



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

NINTH REPORT
OF
2012

22 August 2012

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

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

NINTH REPORT OF 2012

The Committee presents its Ninth 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:

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Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

Introduced into the House of Representatives on 30 May 2012

Portfolio: Attorney-General

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Attorney-General responded to the Committee's comments in a letter dated 15 August 2012. A copy of the letter and the attachment are reproduced at the back of this report.

Background

This bill amends the *Criminal Code* and the *Crimes Act 1914* to:

- establish new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim;
- ensure the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave;
- extend the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting;
- increase the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences;
- broaden the definition of exploitation under the Criminal Code to include all slavery-like practices;
- amend the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability; and
- improve the availability of reparations to victims.

Alert Digest No. 6 of 2012 - extract

Undue trespass—definition of offences Schedule 1, item 8, proposed 270.1A

This item includes a definition of coercion. A number of the serious offences introduced by this bill depend on the prosecution being able to prove that a particular purpose was achieved on the basis of coercion. Coercion is defined very broadly to include force, duress, detention, psychological oppression, abuse of power, and taking advantage of a person's vulnerability. The explanatory memorandum offers the following justification for this approach (at page 10):

...investigations into slavery and slavery-like offences have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim's compliance, such as psychological oppression, the abuse of power or taking advantage of a person's vulnerability. In these circumstances, it has proved challenging to convince juries that the offender's conduct constitutes the offence.

The Committee notes the breadth of the definition, but in the circumstances leaves to the Senate as a whole the question of whether the proposed approach is appropriate.

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.

Attorney-General's response - extract

The Committee brought three of the Bill's provisions to the attention of Senators. While I note that the Committee did not request my advice on the definition of the term 'coercion', I have included details on that provision below to further assist the Committee and the Senate.

Proposed section 270.1A of the Criminal Code - definition of the term 'coercion'

As set out in the Explanatory Memorandum accompanying the Bill, the situation of many suspected victims of people trafficking, slavery, and slavery-like practices in Australia does not conform to the popular image that those crimes involve abduction, violence and physical restraint. For example, in 2009-10, the AFP received only one report of people trafficking in which physical confinement was used as a method of control.

Criminals involved in these serious crimes are often alert to law enforcement activity, prosecutorial strategies and changes in migration regulations. Consequently, sophisticated people trafficking syndicates are changing their modes of operation to avoid detection and, if detected, to make the elements of the offences harder to prove to the standard that satisfies the court and a jury. Information from law enforcement agencies such as the Australian Federal Police is that offenders often use subtle, non-physical means such as psychological oppression, the abuse of power or taking advantage of a person's vulnerability.

Currently, a number of the offences criminalising people trafficking, slavery, and slavery-like practices in Divisions 270 and 271 of the Criminal Code apply where a person uses force or threats in order to obtain a victim's compliance. However, it is arguable that the terms 'force' and 'threats' do not capture the subtle, non-physical means by which a trafficker may gain a victim's compliance. As such, a broadly drafted, non-exhaustive definition of 'coercion' is appropriate and necessary to ensure that our criminal law remains effective and responsive to emerging trends.

The definition of 'coercion' set out in proposed section 270.1A has intentionally been drafted to be broad and non-exhaustive in order to supplement the existing framework and ensure the broadest possible range of exploitative behaviour is captured and criminalised. As the Committee is aware, the proposed definition of coercion includes coercion by force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person's vulnerability.

Importantly, the prosecution will still be required to prove the elements of the relevant offence beyond a reasonable doubt. For example, in order to make out the people trafficking offence at subsection 271.2(1) of the Criminal Code, the prosecution would be required to prove beyond a reasonable doubt that the defendant:

- (a) intentionally organised or facilitated the entry or proposed entry, or the receipt, of the victim into Australia, and
- (b) the defendant intentionally used coercion; and
- (c) the defendant was reckless' as to the fact that his or her use of coercion would result in the defendant obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.

Committee Response

The Committee thanks the Attorney-General for this additional information, which is useful in considering the proposed approach.

