SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2015

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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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 2015

The committee presents its *First Report of 2015* 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:

Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process, whereby the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness to 31 December 2014

Bill	Portfolio	Correspondence	
		Due	Received
Acts and Instruments (Framework Reform) Bill 2014	Attorney-General	4/12/14	28/1/15
Australian Citizenship and Other Legislation Amendment Bill 2014	Immigration and Border Protection		
Further response required		4/12/14	*Not yet received*
Australian Education Amendment Bill 2014	Education	17/10/14	21/10/14
Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014	Communications	4/12/14	9/12/14
Building Energy Efficiency Disclosure Amendment Bill 2014	Industry	4/12/14	5/12/14
Carbon Farming Initiative Amendment Bill 2014	Environment		
Further response required (amendment section)		11/12/14	5/1/14
Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No.2]	Environment	24/7/14	15/8/14
Competition and Consumer Amendment (Industry Code Penalties) Bill 2014	Treasury	11/9/14	1/9/14

Bill	Portfolio	Correspondence	
		Due	**Received**
Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014	Attorney-General	20/10/14	21/10/14
Further response required		27/10/14	27/10/14
Further response required		13/11/14	24/11/14
Counter-Terrorism Legislation Amendment Bill (No. 1) 2014	Attorney-General	21/11/14	3/12/14
Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014	Attorney-General	11/9/14	23/9/14
Further response required (amendment section)		18/12/14	20/1/14
Fair Entitlements Guarantee Amendment Bill 2014	Employment	9/10/14	8/10/14
Federal Courts Legislation Amendment Bill 2014	Attorney-General	18/12/14	4/2/15
Freedom of Information Amendment (New Arrangements) Bill 2014	Attorney-General	10/11/14	24/11/14
Higher Education and Research Reform Amendment Bill 2014	Education	18/9/14	30/9/14
Migration Amendment (Character and General Visa Cancellation) Bill 2014	Immigration and Border Protection		
Further response required		27/11/14	*Not yet received*
Migration Amendment (Protection and Other Measures) Bill 2014	Immigration and Border Protection	24/7/14	11/8/14
Further response required		11/9/14	19/9/14
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014	Immigration and Border Protection		
Further response required		27/11/14	*Not yet received*
National Security Legislation Amendment Bill (No. 1) 2014	Attorney-General	16/9/14	18/9/14
Further response required		25/9/14	9/10/14

Bill	Portfolio	Correspondence	
		Due	Received
Omnibus Repeal Day (Spring 2014) Bill 2014	Prime Minister	4/12/14	15/1/15
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014	Finance	24/7/14	26/8/14
Social Security (Strengthening the Jobseeker Compliance Framework) Bill 2014	Employment	17/10/14	5/12/14
Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014	Social Services	10/11/14	21/11/14
Tax and Superannuation Laws Amendment (2014 Measures No. 4) Bill 2014	Treasury	11/9/14	4/9/14
Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014	Treasury	4/12/14	2/12/14
Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014	Attorney-General	11/12/14	4/2/15

Members/Senators responsiveness to 31 December 2014

Bill	Member/Senator	Correspondence
		Received
Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014	Senator Siewert	*
Criminal Code Amendment (Harming Australians) Bill 2013	Senator Xenophon	*
Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	Senator Xenophon	*

Bill	Member/Senator	Correspondence Received
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013	Senator Farrell	*
Great Barrier Reef Legislation Amendment Bill 2013	Senator Waters	*
Guardian for Unaccompanied Children Bill 2014	Senator Hanson-Young	*
Live Animal Export Prohibition (Ending Cruelty) Bill 2014	Mr Wilkie	*
Motor Vehicle Standards (Cheaper Transport) Bill 2014	Senator Milne	*
Privacy Amendment (Privacy Alerts) Bill 2014	Senator Singh	*
Regulator of Medicinal Cannabis Bill 2014	Senators Di Natale, Macdonald, Leyonhjelm & Urquhart	23/1/15
Save Our Sharks Bill 2014	Senator Siewert	*
Stop Dumping on the Great Barrier Reef Bill 2014	Senator Waters	24/11/14

***** not yet received

Acts and Instruments (Framework Reform) Bill 2014

Introduced into the House of Representatives on 22 October 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No.156 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 19 January 2015. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Legislative Instruments Act 2003* and other Acts to:

- consolidate the frameworks for the publication of Commonwealth Acts and the registration of legislative and other instruments by repealing the *Acts Publication Act 1905* and incorporating the requirements for publishing Commonwealth Acts into the *Legislative Instruments Act 2003*;
- establish a new category of instruments called notifiable instruments, which will be able to be registered in authoritative form; and
- clarify provisions relating to references to ministers, departments and other government authorities, and broaden existing provisions relating to machinery of government changes.

Insufficiently subject the exercise of legislative power to parliamentary scrutiny
Schedule 1, part 2, section 10 instruments declared to be legislative instruments

Current subsection 6(a) of the *Legislative Instruments Act 2003* effectively deems any instrument 'described as a regulation by the enabling legislation' to be a legislative instrument (subject to current section 7, which includes categories of instruments declared not to be legislative instruments and section 9, which declares rules of court not to be legislative instruments).

This means that unless a specific exemption is provided in the enabling legislation, any regulation is a legislative instrument and subject to the provisions of the Legislative

Instruments Act, including those relating to sunsetting and disallowance, which are essential aspects of the Parliamentary scrutiny of delegated legislation.

Proposed section 10 seeks to preserve this approach in relation to a regulation or Proclamation (other than one relating to commencement) and some other instruments. Given the importance of the disallowance process to Parliamentary scrutiny, the committee notes the current drafting practice of providing for a general instrument making power (for example, the power to make instruments that are 'required or permitted' or 'necessary or convenient'). In light of the similar character of instruments based on the general power (however described e.g. regulations, rules, determinations etc.), **the committee seeks the Attorney General's advice as to why all instruments made on the basis of general instrument making powers should not be included in the definition of instruments and so deemed to be legislative instruments (so that disallowance and sunsetting requirements apply unless they are explicitly excluded).**

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Attorney-General's response - extract

Consistent with the existing provisions of the Legislative Instruments Act, the Bill provides flexibility to specify an appropriate instrument-making power in an Act or instrument based on the nature of the proposed instruments and the particular subject matter they will deal with.

