain information under subclauses 72(3) and 73 are limited to information that is reasonably necessary for the purposes of an assessment. The Guide provides that reasonable excuse defences can be justified if the potential for innocuous conduct being caught is so great that it is not practical to design specific defences. This approach is consistent with the Guide where the reasonable excuse defence is to take account of the many and varied circumstances specific to community stores given the remoteness and seasonal challenges these stores can face. Subclauses 72(3) and 73(5).clarify that the requirement to give documents or compellable information does not apply if giving the information might tend to incriminate the person or expose them to a penalty. Without these provisions, it would be unclear whether the privilege against self–incrimination has been abrogated. In these circumstances, I am of the view that the approach is consistent with the Guide.

Committee Response

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

Alert Digest No. 1 of 2012 - extract

Strict liability
Clauses 88 and 89

These clauses have the effect of imposing strict liability in relation to civil penalties under the Bill. Clause 88 provides for a defence in relation to a mistake of fact, but subclause 88(3) places an evidential burden on a person who wishes to rely on that defence. The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the *Guide to framing Commonwealth Offences*. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach**.

> *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

Strict liability (Clauses 88 and 89)

Clause 88 provides for a defence of mistake of fact in relation to civil penalty proceedings. Clause 89 provides that certain fault elements are not required to be proven in relation to civil penalty proceedings. The effect of these provisions is to create strict liability civil penalties.

The Committee seeks my advice as to the rationale for the proposed approach.

The Guide provides that the application of strict liability to all physical elements of an offence. Strict liability is considered appropriate if the offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 penalty units for a body corporate), where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault'. This is in part because they will be placed on notice to guard against the possibility of any contravention.

In all cases the community store in question will be made aware of a potential contravention of a civil penalty provision at various stages before civil penalties could apply because of key licensing decisions that lead to any contravention. This will include being given the opportunity to make submissions about key licensing decisions and the ability to seek merits review of those decisions in the AAT. The civil penalty provisions to which civil penalty proceedings are available (subclauses 38(1) and clauses 56 and 61) only attract penalties that are much lower than apply in other legislation (maximum penalties of 50, 20 and 20 penalty units respectively) and are not, by their civil penalty nature, punishable by imprisonment. The civil penalty provisions are in relation to operating without a community store licence when a licence is required, breaching licence conditions and not registering under the Cor*porations (Aboriginal and Torres Strait Islander) Act 2006* which are central matters that the licensing scheme seeks to regulate. In these circumstances, I do not consider it appropriate to require intention to be proven in these civil penalty proceedings.

Finally, there are several references in the Digest where the Committee notes that the explanatory memorandum does not provide a sufficiently detailed explanation in relation to a particular matter. I have taken the Committee's comments on board and will endeavour to ensure that future explanatory memoranda provide fuller explanations on these types of matters, as appropriate.

I appreciate the opportunity to comment on the matters raised by the Committee and trust that the above comments satisfactorily respond to the matters on which I was asked to provide advice.

Committee Response

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

Senator Mitch Fifield
Chair

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

23.2.2012

11/19031, MC12/01220

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

Dear Senator Fifield Mitch

I refer to the letter from Ms Toni Dawes, Committee Secretary for the Senate Standing Committee for the Scrutiny of Bills to my Senior Advisor requesting a further response to issues raised by the Committee in the *First Report of 2012* (8 February 2012) in relation to the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011.

In the Report, the Committee has expressed concern that the proposed amendment in the Bill to allow Australia to make a request to a foreign country for forensic material may result in types of material being obtained from overseas that could not be obtained within Australia.

Proposed section 28A allows Australia to make requests to foreign countries for forensic procedures to be carried out on a person if the procedure may result in evidence relevant to an Australian criminal proceeding. Items 108 and 109 of the Bill will insert definitions of both 'forensic procedure' and 'forensic material' into the *Mutual Assistance in Criminal Matters Act 1987*. These definitions will have the same meaning as 'forensic procedure' and 'forensic material' in Part ID of the *Crimes Act 1914*.