Alert Digest No. 6 of 2012 - extract

**Undue trespass—reversal of onus
Schedule 1, item 8, proposed subsection 270.7B(4)**

This provision creates a defence of reasonable excuse in relation to the offence of being a party to a forced marriage. The defendant bears an evidential burden of proof in relation to establishing whether a reasonable excuse exists. The justification offered for this approach is that ‘the elements needed to establish a reasonable excuse would likely be peculiarly within the knowledge of the defendant, and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish’ (see the explanatory memorandum at page 27).

Although this point carries considerable force, it remains the case that the circumstances which would enable the defence to be pleaded are very open-ended. As such it may be unclear to a defendant what they need to establish. Given the seriousness of the offence and the fact it carries a penalty of 4 years imprisonment (or 7 years for an aggravated offence), **the Committee seeks the Attorney-General's advice as to whether consideration has been given to alternative methods of protecting victims while ensuring fairness for defendants, such as providing examples of what would constitute a reasonable excuse.**

Pending the Attorney-General'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.

Attorney-General's response - extract

Proposed subsection 270.7B(4) of the Criminal Code - defence of reasonable excuse

Proposed subsection 270.7B(4) provides that the offence of being party to a forced marriage does not apply if the defendant had a reasonable excuse. There would be an evidential burden on the defendant to point to evidence which would establish that he or she had a reasonable excuse.

The Explanatory Memorandum provides an example at page 27 of a type of situation which the reasonable excuse defence would be intended to cover:

For example, a person may be aware that threats of physical harm have been made against the victim by the victim 's father if she does not get married. On this basis, the person enters the marriage in order to protect the victim from the threats of harm, with the agreement of the victim. In this type of circumstance, it would be inappropriate to prosecute that person for an offence of forced marriage.

This example may be of assistance to the courts and to defendants in interpreting the defence. It is desirable that the reasonable excuse defence is cast in broad terms, as it is difficult to predict the situations which may arise in which the defence could apply. In its present form, the courts would have wide scope to interpret and apply the defence in response to the facts of particular cases which present themselves.

Committee Response

The Committee thanks the Attorney-General for this response and notes the useful example provided in the explanatory memorandum. **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 6 of 2012 - extract

Undue trespass on personal rights and liberties—absolute liability Schedule 1, item 18, proposed subsection 271.7F(3)

This provision creates a new offence of harbouring a victim to assist a third person with a related offence. Absolute liability attaches to an element of the offence, which is that the third person offence (the related offence) must be an offence against specified parts of the bill (Division 270, or 271 apart from section 271.7F(3)).

As the explanatory memorandum states, at page 50, the ‘application of absolute liability to this element of the offence means that there is no fault element for the physical element...and that the defence of mistake of fact...would not be available to the defendant’. However, the explanatory memorandum does not indicate why the application of absolute liability is considered appropriate.

Although the Committee has accepted in the past that absolute liability is appropriate in some circumstances, it routinely requests that explanatory memoranda justify the approach whenever absolute liability is proposed. **The Committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach.**

Pending the Attorney-General'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.

Attorney-General's response - extract

Proposed subsection 271.7F(3) a/the Criminal Code – justification for the application of absolute liability to proposed paragraph 271.7F(1)(c)

As outlined in the Explanatory Memorandum, under proposed new section 271.7F, a person (the **first person**) commits an offence of harbouring a victim if:

- the first person harbours, receives or conceals another person (the *victim*) (new paragraph 271.7F(1)(a))
- the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of any 'third person offence' (new paragraph 271.7F(1)(b)), and
- the 'third person offence' is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 (new paragraph 271.7F(1)(c)).

Pursuant to new subsection 271.7F(3), absolute liability applies to paragraph 271.7F(1)(c) of the Criminal Code - the fact that the 'third person offence' is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 of the Criminal Code. However, as noted by the Committee, the Explanatory Memorandum does not provide a justification for the application of absolute liability to paragraph 271.7F(1)(c) of the Criminal Code.

The proposed offence of harbouring a victim has been carefully drafted so that it only applies to the context of harbouring a victim of a people trafficking, slavery, or slavery-like offence (that is, an offence against Divisions 270 or 271 of the Criminal Code, not including the offence of harbouring a victim itself). The application of absolute liability to the question of whether the relevant 'third person offence' is a people trafficking, slavery, or slavery-like offence is appropriate and necessary in the circumstances, particularly given the intended deterrent effect of the offence.