For general instrument-making powers, it is not practicable or desirable for new section 8 to provide a categorical declaration that instruments made under a broad instrument-making power are legislative instruments. This is because it would be difficult to formulate such a provision, and because it is preferable to determine the status of instruments in enabling legislation on a case-by-case basis, and to express that status clearly on the face of the enabling legislation.

For rule-making powers, which I understand to be of concern to the Committee, changing the definition of a legislative instrument to include all rules by default could have significant unintended consequences in relation to:

- rules of court, which are currently declared not to be legislative instruments, and
- rules that are not currently required to be registered or subject to disallowance, such as cabling provider rules made under subsection 421(1) of the *Telecommunications Act 1997*.

The rule-making power in this Bill has two limbs, based on the standard regulation-making power:

- rules 'required or permitted by this Act to be prescribed', and
- rules 'necessary or convenient to be prescribed for carrying out or giving effect to this Act' .

The first limb requires a specific rule-making power to be found elsewhere in the Act to trigger the exercise of the power. This should not be of concern, since the specific power will in effect be no different from any other power to make a legislative instrument. Rule-making powers can be appropriately limited by specifying the matters for which rules are required or permitted to be made in the enabling legislation. The rule-making power in new section 61A of the Legislation Act is limited in this way, and matters for which the rules are required or permitted to be made are set out in authorising provisions.

If there is a power to make rules that are 'necessary or convenient' for carrying out or giving effect to the Act, it is true that such rules are generally legislative in character, and in accordance with established government policy and drafting practice, the enabling legislation is required to declare such rules to be legislative instruments.

However, legislative instruments are described differently in different legislative contexts. The note to new subsection 8(1) of the Legislation Act gives examples of four types of instrument:

> Note: Instruments that can be legislative instruments may be described by their enabling legislation in different ways, for example as regulations, rules, ordinances or determinations.

The description of instruments by enabling legislation varies greatly, as indicated only briefly in the note. What may be called a 'rule' by one Act may be called a 'principle' in another and a 'standard' in yet another Act. Each may well be a legislative instrument under the various tests in new section 8, but need not be. It is considered that the greatest degree of transparency is achieved by including individual declarations of legislative instrument status in each enabling law, to ensure that users of the enabling law have greater certainty about the status of instruments under that law. Accordingly, the status of such instruments will be clear in the immediate context of the enabling law, without requiring users to be familiar with a generic provision in another Act (the Legislation Act).

Office of Parliamentary Counsel (OPC) Drafting Direction 3.8 addresses the use of legislative instruments. The First Parliamentary Counsel (FPC) has updated this Direction. The updated Drafting Direction takes into account issues relevant Senate Committees have raised about instrument-making powers.

Committee Response

The committee thanks the Attorney-General for this response and for his advice that 'it is not practical or desirable for new section 8 to provide a categorical declaration that instruments made under a broad instrument-making power are legislative instruments'.

While the committee notes this view, and would welcome the status of instruments being clearly expressed on the face of the enabling legislation, it considers it desirable to continue existing legislative support for the position that, generally, instruments should be deemed to be legislative and subject to disallowance and sunsetting. The committee is surprised that a workable approach could not be drafted, with appropriate exceptions, to accommodate at least a significant majority of circumstances in which a broad instrument-making power is utilised.

However, the committee also notes that Drafting Direction 3.8 itself contains a standard provision (at paragraph 22) authorising the making of legislative instruments under primary legislation, which effectively deems the instruments permitted by the enabling legislation to be legislative instruments. If this standard provision is used appropriately it will substantially address the committee's concern, as all instruments made in accordance with this general instrument making power will be legislative instruments. However, the committee remains concerned that this is subject to the approach being adopted in every instance without the safety net of a default position.

The committee intends to closely monitor this issue and expects that explanatory material will provide a detailed justification if the standard provision is not used.

The committee draws its concern that, generally, instruments should be deemed to be legislative and subject to disallowance and sunsetting to the attention of Senators, and leaves the matter to the consideration of the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 15 of 2014 - extract

Insufficiently subject the exercise of legislative power to parliamentary scrutiny
Part 2, schedule 1, item 26, sections 15D and 15V
Part 2, Division 3

These provisions seek to provide the First Parliamentary Counsel with editorial powers to amend the text of registered legislation in specified circumstances. The committee notes that the Clerk of the Senate has made a submission to the inquiry into the bill currently being undertaken by the Legal and Constitutional Affairs Legislation Committee that outlines some concerns of relevance to the Scrutiny of Bills Committee. While the Clerk has identified some practical and necessary aspects to these powers (e.g. see p. 4) the committee also notes the points made in relation to:

1. Section 15D — which will empower the First Parliamentary Counsel to correct a mistake, omission or other error in the text of registered legislation, subject to conditions. While the FPC must include in the Register a statement that the correction has been made and a brief outline of the correction in general terms, it is unclear why the correction should not be detailed with specificity. (Clerk's submission, p. 2)

2. Section 15V and the definition of editorial change in section 15X — which appear to permit a wide range of editorial and presentational changes and there is no mechanism for FPC to be required to publicly document these changes. (Clerk's submission, p. 2)

3. Paragraph 15V(2)(b) — which appears to give the FPC discretion to make an editorial change considered desirable to align the Act or instrument with legislative drafting practice being used by the Office of Parliamentary Counsel. It is not apparent that any transparency and accountability measures apply to the use of this discretion and it is not clear whether this could diminish the legislative authority of Parliament. There does not appear to be a mechanism to resolve whether Parliament would agree with the FPC that an amendment is 'desirable'. It is also unclear how the discretion would operate in relation to the existing Parliamentary processes for Chair's amendments. (Clerk's submission, pp 2–3)

The committee therefore seeks the Attorney-General's advice as to:

- **why the requirement in relation to section 15D is for an explanation in general rather than specific terms?**

Attorney-General's response - extract

The Bill will give FPC two sorts of powers. The first is to correct errors on the Register (new section 15D). This is similar to the powers that FPC already has in relation to the Federal Register of Legislative Instruments, which is being replaced. The second is to make minor editorial changes to Acts and instruments to correct an error or bring the Act or instrument into line with current drafting practices (new sections 15V-X). Editorial changes include spelling, punctuation, grammar, numbering and gender-related language.