'Forensic material' refers to the actual thing that is taken from or of a person's body by a forensic procedure. 'Forensic procedure' refers to the method by which the thing is collected from the person's body for the purpose of the criminal investigation. Under section 23WA of the Crimes Act, 'forensic material' can include for example samples, hand prints, finger prints, foot prints, photographs or video recordings, or casts or impressions that have been taken from or of a person's body. Part ID of the Crimes Act allows for both intimate and non-intimate forensic procedures to be used for the purposes of collecting forensic material. Intimate forensic procedures are defined under section 23WA of the Crimes Act to include taking blood or saliva samples, taking a dental impression and examining the genital area of the body. Non-intimate forensic procedures are defined under section 23WA to include taking fingerprints or hand prints, taking a hair sample or taking a photograph. It is unlikely

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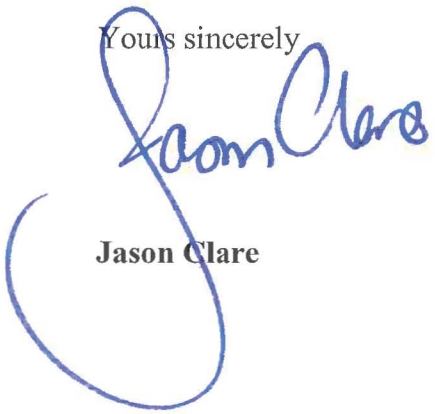
that Australia would make a request for a forensic procedure to be conducted or forensic material to be obtained that does not fall within the Crimes Act definitions of these terms. In addition, under proposed subsections 28A(1) and 28A(2), a request will only be made where a proceeding or investigation related to a criminal matter has commenced in Australia and there are reasonable grounds to believe carrying out the forensic procedure on the person in the foreign country may result in evidence relevant to the proceeding or investigation.

I thank the Committee for providing me an opportunity to respond to these further issues.

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

Yours sincerely



Jason Clare

Dr Richard Di Natale
Australian Greens Senator for Victoria

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

23 February 2012

Dear Senator Fifield,

In the Scrutiny of Bills Committee's Alert Digest of the 8th of February this year, the Committee raised a concern with the *Government Investment Funds Amendment (Ethical Investments) Bill 2011* introduced by myself and Senator Ludlam last year. This bill seeks to create a requirement for the Future Fund and other government investment funds to consider contemporary ethical investment practices when making investments.

I would like to respond to the Committee's request for a rationale regarding the development of the ethical investment guidelines by legislative instrument. In particular, we have three reasons for this decision:

1. The bill specifies the minimum requirements for the guidelines in sections 20A (2) and (3), but does not specify the guidelines in full detail. We consider this level of policy detail is more appropriately achieved by regulation. A complete set of ethical investment guidelines – particularly for an organisation as large as the Future Fund – will be a lengthy, detailed and technical document. It will also be a "living document"; one that is regularly updated to reflect world's best practice and the circumstances of the day. We seek to avoid the requirement for legislative change each time, for instance, a labour rights or environmental concern affects a particular industry, though such an event might be a trigger for an update in the Guidelines.

2. The development of the Guidelines by the Ministers is similar to the development of the Investment Mandate. The Investment Mandate is provided for but not detailed in legislation, and was written based on the exigencies of the day and can be updated without legislative change to reflect changes in economic circumstances

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Dr Richard Di Natale
Australian Greens Senator for Victoria

and other relevant requirements. There is therefore a strong argument, based on a clear, recent and relevant precedent for the Ethical Investment Guidelines to follow the same process.

3. Concerns around excessive delegation of powers to the Executive are valid and we share those concerns in general. However, we consider that the development of the Ethical Investment Guidelines raises few issues concerning potential abuse of executive power. There is some risk that the guidelines would be too weak (minimum standards are specified in the bill to address this), but Government has no incentive to make guidelines that are overly restrictive and adversely affect the returns of the Funds.

Thank you for considering this response in any future reports on the bill.

Yours sincerely,

Senator Richard Di Natale

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MN12-3000295

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

Dear Senator ~~Fifield~~ Mitch

I refer to the Committee's letter of 9 February 2012 seeking my response to matters raised in the *Alert Digest No. 1 of 2012* (the Digest) in relation to the Stronger Futures in the Northern Territory Bill 2011 (the SFNT Bill) which was introduced into the Parliament on 23 November 2011.