The application of absolute liability would mean a defendant could not rely on the defence of honest or reasonable mistake of fact in relation to the circumstance in paragraph 271.7F(1)(c). It would be inappropriate for the defendant to escape liability for conduct that would otherwise constitute an offence of harbouring a victim simply because the

person was unaware that the offence they knowingly or recklessly assisted was of a particular type.

For example, as a result of the application of absolute liability to paragraph 271.7F(1)(c), a defendant would not be able to claim, in defence to a charge of harbouring a victim, that he or she had a mistaken but reasonable belief about whether the third party offence was a people trafficking, slavery, or slavery-like offence where the defendant had been told by the third person that the defendant was assisting the third person kidnap the victim.

Importantly, as outlined in the Explanatory Memorandum, the prosecution will still be required to prove that the defendant knew or was reckless as to the fact that the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of the 'third person offence' (i.e. the element in proposed paragraph 271.7F(1)(b)).

I trust this information is of assistance to the Committee.

Committee Response

The Committee thanks the Attorney-General for this informative response and **requests that the key information be included in the explanatory memorandum.**

Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2011

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

Introduction

The Committee reconsidered this bill in *Alert Digest No. 8 of 2012*. The Minister responded to the Committee's comments as a matter of urgency in a letter dated 15 August 2012. The Committee wishes to thank the Minister for the speedy response. A copy of the letter and the attachment are reproduced at the back of this report.

Alert Digest No. 8 of 2012 - 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.

Delegation of legislative power - commencement Proposed Government amendment BP256 (15)

The Federal Register of Legislative Instruments (FRLI) was established on 1 January 2005 under the Legislative Instruments Act 2003 (LI Act) as the authoritative source for legislative instruments and compilations of legislative instruments. The LI Act provides that a legislative instrument does not take effect until it is registered on the FRLI, unless an alternative commencement process is expressly provided for in relevant legislation.

The underlying scrutiny principle is that laws should be readily knowable and accessible before they commence so that people can realistically be guided in their actions on the basis of the laws that apply to them.

Amendment 15 would have the effect that a legislative instrument may commence prior to registration. While the supplementary explanatory memorandum explains the effect of the provision, it does not provide a justification for the approach. **The Committee therefore 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.

Minister's response - extract

Delegation of legislative power - commencement Proposed Government amendment DP256 (15)

The Alert Digest states that a legislative instrument made under subsection 198AB(1) of the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 as passed by the House of Representatives on 15 August 2012 may commence prior to registration on the Federal Register of Legislative Instruments. This is incorrect.

Subsection 198AB(1B) only displaces subsection 12(1) of the *Legislative Instrument Act 2003* and not subsection 12(2) of the *Legislative Instruments Act 2003*.

As an instrument made under subsection 198AB(1) would impact on the rights of a person (other than the Commonwealth or an authority of the Commonwealth) subsection 12(2) of the *Legislative Instruments Act 2003* will continue to apply. Therefore a legislative instrument made under subsection 198AB(1) would have no effect before the date it is registered on the Federal Register of Legislative Instruments.

Subsection 198AB(1B) is inserted to ensure that a legislative instrument made under subsection 198AB(1) is subject to parliamentary scrutiny prior to commencement. It provides that despite subsection 12(1) of the *Legislative Instruments Act 2003* a legislative instrument made under subsection 198AB(1) commences at the earlier of the following times:

- immediately after both Houses of the Parliament have passed a resolution approving the designation; or
- immediately after both of the following apply:
 - a copy of the designation has been laid before each House of the Parliament under section 198AC; and

- 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

The intention of this amendment is to provide for parliamentary scrutiny of a legislative instrument made under subsection 198AB(1). It delays commencement where the instrument has been registered on the Federal Register of Legislative Instruments until there has been an opportunity for parliamentary scrutiny of the legislative instrument.

Subsection 198AB(1B) allows for each House of Parliament to pass a resolution disapproving the designation of a country as a regional processing country under subsection 198AB(1).

Committee Response

The Committee thanks the Minister for clarifying the operation of this provision, which addresses the Committee's concern.