New section 15D preserves, and rewrites more clearly, the essential features of the *Legislative Instruments Act 2003,* section 23, and *Acts Publication Act 1905,* section 8, currently described as dealing with the 'rectification' of errors in the Federal Register of Legislative Instruments or the Acts database.

The FPC only corrects the existing Federal Register of Legislative Instruments in very clear cases, for example, the removal or insertion of text to correct an obvious oversight in the compilation process. In such cases it is considered imperative to act swiftly after the identification of an error to preserve the integrity of the Federal Register of Legislative Instruments and ensure proper access to a correct statement of the law.

The existing provisions require the Federal Register of Legislative Instruments or Acts database to be annotated with the nature, day and time of the rectification and the reason for the rectification. The highly detailed nature of the corrections involved, however, makes such specific annotation redundant and overly pedantic, particularly given the additional requirement to state the reason for the rectification. This can be seen from the following examples:

Examples of rectification of Acts database under Acts Publication Act 1905, section 8

Act	Annotation	Reason stated
Railway Agreement (Western Australia) Act 1961	To remove extra word 'the' that was repeated in the first paragraph of the Second Schedule.	The word 'the' was incorrectly repeated in the Second Schedule.
Parliamentary Entitlements Act 1990	To reinsert text at the end of subsection 49(1)	The amending legislation removed paragraph 49(1)(z), the text at the end of subsection 49(1) was incorrectly removed.

Highly specific explanations of corrections are unlikely to significantly assist users of the Register. The detail involved may actually impede users from finding more relevant information about the law. It is considered that a brief outline in general terms is sufficient, and will alert interested users to investigate further. OPC is always ready to respond to user queries.

The requirement to include 'a brief outline of the correction in general terms' is not intended to provide less information than is currently provided but to make it easier to provide a clear explanation of the correction in one place. To provide additional transparency, the incorrect version of the law is never removed from the Federal Register of Legislative Instruments or the Acts database. It will also never be removed from the new Federal Register of Legislation.

Editorial changes share with corrections (or rectifications) of the Register the same detailed characteristics. To appreciate the type of changes involved, consider that most amendments in the Statute Law Revision Bills routinely prepared by the OPC would be able to be made by the editorial change powers as proposed. Reporting at the level of detail currently required for rectification under the Legislative Instruments Act or the Acts Publication Act would have the same effect as described above for corrections of the Register. That is, highly specific explanations would not significantly assist users of the Register, and the detail involved may actually impede users from finding more relevant information about the law.

For the same reason, it is considered that for editorial changes, the requirement to include 'a brief outline of the changes made in general terms' is not intended to withhold information from users of the law, but to make it easier to provide a clear explanation of the editorial changes in one place.

Committee Response

The committee thanks the Attorney-General for this response. In particular, the committee notes that the incorrect version of the law is never removed from the Federal Register of Legislative Instruments or the Acts database and the advice that “the requirement to include ‘a brief outline of the changes made in general terms’ is not intended to withhold information from users of the law, but to make it easier to provide a clear explanation of the editorial changes in one place”.

In the circumstances, the committee draws these issues to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 15 of 2014 - extract

- **how editorial powers operate in other jurisdictions, who exercises them and whether there is any mechanism for transparency or oversight, including any requirement to report on the extent to which the powers are used, or on particular uses of the power.**

Attorney-General's response - extract

All Australian jurisdictions except the Northern Territory and the Commonwealth (currently) allow for editorial changes to be made in the preparation of up-to-date consolidations of the law. A number of other Commonwealth jurisdictions (see table below) also allow for editorial changes.

The table sets out significant features of all comparable schemes, including the scheme proposed for the Commonwealth in the Acts and Instruments (Framework Reform) Bill.

Officers of the Attorney-General's Department and the OPC reviewed the comparable legislation in detail in the drafting process for the Bill. The following key points emerged:

- In most cases, the types of editorial change allowed are similar. The Bill is based on items covered in the most recently developed schemes, for example New Zealand and the Australian Capital Territory.

- In all cases except Hong Kong, the head of the Government's legislative drafting office (or an authorised employee) is responsible for making editorial changes in preparing laws for publication.

- In all cases editorial changes are not permitted if they would change the substantive effect of the law.

- Public notice of editorial change will be required by the proposed Commonwealth Legislation Act under new section 15P(l)(b). A registered compilation that incorporates editorial changes will be required to include a statement that editorial changes have been, and a brief outline of the changes in general terms. The proposed Commonwealth requirement will require as much, if not more, transparency as is required by any other comparable scheme set out below in terms of public notice requirements (similar to Queensland, New Zealand, Ontario). Some (eg the ACT) only require the recording of the fact of editorial changes. Others do not require any notice of editorial change at all to be included in the compilation.

- In no case is there any requirement for prior consultation with any particular person or body, or specific notice to a particular person or body after a change is made.
- In no case is there any requirement for reporting to Parliament on the use of the power.