The matters on which the Committee has sought my response are addressed below. The aim of the legislation is to address unique and exceptional social and economic disadvantage faced by Aboriginal people living in the Northern Territory. The legislation is being enacted to address areas of extreme Aboriginal disadvantage and help Aboriginal people to enjoy their human rights equally with others in the Australian community. Against this background, my comments are provided below.

Stronger Futures in the Northern Territory Bill 2011

Tackling alcohol abuse

Reversal of onus (Item 1, subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(1))

The Committee has noted that the Guide to Framing Commonwealth Offences (the Guide) states that a matter should be included in a defence, thereby placing an evidential burden of proof on the defendant, 'only where the matter is peculiarly within the knowledge of the defendant' and 'is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish'. The Committee notes that this reverse onus of proof issue is in relation to the following defences in subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(1) of the NT's *Liquor Act.*

In relation to the approach to these defences, the Committee has noted that it would be helpful for the explanatory memorandum to set out why the factors which are generally

thought to justify placing an evidential burden on defendants (as set out in the Guide) apply or why other factors justify the approach.

The Committee has sought my advice, beyond what is already provided in the explanatory memorandum, as to the justification for the reversal of the onus of proof in subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75C(1) of the NT *Liquor Act* in the SFNT Bill.

The approach to including specific defences in sections 75B and 75C, as noted in the explanatory memorandum, mirror the structure of similar offence and defence provisions in the NT *Liquor Act* and because these provisions are inserted into that Act this approach was considered appropriate to ensure consistency. These defences relate to whether a person is engaging in conduct that would provide for a defence under these provisions (i.e. conduct relating to recreational boating activities, commercial fishing activities, tours and tourist activities (including in national parks or NT parks) and emergency situations) and these are matters peculiarly within the knowledge of the defendant which is consistent with the Guide. To illustrate, fishing and tourism takes place in remote areas in the NT where there is limited policing available and these defences are included to cover these types of activities. The NT encourages these types of activities for economic development (including Indigenous economic development) and therefore such defences cater for these circumstances unique to the NT. I consider that including these specific defences in the NT *Liquor Act* is appropriate in the circumstances.

Insufficiently defined administrative powers (Subclauses 12(4), 12(5) and 13)

The Committee has requested further advice as to how subclauses 12(4), 12(5) and 13, which allow the Minister to make determinations modifying liquor licences and permits, intend to be administered and whether criteria can be included in primary or subordinate legislation.

There is a limitation on the powers in that they must be exercised consistent with the object of Part 2, being to reduce alcohol-related harm to Aboriginal people in the NT. The same principle applies for the NT *Liquor Act*. In effect alcohol-related harm is the criterion under which such decisions and determinations would be made. Alcohol consumption levels in the NT are 1.5 times higher than in other jurisdictions and the resultant level of alcohol related harm is unacceptable. Aboriginal people consulted on the Stronger Futures package were clear that they wanted action to reduce alcohol abuse and reduce alcohol-related harm. I further note that determinations made under these provisions would be subject to merits review in the Administrative Appeals Tribunal (AAT) under clause 31 of the SFNT Bill. I am therefore of the view that including criteria about how determinations modifying liquor licences and permits in the primary or subordinate legislation is not necessary.

Delegation of legislative power
Insufficiently defined administrative powers (Clauses 17 and 23)

Clause 17 provides for the approval or refusal of an alcohol management plan whereas clause 23 provides for the approval of variations of alcohol management plans. The Committee has requested my advice regarding subclause 17(2) and clause 23 as to why matters that the Minister is to have regard to in relation to these decisions can be prescribed in the rules and the justification for the proposed approach.

Alcohol management plans will apply to communities and localities. There will be a wide range of local circumstances that alcohol management plans will need to address. Given the specific and detailed nature of these local circumstances, it was considered that specifying these matters in legislation was impractical. The preferred approach is to have these matters

set out in a legislative instrument which balances the need for both transparency and flexibility. The ability to prescribe matters to which the Minister must have regard in subclauses 17(2) and 23(2) when approving, refusing or varying an alcohol management plan will enable the Minister to identify and indicate to applicants what will be considered a relevant matter in those decisions. This will enable applicants to clearly know what matters will be relevant and considered by the Minister when making a decision to approve, refuse or vary an alcohol management plan. I note that any rules prescribed by the Minister under these provisions will be subject to parliamentary scrutiny and disallowance as they are legislative instruments. Consultation on proposed legislative instruments can be undertaken in accordance with *Legislative Instruments Act 2003* requirements. The Department is also developing a web-based consultation process which will enable people to comment on draft legislative instruments before they are made. I further note that determinations made under these provisions would be subject to merits review in the AAT under clause 31 of the SFNT Bill.