Alert Digest No. 8 of 2012 - extract

Retrospective effect

Proposed Government amendment BP256 (36)

Amendment 36 would have the effect that Section 198AD (which provides for regional entry persons to be taken to a regional processing country) applies in relation to a regional entry person who enters Australia on or after 13 August 2012. The proposed date is necessarily prior to the date the bill will commence. In effect it will allow for the scheme to commence operation in relation to certain people prior to the legislative foundation for it is secured.

The supplementary explanatory memorandum states that this date 'aligns with the date on which the Expert Panel on Asylum Seekers reported its recommendations to the Government', but does not provide any further justification for the proposed approach (see paragraph 35).

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. The Committee also has a long-standing concern about provisions which could have a retrospective and possibly detrimental effect

on a person and requests a an explanation of the justification for any such provisions. **In the circumstances, the Committee therefore 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.

Minister's response - extract

Retrospective effect

Proposed Government amendment BP256 (36)

The Prime Minister and I clearly articulated on 13 August 2012 that anybody who comes to Australia by boat from that point forward runs the risk of being transferred to a regional processing country and that anybody who comes to Australia by boat should be very clear about the possibility of not having their claims processed in Australia.

I do not want to see people rushing to take dangerous boat journeys in the coming days in the belief that they can circumvent these arrangements. To do so would be grossly irresponsible, particularly in view of paragraph 198AA(a), which makes it clear that the very reason for these amendments is to prevent loss of life at sea.

The Government has considered this risk and has determined that it is vital to send a very clear message that people should not board a boat to Australia in coming days in advance of the finalisation of regional processing arrangements. Therefore all persons have been put on notice as of that date that they may be considered under the proposed new arrangements.

While the amendments once enacted will apply to persons who arrive on or after 13 August 2012, no action under the amendment can be taken in relation to such persons until the amendments commence and relevant designations have been made and entered into force.

It is the view of the Government that the amendments are justified and do not unduly trespass on personal rights and liberties.

I have also included a copy of the letter to the Committee concerning why it is considered necessary to specifically exclude natural justice obligations.

Committee Response

The Committee thanks the Minister for this response and notes that the bill has already been passed by the Parliament.

Senator the Hon Ian Macdonald
Chair



**THE HON NICOLA ROXON MP
ATTORNEY-GENERAL
MINISTER FOR EMERGENCY MANAGEMENT**

RECEIVED

15 AUG 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

12/12116-03

15 AUG 2012

Senator the Hon Ian Macdonald
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

I am writing to you to address issues raised by the Senate Scrutiny of Bills Committee (the Committee) in Alert Digest No. 6 of 2012 about the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill. I have addressed each of the issues separately below.

The Committee brought three of the Bill's provisions to the attention of Senators. While I note that the Committee did not request my advice on the definition of the term 'coercion', I have included details on that provision below to further assist the Committee and the Senate.

Proposed section 270.1A of the Criminal Code – definition of the term 'coercion'

As set out in the Explanatory Memorandum accompanying the Bill, the situation of many suspected victims of people trafficking, slavery, and slavery-like practices in Australia does not conform to the popular image that those crimes involve abduction, violence and physical restraint. For example, in 2009–10, the AFP received only one report of people trafficking in which physical confinement was used as a method of control.

Criminals involved in these serious crimes are often alert to law enforcement activity, prosecutorial strategies and changes in migration regulations. Consequently, sophisticated people trafficking syndicates are changing their modes of operation to avoid detection and, if detected, to make the elements of the offences harder to prove to the standard that satisfies the court and a jury. Information from law enforcement agencies such as the Australian Federal Police is that offenders often use subtle, non-physical means such as psychological oppression, the abuse of power or taking advantage of a person's vulnerability.

Currently, a number of the offences criminalising people trafficking, slavery, and slavery-like practices in Divisions 270 and 271 of the Criminal Code apply where a person uses force or threats in order to obtain a victim's compliance. However, it is arguable that the terms 'force' and 'threats' do not capture the subtle, non-physical means by which a trafficker may gain a victim's compliance. As such, a broadly drafted, non-exhaustive definition of 'coercion' is appropriate and necessary to ensure that our criminal law remains effective and responsive to emerging trends.