Editorial powers in comparable jurisdictions

Jurisdiction	Legislation	Who exercises power	Public notice of editorial changes in compilation
Commonwealth	*Legislation Act 2003*, Ch 2, Part 2, Div 2 and s 15P	FPC	If any editorial changes are made in preparing a compilation, the compilation must include a statement that editorial changes have been made and a brief outline of the changes in general terms (s 15P(1)(b)).
ACT	*Legislation Act 2001*, Part 11.3	Parliamentary Counsel	If a republication of a law is published incorporating any editorial change, the republication must indicate the fact of editorial change in a suitable place (s 118).
NSW	*Interpretation Act 1987*, s 45E	Parliamentary Counsel	None required
Qld	*Reprints Act 1992*, Part 4	Parliamentary Counsel	If a reprint of a law is published incorporating any editorial change, the reprint must: (a) indicate the fact of editorial change in a suitable place; and (b) outline the nature of the editorial change general terms, and in a suitable place. (s 7(2))
SA	*Legislation Revision and Publication Act 2002*, s 7	Commissioner for Legislation Revision and Publication (who is the Parliamentary Counsel or another person employed in the OPC)	None required
Vic	*Interpretation of Legislation Act 1987*, s 54A, Sch 1	Chief Parliamentary Counsel	None required
WA	*Reprints Act*	Parliamentary	None required

Editorial powers in comparable jurisdictions

Jurisdiction	Legislation	Who exercises power	Public notice of editorial changes in compilation
	1984, s 7	Counsel or other authorised person employed in the PCO	
Hong Kong	*Legislation and Publication Ordinance*, CAP 614, ss 12-17 (not yet in operation)	Secretary for Justice	An editorially-amended law must indicate in a suitable place the fact that an editorial change has been made (s 14). Secretary for Justice to keep a record describing editorial amendments. An editorial change is ineffective unless recorded. There is no legal requirement to provide public access to the record, however. (ss 15-17)
New Zealand	*Legislation Act 2012*, Part 2, Subpart 2	Chief Parliamentary Counsel	If a reprint of a law is published incorporating any editorial change, the reprint must (a) Indicate the fact of editorial change in a suitable place; and (b) Outline the nature of the editorial change general terms, and in a suitable place. (s 27)
Ontario, Canada	*Legislation Act 2006*, Part 5	Chief Legislative Counsel	CLC must publically notify significant editorial changes by stating the change or the nature of the change. CLC may publically notify other changes (s 43).

Committee Response

The committee thanks the Attorney-General for this detailed response. **In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Alert Digest No. 15 of 2014 - extract

- **the proposed scope of the discretion for the First Parliamentary Counsel to make editorial changes to align an Act or instrument with legislative drafting practice, including how it would operate in conjunction with the existing process for Chair's amendments (and whether it would be reasonable for transparency and accountability requirements to apply to the use of this discretion).**

Attorney-General's response - extract

Proposed scope of discretion

At the broadest level, the FPC has the responsibility of providing the public with improved access to law by improvements in drafting practices and by the vigilant maintenance of the Register to maximise its usefulness. Having regard to the same principle, appropriate editorial changes will only be made if it is clear that they will make the law easier to use and to understand.

More specifically, in considering whether to make an editorial change to a law, the FPC must consider (under new section 15V(2)) whether the change is desirable:

- to bring the law into line, or more closely into line, with legislative drafting practice being used by the OPC, or

- to correct an error, or ensure that a misdescribed amendment is given effect to as intended.

An editorial change is not authorised unless it meets these specific criteria. Editorial changes cannot alter the effect of the legislation (new section 15V(6)).

The FPC will issue further guidance (in the form a Drafting Direction or other publically available document) about cases in which it would be appropriate to use the power.

The FPC only makes corrections to the existing Federal Register of Legislative Instruments in very clear cases. It is intended that the editorial change power will also be exercised very carefully and with due conservatism. This is the same approach that is taken to the decision about whether to include a formal amendment of a law in the regular Statute Law Revision Bills. Disputes about whether amendments made by Statute Law Revision Acts have changed the intended effect of the law are almost unheard of. The same rigorous

oversight will be extended to editorial changes in compilations to ensure that there is no perceived or actual change to the intended effect of the law concerned.

Interaction with existing process for Chair's amendments

In practice, it is rare for an OPC request for a Clerk's or Chair's correction of a Bill to be refused. In any case, the FPC would not seek to achieve by editorial amendment what could not be achieved by a parliamentary correction. On the other hand, while a Bill is before the Parliament, if a clear formal error is found, the OPC would seek to make the requisite correction by the established parliamentary process, to ensure that the Bill as enacted is correct.

Transparency and accountability

The provisions in the Bill will ensure that both corrections and editorial changes are required to be notified on the Register. New section 15D requires the FPC to 'include in the Register a statement that the correction has been made, and a brief outline of the correction in general terms'. New section 15P(l)(b) will apply to editorial changes a transparency requirement in the same terms.

This requirement is at the highest level of transparency of all the comparable jurisdictions listed above (see response to Question 2(b) and the table). As discussed in response to question 2(a), it is considered that this approach will be of more use to readers of legislation than a prescriptive requirement to describe each change individually.

To provide additional transparency, all compilations of the relevant law are retained on the Register (to enable point in time reference). This will preserve clear evidence of editorial changes on the public record.

Given the minor, formal and detailed nature of the changes involved, and the fact that public notice is required to be given in the Register of every use of the editorial change power, it is not intended to require the FPC to report to the Parliament on this matter. None of the comparable jurisdictions listed in the table require any specific reporting to Parliament on the use of the editorial change power.

The FPC and the OPC are subject to the normal annual reporting requirements applicable to other government agencies. Accordingly, OPC will include a section in its annual report summarising the use of the editorial powers each year.

An editorial change to a law has the status of an amendment of a law, albeit a minor formal amendment not having substantive effect (see new section 15W). The amendment of a law is a legislative action rather than an administrative action. So the decision to make an editorial change to the law would not be subject to administrative challenge. However, an individual suitably affected by an editorial change to the law may have a right to challenge the validity or effectiveness of the law as changed in a court. This may be possible by

seeking judicial review of the change under section 39B of the *Judiciary Act 1903* or under section 75(v) of the *Constitution.*

In addition, any individual concerned by an editorial change could raise the matter with the FPC who would take any such concerns very seriously.