Land reform

Trespass on personal rights and liberties
Delegation of legislative power (Clauses 34 and 35)

Part 3 of the SFNT Bill is the land reform measure which gives the Commonwealth power to make regulations that modify relevant NT law in relation to community living areas and town camps. Further to the explanation provided in the explanatory memorandum, the Committee seeks my advice as to the justification for the use of regulations in relation to community living areas and town camps (clauses 34 and 35 of the SFNT Bill).

The Committee acknowledges the broad objectives of the land reform measures which are designed to overcome NT legislative restrictions and impediments relating to residential and economic development in town camps and community living areas. A regulation enabling power provides a practical way of being able to implement, in both town camps and community living areas, appropriate, sustainable and community supported residential and economic models designed in consultation with, and supported by, relevant stakeholders, including the relevant interest holders in the land and the NT Government. Given the complex nature of the relevant NT legislation, restrictions and impediments in NT legislation must be identified through a thorough analysis of the relevant models developed in consultation with stakeholders.

The proposed land reform regulation powers allows implementation of models to commence once this analysis has been completed and also ensures that appropriate safeguards in relation to dealings in land can be maintained where necessary or relevantly modified under NT legislation. I note that the submission from the Northern Land Council to the Senate Standing Committee on Community Affairs inquiry into this Bill shares this particular view with regard to community living areas.

The requirement for consultation with relevant stakeholders under subclauses 34(9) and 35(5) is compatible with this approach. Subclauses 34(9) and 35(5) are wholly consistent with provisions under the *Legislative Instruments Act 2003* governing consultation requirements in relation to legislative instruments. While it is clear that the failure to consult will not invalidate a relevant regulation, this is a provision that applies to all legislative instruments. Subclauses 34(9) and 35(5) also prevent uncertainty that the validity of any regulations made could be challenged due to non-compliance with the consultation requirements years later or after significant investments have been made in certain communities. Subclauses 34(8) and 35(4) make clear that consultation is, nevertheless, a requirement under the proposed

legislation. The Department is also developing a web-based consultation process which will enable people to comment on draft legislative instruments before they are made.

As legislative instruments, any regulation made under these measures would be subject to Parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003*.

Food Security

Trespass on personal rights and liberties (Clause 54)

The Committee notes that clause 54 of the SFNT Bill provides that it is a condition of all community store licences that the owner and the manager of the store must allow authorised officers to enter the premises for the purposes of auditing or monitoring compliance with licence conditions and to inspect things at the premises. Further, the owner and manager must give authorised officers documents relevant to auditing and compliance. Clause 69 enables the Secretary to appoint APS employees or other persons to exercise powers, or perform duties or functions' under Part 4.

The Committee seeks my advice as to why the SFNT Bill does not require guidelines for the exercise of these powers to be developed and whether these powers can be subjected to Parliamentary scrutiny (either by inclusion in the primary legislation or by their inclusion in subordinate legislation). Further, the Committee seeks advice as to how I will ensure that persons who exercise the powers will be appropriately qualified, given that they do not need to be APS employees.

It is important that the community stores licensing scheme is supported by appropriate powers enabling effective auditing of and monitoring compliance with licences. The condition enabling authorised officers to enter premises, inspect things and receive documents is constrained in that the powers must be exercised for the purpose of auditing and monitoring compliance of licences and the requirement to give documents does not apply if it would tend to incriminate the person or expose them to a penalty. The powers can only be used in relation to a community store that is already licensed. Before the Secretary appoints an authorised officer, who is charged with exercising these powers, the Secretary must be satisfied that the authorised officer is 'appropriately qualified'. My Department is developing publicly available policy guidelines regarding the appointment of authorised officers and the exercise of their powers. In these circumstances it is unnecessary for the SFNT Bill to require guidelines for the exercise of these powers.