The definition of 'coercion' set out in proposed section 270.1A has intentionally been drafted to be broad and non-exhaustive in order to supplement the existing framework and ensure the broadest possible range of exploitative behaviour is captured and criminalised. As the Committee is aware, the proposed definition of coercion includes coercion by force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person's vulnerability.

Importantly, the prosecution will still be required to prove the elements of the relevant offence beyond a reasonable doubt. For example, in order to make out the people trafficking offence at subsection 271.2(1) of the Criminal Code, the prosecution would be required to prove beyond a reasonable doubt that the defendant:

- (a) intentionally organised or facilitated the entry or proposed entry, or the receipt, of the victim into Australia, and
- (b) the defendant intentionally used coercion; and
- (c) the defendant was reckless¹ as to the fact that his or her use of coercion would result in the defendant obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.

Proposed subsection 270.7B(4) of the Criminal Code – defence of reasonable excuse

Proposed subsection 270.7B(4) provides that the offence of being party to a forced marriage does not apply if the defendant had a reasonable excuse. There would be an evidential burden on the defendant to point to evidence which would establish that he or she had a reasonable excuse.

The Explanatory Memorandum provides an example at page 27 of a type of situation which the reasonable excuse defence would be intended to cover:

For example, a person may be aware that threats of physical harm have been made against the victim by the victim's father if she does not get married. On this basis, the person enters the marriage in order to protect the victim from the threats of harm, with the agreement of the victim. In this type of circumstance, it would be inappropriate to prosecute that person for an offence of forced marriage.

This example may be of assistance to the courts and to defendants in interpreting the defence. It is desirable that the reasonable excuse defence is cast in broad terms, as it is difficult to predict the situations which may arise in which the defence could apply. In its present form, the courts would have wide scope to interpret and apply the defence in response to the facts of particular cases which present themselves.

¹ In accordance with subsection 5.4(4) of the Criminal Code, recklessness can be established by proving intention, knowledge, or recklessness.

Proposed subsection 271.7F(3) of the Criminal Code – justification for the application of absolute liability to proposed paragraph 271.7F(1)(c)

As outlined in the Explanatory Memorandum, under proposed new section 271.7F, a person (the *first person*) commits an offence of harbouring a victim if:

- the first person harbours, receives or conceals another person (the *victim*) (new paragraph 271.7F(1)(a))
- the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of any ‘third person offence’ (new paragraph 271.7F(1)(b)), and
- the ‘third person offence’ is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 (new paragraph 271.7F(1)(c)).

Pursuant to new subsection 271.7F(3), absolute liability applies to paragraph 271.7F(1)(c) of the Criminal Code – the fact that the ‘third person offence’ is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 of the Criminal Code. However, as noted by the Committee, the Explanatory Memorandum does not provide a justification for the application of absolute liability to paragraph 271.7F(1)(c) of the Criminal Code.

The proposed offence of harbouring a victim has been carefully drafted so that it only applies to the context of harbouring a victim of a people trafficking, slavery, or slavery-like offence (that is, an offence against Divisions 270 or 271 of the Criminal Code, not including the offence of harbouring a victim itself). The application of absolute liability to the question of whether the relevant ‘third person offence’ is a people trafficking, slavery, or slavery-like offence is appropriate and necessary in the circumstances, particularly given the intended deterrent effect of the offence.

The application of absolute liability would mean a defendant could not rely on the defence of honest or reasonable mistake of fact in relation to the circumstance in paragraph 271.7F(1)(c). It would be inappropriate for the defendant to escape liability for conduct that would otherwise constitute an offence of harbouring a victim simply because the person was unaware that the offence they knowingly or recklessly assisted was of a particular type.

For example, as a result of the application of absolute liability to paragraph 271.7F(1)(c), a defendant would not be able to claim, in defence to a charge of harbouring a victim, that he or she had a mistaken but reasonable belief about whether the third party offence was a people trafficking, slavery, or slavery-like offence where the defendant had been told by the third person that the defendant was assisting the third person kidnap the victim.

Importantly, as outlined in the Explanatory Memorandum, the prosecution will still be required to prove that the defendant knew or was reckless as to the fact that the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of the 'third person offence' (i.e. the element in proposed paragraph 271.7F(1)(b)).

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'N. Roxon', with a long horizontal flourish extending to the right.