Committee Response

The committee thanks the Attorney-General for this detailed response and notes the Attorney-General's advice that:

- the FPC will issue further guidance (in the form a Drafting Direction or other publically available document) about cases in which it would be appropriate to use the power;
- it is intended that the editorial change power will be exercised very carefully and with due conservatism;
- the FPC would not seek to achieve by editorial amendment what could not be achieved by a parliamentary correction (i.e. a Chair's or Clerk's amendment), and '…while a Bill is before the Parliament, if a clear formal error is found, the OPC would seek to make the requisite correction by the established parliamentary process, to ensure that the Bill as enacted is correct';
- clear evidence of editorial changes will be preserved on the public record;
- given the 'minor, formal and detailed nature of the changes involved', and the fact that public notice is required to be given in the Register of every use of the editorial change power, it is not intended to require the FPC to report to the Parliament on this matter; and that
- in addition, any individual concerned by an editorial change could raise the matter with the FPC who would take any such concerns very seriously.

continued

In relation to the scope of the editorial change power, the committee notes the Attorney-General's advice 'that most amendments in the Statute Law Revision Bills routinely prepared by the OPC would be able to be made by the editorial change powers as proposed' in the bill. In this regard, the committee notes that many items currently in Statute Law Revision bills provide for retrospective commencement. For example, in relation to the Statute Law Revision Bill 2009, the committee accepted the retrospective application of certain provisions on the basis that the explanatory memorandum provided 'a thorough explanation as to why retrospectivity is considered appropriate' and the commencement of the relevant items is tied to the time specified in the amending Act for the commencement of the misdescribed or redundant amendment (*Alert Digest 14 of 2009,* p. 21). The issue of retrospectivity continues to be one of significant interest to the committee.

The committee draws proposed section 15V (which will enable the First Parliamentary Counsel to make editorial and presentational changes to a compilation of an Act or an instrument) and the above comments to the attention of Senators.

The committee requests that the key information above be included 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.

Asset Recycling Fund Bill 2014

Introduced into the House of Representatives on 29 May 2014
Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 4 August 2014. A copy of the letter is attached to this report.

The committee deferred consideration of the Minister's letter pending detailed consideration by the Senate Regulations and Ordinances Committee of the issues raised in the letter. The Regulations and Ordinances Committee comprehensively reported on this and related matters in its *Delegated Legislation Monitor No. 17 of 2014* (tabled on 3 December 2014).

Alert Digest No. 6 of 2014 - extract

Background

This bill seeks to establish the Asset Recycling Fund which, if passed, will commence on 1 July 2014 to:

- enable grants of financial assistance to be made to the states and territories for expenditure incurred under the National Partnership Agreements on Asset Recycling and Land Transport Infrastructure Projects;
- make infrastructure national partnership grants; and
- enable the making of infrastructure payments.

Delegation of legislative power
Clause 59

Clause 59 of this bill provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of ‘rules’ rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

> OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- **whether general rule-making powers, such as clause 59, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**

- **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**

- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).**

The committee notes that it has raised the same issues in relation to substantively similar provisions in the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Trade Support Loans Bills 2014.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

Minister's response - extract

The Standing Committee for the Scrutiny of Bills has sought my advice on the general rule-making powers, such as clause 59, that would permit a rule-maker to make various other provisions, and whether there are any processes or procedure in place which provide for the Office of Parliamentary Counsel (OPC) to monitor compliance of all new legislative instruments with its drafting standards.

I have sought OPC advice on this matter, which I have attached to this letter. I consider that the First Parliamentary Counsel, Mr Peter Quiggin PSM, has provided a useful analysis of the issues and a thoughtful response to the questions raised by the Committee. I share his view that OPC resources should be dedicated to the highest risks and to drafting instruments that have the greatest impacts on the community.

I thank the Committee for its comments on the *Asset Recycling Fund Bill 2014.*

I have copied this letter to Mr Quiggin.

Advice from Mr Peter Quiggin, First Parliamentary Counsel of the Office of Parliamentary Counsel - extract

Asset Recycling Fund Bill 2014-Request for information from Senate Standing Committee for the Scrutiny of Bills

Background

1. In Alert Digest No. 6 of 2014, the Senate Standing Committee for the Scrutiny of Bills asked you for information on matters relating to the general rule making power in clause 59 of the Asset Recycling Fund Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) in relation to those matters.

2 Clause 59 is as follows:

59 Rules

The Finance Minister may, by legislative instrument, make rules prescribing matters:

(a) required or permitted by this Act to be prescribed by the rules; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The Committee's comments on the clause were as follows:

Delegation of legislative power
Clause 59

Clause 59 of this bill provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

> OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the

committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1-5). The committee notes that the Regulations and Ordinances Committee bas sought further advice about this and other matters relating to the issue.

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- **whether general rule-making powers, such as clause 59, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**
- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in**

accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).

Prescribing of matters by legislative rules

4 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).

Ramifications for the quality and scrutiny of legislative rules

5 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues. The information set out in the following paragraphs supplements the information previously provided to the Committee in a letter from me (the OPC Farm Household Support letter) responding to concerns raised by the Committee in Alert Digest No. 3 of 20 l4 in relation to clause 106 of the Farm Household Support Bill 20 l4. Extracts of my letter were set out in the Committee's Fifth Report of 2014. Similar supplementary information has already been provided to the Senate Standing Committee on Regulations and Ordinances.

1. OPC's drafting functions

(a) OPC's drafting functions generally

6 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

7 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

8 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

9 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

10 ln relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

11 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

12 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

13 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker

of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

14 *Drafting Direction No.3.8-Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

15 Under section 16 of the *Legislative Instruments Act 2003,* I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

16 I am also required to govern OPC in a way that promotes proper use and management of public resources for which I am responsible (see section 15 of the *Public Governance, Performance and Accountability Act 2013),* including resources allocated for the drafting of subordinate legislation.

17 I consider that DD3.8 is an appropriate response to this responsibility in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

18 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

19 As mentioned in the OPC Farm Household Support letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

20 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies". The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

21 In my view, the Council's statement is still accurate today.

22 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

23 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

24 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

25 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately

included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

26 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

(d) Proliferation of number and kinds of legislative instruments

27 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

28 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

29 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

30 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

31 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

32 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

33 In response to the material in OPC Farm Household Support letter the Committee has stated, in its Fifth Report of 20l4:

> From the information available to the committee it appears that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process. It may also negatively impact on the standard to which important legislative instruments are drafted with flow-through impact on the ability of Parliament (and the public in general) to effectively scrutinise such instruments.