Trespass on personal rights and liberties (Clause 73)

Clause 73 provides for a power to compel information relating to assessments. Subparagraph 73(2)(a) provides that the Secretary may require a person to give compellable information within a specified period of time.

The Committee seeks my advice as to whether a minimum period of 14 days to provide compellable information can be included in the Bill, consistent with the Guide.

While the Secretary has the power under this provision to require a person to give compellable information within a specified period of time and that this specified period of time would need to be reasonable given that failure to comply may attract a criminal penalty, I agree that the time period in this provision should be framed consistently with the Guide. I therefore undertake to include a minimum period of 14 days to provide compellable

information under clause 73 after the scheme under guidelines to support the food security legislation in the Bill. In these circumstances, I do not consider it necessary to amend the legislation to include this period.

Reversal of onus (Subclause 72(3) and clause 73)

In relation to subclause 72(3) and clause 73, the Committee notes that a failure to produce information is an offence. There are, however, defences if a person has a 'reasonable excuse' or in relation to self-incrimination. The defendant has an evidential burden in relation to both defences. The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the Guide.

The Committee has sought my advice as to the rationale for the proposed approach.

It is important that the community stores licensing scheme is supported by appropriate powers to gather information relevant to assessments and therefore decision-making under the scheme. The requirement to obtain information under subclauses 72(3) and 73 are limited to information that is reasonably necessary for the purposes of an assessment. The Guide provides that reasonable excuse defences can be justified if the potential for innocuous conduct being caught is so great that it is not practical to design specific defences. This approach is consistent with the Guide where the reasonable excuse defence is to take account of the many and varied circumstances specific to community stores given the remoteness and seasonal challenges these stores can face. Subclauses 72(3) and 73(5) clarify that the requirement to give documents or compellable information does not apply if giving the information might tend to incriminate the person or expose them to a penalty. Without these provisions, it would be unclear whether the privilege against self-incrimination has been abrogated. In these circumstances, I am of the view that the approach is consistent with the Guide.

Strict liability (Clauses 88 and 89)

Clause 88 provides for a defence of mistake of fact in relation to civil penalty proceedings. Clause 89 provides that certain fault elements are not required to be proven in relation to civil penalty proceedings. The effect of these provisions is to create strict liability civil penalties.

The Committee seeks my advice as to the rationale for the proposed approach.

The Guide provides that the application of strict liability to all physical elements of an offence. Strict liability is considered appropriate if the offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 penalty units for a body corporate), where the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences and where there are legitimate grounds for penalising persons lacking 'fault'. This is in part because they will be placed on notice to guard against the possibility of any contravention.

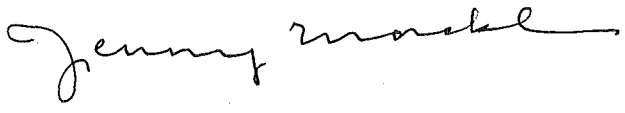
In all cases the community store in question will be made aware of a potential contravention of a civil penalty provision at various stages before civil penalties could apply because of key licensing decisions that lead to any contravention. This will include being given the opportunity to make submissions about key licensing decisions and the ability to seek merits review of those decisions in the AAT. The civil penalty provisions to which civil penalty proceedings are available (subclauses 38(1) and clauses 56 and 61) only attract penalties that are much lower than apply in other legislation (maximum penalties of 50, 20 and 20 penalty

units respectively) and are not, by their civil penalty nature, punishable by imprisonment. The civil penalty provisions are in relation to operating without a community store licence when a licence is required, breaching licence conditions and not registering under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* which are central matters that the licensing scheme seeks to regulate. In these circumstances, I do not consider it appropriate to require intention to be proven in these civil penalty proceedings.

Finally, there are several references in the Digest where the Committee notes that the explanatory memorandum does not provide a sufficiently detailed explanation in relation to a particular matter. I have taken the Committee's comments on board and will endeavour to ensure that future explanatory memoranda provide fuller explanations on these types of matters, as appropriate.

I appreciate the opportunity to comment on the matters raised by the Committee and trust that the above comments satisfactorily respond to the matters on which I was asked to provide advice.

Yours sincerely



JENNY MACKLIN MP