NICOLA ROXON



The Hon Chris Bowen MP
Minister for Immigration and Citizenship

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
Canberra ACT 2600

16 August 2012

Dear Senator MacDonald,

Thank you for your letter dated 16 August 2012 in relation to the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012.

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

Delegation of legislative power – commencement
Proposed Government amendment DP256 (15)

The Alert Digest states that a legislative instrument made under subsection 198AB(1) of the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 as passed by the House of Representatives on 15 August 2012 may commence prior to registration on the Federal Register of Legislative Instruments. This is incorrect.

Subsection 198AB(1B) only displaces subsection 12(1) of the *Legislative Instrument Act 2003* and not subsection 12(2) of the *Legislative Instruments Act 2003*.

As an instrument made under subsection 198AB(1) would impact on the rights of a person (other than the Commonwealth or an authority of the Commonwealth) subsection 12(2) of the *Legislative Instruments Act 2003* will continue to apply. Therefore a legislative instrument made under subsection 198AB(1) would have no effect before the date it is registered on the Federal Register of Legislative Instruments.

Subsection 198AB(1B) is inserted to ensure that a legislative instrument made under subsection 198AB(1) is subject to parliamentary scrutiny prior to commencement. It provides that despite subsection 12(1) of the *Legislative Instruments Act 2003* a legislative instrument made under subsection 198AB(1) commences at the earlier of the following times:

- immediately after both Houses of the Parliament have passed a resolution approving the designation; or
- immediately after both of the following apply:
 - a copy of the designation has been laid before each House of the

Parliament under section 198AC; and

- 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

The intention of this amendment is to provide for parliamentary scrutiny of a legislative instrument made under subsection 198AB(1). It delays commencement where the instrument has been registered on the Federal Register of Legislative Instruments until there has been an opportunity for parliamentary scrutiny of the legislative instrument.

Subsection 198AB(1B) allows for each House of Parliament to pass a resolution disapproving the designation of a country as a regional processing country under subsection 198AB(1).

Retrospective effect

Proposed Government amendment BP256 (36)

The Prime Minister and I clearly articulated on 13 August 2012 that anybody who comes to Australia by boat from that point forward runs the risk of being transferred to a regional processing country and that anybody who comes to Australia by boat should be very clear about the possibility of not having their claims processed in Australia.

I do not want to see people rushing to take dangerous boat journeys in the coming days in the belief that they can circumvent these arrangements. To do so would be grossly irresponsible, particularly in view of paragraph 198AA(a), which makes it clear that the very reason for these amendments is to prevent loss of life at sea.

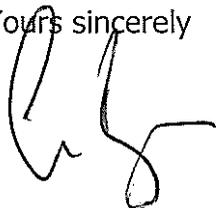
The Government has considered this risk and has determined that it is vital to send a very clear message that people should not board a boat to Australia in coming days in advance of the finalisation of regional processing arrangements. Therefore all persons have been put on notice as of that date that they may be considered under the proposed new arrangements.

While the amendments once enacted will apply to persons who arrive on or after 13 August 2012, no action under the amendment can be taken in relation to such persons until the amendments commence and relevant designations have been made and entered into force.

It is the view of the Government that the amendments are justified and do not unduly trespass on personal rights and liberties.

I have also included a copy of the letter to the Committee concerning why it is considered necessary to specifically exclude natural justice obligations.

Yours sincerely



CHRIS BOWEN

16 AUG 2012



COPY

The Hon Chris Bowen MP
Minister for Immigration and Citizenship

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

Dear Senator

Thank you for your letter dated 9 February 2012 in relation to the comments made in the Committee's *First Report of 2012* (8 February 2012) 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 Report.

On page 36 of the Report, 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 states it remains concerned about the proposed approach and requests the Minister's further advice about this issue.

While it may be the case that the observations in *Kioa v West* that you have mentioned could be argued to apply in these circumstances, that proposition is not beyond doubt. In this highly contested area of policy, any potential grounds of judicial review are likely to be pursued, with the delay that that involves. This would thwart the intent of the amendments. An explicit statement excluding natural justice is considered appropriate to ensure that the Minister's decisions are able to be acted upon in a timely and efficient manner.

Yours Sincerely

CHRIS BOWEN

13 AUG 2012