34 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

The first issue raised by the Committee: whether general rulemaking powers would permit a rule-maker to make certain kinds of provisions

35 The Committee has asked whether a general rule-making power would permit the rule-maker to make the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(c) seizure provisions;

(f) provisions which make textual modifications to Acts;

(g) provisions where the operation of an Act is modified;

(h) civil penalty provisions;

(i) provisions which impose (or set or amend the rate) of taxes;

(j) provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

36 The standard form of a general rule-making power contains:

(a) a "required or permitted" power; and

(b) a "necessary or convenient" power.

37 The Committee's question needs to be considered separately in relation to each of those powers.

The "required or permitted" power

38 The "required or permitted" power authorises the rule-maker to make rules prescribing matters "required or permitted by this Act to be prescribed by the rules". This is not a power at large. Its scope is entirely dependent on what other provisions of the same Act expressly say must or may be done in the rules.

39 Could another provision of the same Act expressly authorise the rules to include provisions of the kinds identified by the Committee? In theory yes, but there are some significant constraints on this.

40 The first constraint is that the provision containing the express authorisation must have been passed by both Houses of the Parliament. A Bill introduced into Parliament may contain clauses purporting to expressly allow rules to contain provisions of one or more of these kinds, but the question whether the clauses are agreed to by the Parliament is of course a matter for each of the Houses.

41 The second constraint arises out of OPC's drafting policy as set out in DD3.8. This sets out OPC's approach to drafting instrument-making powers, including general rulemaking powers. It contains a number of paragraphs affecting the approach that the drafter of a Bill should take when drafting provisions that will allow matters to be dealt with by rules or regulations.

The "necessary or convenient" power

42 The "necessary or convenient" power authorises the rule-maker to make rules prescribing matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act." Like the "required or permitted" power, this is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act...will usually

indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

43 The Committee's list of kinds of provisions differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number l02 dated 26 February 2014 (http://www.ags.gov .au/publications/legal-briefing/br102.html).

44 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions in the Committee's list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

45 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

46 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency.

47 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

The second issue raised by the Committee: whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards

48 The Committee has asked whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined

above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of DD3.8).

49 All OPC drafters are required to comply with DD3.8. This is part of their broader obligation to comply with all the Drafting Directions.

50 OPC does not monitor whether legislative instruments drafted outside OPC comply with drafting standards (or Drafting Directions). OPC does not have resources to perform a monitoring role in relation to all such instruments, nor is it appropriate for it do so. The responsibility for ensuring that an instrument is within power, and complies with drafting standards, should lie with the rule-maker. The options mentioned in paragraphs 45 and 46 would assist a rule-maker's ability to ensure instruments are within power, and would emphasise the rule-maker's responsibility.

Conclusion

51 I would be happy to provide further information if that would be of assistance.

Committee Response

The committee thanks the Minister and First Parliamentary Counsel for the detailed response.

The committee notes that it deferred consideration of these aspects of the bill pending detailed consideration by the Senate Regulations and Ordinances Committee, which comprehensively reported on this and related matters in its Delegated Legislation Monitor No. 17 of 2014 (tabled on 3 December 2014). The committee also notes that the Office of Parliamentary Counsel released its new Drafting Direction 3.8 (DD3.8), *Subordinate Legislation*, in December 2014 which 'notes some considerations, and sets out some standard forms, for drafting provisions of legislation dealing with subordinate legislation' of direct relevance to the matters outlined above.

The committee supports the views of the Regulations and Ordinances Committee outlined in Monitor No. 17 of 2014 and particularly notes that it will be closely monitoring:

- instances of general instrument-making powers in primary legislation that are inconsistent with DD3.8 and whether the justification for, and scope of, the power is clearly addressed in accompanying material;

- the DD3.8 requirement to recommend to instructors that the explanatory memorandum should provide a 'strong justification' for not prescribing the specific significant matters in regulations, and set out the factors or criteria relevant to that justification (paragraph 30); *continued*

- the DD3.8 requirement that Acts should include a provision to specify that, in the event of a conflict, regulations will prevail over general instruments (such as rules). Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted (paragraph 38);

- the DD3.8 requirement that Acts should include a provision preventing the delegation of the power to make legislative instruments under a general instrument-making power. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the Explanatory Memorandum should explain the approach that has been adopted (paragraphs 24 and 25); and

- the extent to which the standard provision authorising the making of legislative instruments under primary legislation is being used (as it is drafted in a way that will ensure that instruments generally continue to be subject to disallowance and sunsetting requirements) (paragraph 22).

The committee makes no further comment on this particular bill, but draws these important general matters to the attention of Senators.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014

Introduced into the House of Representatives on 22 October 2014
Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No. 15 of 2014*. The Minister responded to the committee's comments in a letter received on 9 December 2014. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* and the Australian Communications and *Media Authority Act 2005* to:

- remove certain requirements that related to the initial planning of services in the broadcasting services bands spectrum;
- remove the requirement for reports made by certain subscription television licensees and channel providers under the New Eligible Drama Expenditure Scheme to be independently audited;
- remove the requirement for codes of practice to be periodically reviewed; remove the requirement for certain licensees to provide an annual list of their directors and captioning obligations;
- clarify the calculation of media diversity points in overlapping licence areas; provide for grandfathering arrangements for certain broadcasting licensees;
- make technical amendments for references to legislative instruments;
- remove redundant licensing and planning provisions that regulated the digital switchover and restack processes; and
- make consequential amendments.

Insufficiently subject the exercise of legislative power to parliamentary scrutiny
Schedule 4, item 1

This item repeals section 123A of the *Broadcasting Services Act 1992* (the BSA). This section requires the ACMA to conduct periodic reviews to assess whether codes developed under subsections 123(3A) and (3C) are in accordance with community standards. These codes of practice relate to the classification system for Films under the *Classification (Publication, Films and Computer Gams) Act 1995*. Subsection 123A(2) requires the ACMA to make recommendations to the Minister that the BSA be amended if, after conducting a review, it concludes that the codes are not in accordance with prevailing community standards; subsection 123A(3) requires the Minister to table a copy of such a recommendation in each House of Parliament within 15 sitting days after receiving the recommendation.

The explanatory memorandum (at p. 5) justifies this proposed amendment as follows:

> There are alternative mechanisms for the ACMA to determine whether these provisions operate in accordance with prevailing community standards. This may be based upon the volume of complaints received from viewers or the ACMA's own inquiries. In addition the industry codes of practice are periodically reviewed and the ACMA is required to ensure that a draft code provides appropriate community safeguards prior to registration.

Regrettably, this justification does not address the question of whether it is appropriate that Parliament be deprived of the function of scrutinising advice about the exercise of legislative power (i.e. the ACMA recommendations in relation to whether the codes comply with community standards).

The committee therefore seeks the Minister's advice as to the removal of this function and why these amendments should not be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

Minister's response - extract

The Committee has sought my advice as to why these amendments should not be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle l(a)(v) of the Committee's terms of reference.

Policy reasons for the proposed repeal

The Government is proposing that section 123A of the BSA be repealed on the grounds that it is redundant and because there are other well established processes for ensuring the classification arrangements in certain industry codes reflect prevailing community standards. The relevant industry codes are required to be periodically reviewed, and before the Australian Communications and Media Authority (the ACMA) can register the code it must satisfy itself that the code provides relevant community safeguards.

The Government has a strong focus on deregulation including removing redundant provisions in legislation. It is notable that neither the ACMA, nor its precedent bodies, have undertaken a review under section 123A since the enactment of the provision in 1992.

Effect of section 123A

The BSA provides a co-regulatory framework for the development of television and radio codes of practice. Under this framework industry groups representing sectors of the broadcasting market may develop codes of practice in consultation with the ACMA, that are applicable to broadcasting operations in each section of the market (subsection 123(1)). The BSA also lists the matters that a code of practice may relate to (section 123(2)).

In developing codes of practice in relation to certain matters, industry groups representing commercial television licensees, community television licensees (subsection 123(3A)) and the providers of open narrowcasting television services (subsection 123(3C)) must ensure that their codes of practice:

- for the purpose of classifying films, apply the classification system provided by the *Classification (Publications, Films and Computer Games) Act 1995;*
- provide methods for modifying films so that they are suitably classified to be broadcast at particular times;
- provide that films classified as "M" and "MA" are only broadcast within certain time zones; and
- have methods for the provision of advice to consumers on the reasons for a film's receipt of a particular classification.

Section 123A of the BSA places a statutory requirement on the ACMA to periodically conduct a review of the operation of sections 123(3A) and (3C) to see that they are in accordance with prevailing community standards (section 123A(1)). If the review concludes that either subsection 123(3A) or (3C) is not in accordance with prevailing community standards, then the ACMA must recommend appropriate amendments to the BSA that would ensure these subsections, as the case requires, are in accordance with prevailing community standards (subsection 123A(2)). Upon receiving such a recommendation, the Minister for Communications must table a copy of the recommendation in each House of the Parliament within 15 sitting days (subsection 123A(3)).

Subject legislative power to parliamentary scrutiny

I note that the advice that can be provided by the ACMA to the Minister under section 123A relates only to potential amendments to the BSA and not to the codes of practice themselves. As such the advice would not equate to the determination of the law, rather the ACMA would merely be recommending possible future changes to the BSA. The implementation of such advice can only be through amendment to the primary legislation. This would require relevant policy approvals, which would then be subject to parliamentary scrutiny through the normal processes of review and passage by the Parliament.

For these reasons, the proposed repeal of section 123A of the BSA should not be considered as depriving the Parliament of its function of scrutinising the exercise of legislative power in breach of principle 1(a)(v) of the Committee's terms of reference.

I hope that the information provided in this letter will assist the committee in further review of the proposed amendments to the repeal of section 123A to the BSA. The ACMA has been consulted in the preparation of this advice.

Committee Response

The committee thanks the Minister for this response which clarifies the operation of section 123A of the *Broadcasting Services Act 1992* and **requests that the key information above be included in the explanatory memorandum**.

Building Energy Efficiency Disclosure Amendment Bill 2014

Introduced into the House of Representatives on 22 October 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 15 of 2014*. The Minister responded to the committee's comments in a letter dated 3 December 2014. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Building Energy Efficiency Disclosure Act 2010* (BEED Act) to:

- allow building owners who receive unsolicited offers for the sale or lease of their office space and transactions between wholly-owned subsidiaries to be excluded from energy efficiency disclosure obligations;
- enable certain auditing authorities to directly provide or approve ratings used in Building Energy Efficiency Certificates (BEEC);
- enable businesses to nominate a commencement date for a BEEC which is later than the date of issue;
- remove the need for new owners and lessors to reapply or pay the application fee for fresh exemptions if there is an existing one in place for a building; and
- remove the standard energy efficiency guidance from each BEEC.

Delegation of legislative power
Item 20, proposed paragraph 17(3)(c)

This paragraph provides that the secretary may grant an exemption from an energy efficiency disclosure obligation 'in circumstances prescribed by regulation for the purposes of this paragraph'. The explanatory memorandum notes that a new class of exemptions will be set out in the regulations which will provide exemptions to building owners who receive unsolicited offers for the sale or lease of their office space. However, there is no discussion in the explanatory memorandum as to why this new category should be provided for by regulation and why it is necessary for a power for further exemptions to be included by

legislative instrument. **The committee therefore seeks the Minister's more detailed advice about the appropriateness of this delegation of power.**

> *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

The introduction of an exemption class for building owners who receive unsolicited offers for the sale or lease of their office space will lead to $0.3 million estimated reduction of regulatory burden.

The Office of Parliamentary Counsel was consulted on the issue raised in the Alert Digest and advised that the BEED Act already enables regulations to prescribe classes of cases in which the Secretary can grant exemptions from particular obligations under the BEED Act. Proposed paragraph 17(3)(c), referred to in the Alert Digest, closely resembles the same paragraph in the existing legislation and does not represent a significant departure from the current legislative scheme enacted by the Parliament in 2010.

Having a regulation-making power dealing with exemptions gives the Secretary of the Department of Industry flexibility to react to commercial circumstances in the industry. Unforeseeable changes may require revision of exemption classes at short notice in the future. If each different type of exemption resulted in an amendment to the BEED Act, the impact on business would be considerable.

The BEED Regulations will be tabled in Parliament in due course and subject to disallowance. They will also be scrutinised by the Senate Standing Committee for Regulations and Ordinances (SSCRO). As you would be aware, it is part of SSCRO's brief to consider whether instruments that come before it are appropriate exercises of delegated legislative power.

Committee Response

The committee thanks the Minister for this response.

The committee is aware of similar powers in the Act. While this is a relevant consideration, the committee looks at each instance in which powers are sought and is of the view that a strong justification should be provided for a perceived need for 'flexibility'. The committee notes the Minister's advice that flexibility is considered necessary 'to react to commercial circumstances in the industry'. Nevertheless, the committee would have been further assisted by an elaboration of the reasons for this conclusion which referred, as appropriate, to examples.

The committee also notes the Minister's advice as to the potential considerable impact on business if each different type of exemption required an amendment to the Act.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Business Services Wage Assessment Tool Payment Scheme Bill 2014

Introduced into the House of Representatives on 5 June 2014
Negatived in Committee of the Whole on 24 November 2014
Portfolio: Social Services

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 5 August 2014. The committee provided its responses to most aspects of the Minister's letter in its *Tenth Report of 2014*. A copy of the letter was attached to that report.

The committee deferred consideration of clause 102 of the bill pending detailed consideration by the Senate Regulations and Ordinances Committee of the issues raised by this clause. The Regulations and Ordinances Committee comprehensively reported on this and related matters in its *Delegated Legislation Monitor No. 17 of 2014* (tabled on 3 December 2014).

Delegation of legislative power
Clause 102

Please refer to the committee's response in relation to clause 59 of the Asset Recycling Fund Bill 2014 at pages 34–35 of this Report as the committee's response to the issues raised by both clause 102 of this bill and clause 59 of the Asset Recycling Fund Bill 2014 are identical.

Carbon Farming Initiative Amendment Bill 2014

Introduced into the House of Representatives on 18 June 2014
Received Assent on 25 November 2014
Portfolio: Environment

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No. 16 of 2014*. The Minister responded to the committee's comments in a letter dated 5 January 2015. A copy of the letter is attached to this report.

Alert Digest No. 16 of 2014 - extract

Background

This bill seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the *National Greenhouse and Energy Reporting Act 2007*, the *Australian National Registry of Emissions Units Act 2011* and the *Clean Energy Regulator Act 2011* to provide for the establishment of the Emissions Reduction Fund.

Xenophon amendment (2) on sheet 7587, section 22XF of the National Greenhouse and Energy Reporting Act 2007

This new section creates a duty on the responsible emitter for a facility to ensure that an 'excess emissions situation' does not exist. Paragraphs 22XF(1)(e) and (f) create a civil penalty of up to 'one-fifth of the prescribed number of penalty units' for an individual and up to 'the prescribed number of penalty units' otherwise. Subsection 22XF(2) provides that 'prescribed number' for this purpose 'means the number prescribed by the regulation'.

While subsection 22XF(3) provides that the minister must have regard to 'the principle that a responsible emitter must not be allowed to benefit from non-compliance, having regard to the financial advantage the responsible emitter could reasonably be expected to derive from an excess emissions situation' there appears to be no other limit on the exercise of this regulation-making power.

The *Guide to framing Commonwealth offences, infringement notices and enforcement powers* provides that regulations should not be authorised to impose fines exceeding 50 penalty units for an individual or 250 penalty units for a body corporate (pp 44–45). This principle is to ensure that there is the opportunity for full Parliamentary scrutiny of more serious offences and higher level penalties and is therefore equally relevant to the level of penalty for civil penalties.

In this case, the explanatory notes to the amendments do not provide any detailed rationale for the approach. **The committee recognises that this provision originated as a non-government amendment, however as it will now form part of the Act the committee seeks the minister's advice as to the rationale for providing for the level of penalty in delegated legislation rather than in the primary legislation. In particular, the committee seeks advice in relation to:**

- **whether consideration has been given to providing for the number of penalty units that may be prescribed under the provision in the primary legislation; and**
- **if the number of penalty units is not to be determined in the primary legislation—the committee is interested in how the regulation-making power will be administered, for example, will any guidelines or policies ensure that the determination of the number of penalty units is conducted in a public and transparent manner (which would, in turn, assist in Parliamentary scrutiny of any relevant regulation)?**

Minister's response - extract

Specifically, I refer to the request by the Senate Scrutiny of Bills Committee for my advice on section 22XF of the amendment in relation to:

- whether consideration has been given to providing for the number of penalty units that may be prescribed under the provision in the primary legislation; and
- if the number of penalty units is not to be determined in the primary legislation—the committee is interested in how the regulation-making power will be administered, for example, will any guidelines or policies ensure that the determination of the number of penalty units is conducted in a public and transparent manner (which would, in turn, assist in Parliamentary scrutiny of any relevant regulation)?

Firstly, I note that although Senator Xenophon's amendment delegates the maximum number of penalty to the regulations, the amendment includes an important principle guiding the specification of the amount in paragraph 22XF(3)(a). To have full regard to this principle and determine 'the financial advantage the responsible emitter could reasonably be expected to derive from an excess emissions situation', it will be important that I consider the details to be included in the safeguard rules. The key safeguard rules must be in place by 1 October 2015 after consultation with stakeholders.

On the issue of facilitating Parliamentary scrutiny of the regulations, I note the requirement in subitem 60(2) of Schedule 2 to the Bill to set the maximum penalty amount in regulations before 1 October 2015. This requirement ensures appropriate Parliamentary scrutiny of the number of penalty units a full nine months before commencement of the

safeguard mechanism provisions on 1 July 2016. Details of the regulations will also be included in the relevant explanatory statement and the ordinary Parliamentary disallowance procedures will apply.

Committee Response

The committee thanks the Minister for this response and notes the principle outlined in paragraph 22XF(3)(a). While the committee recognises that the regulation will be subject to ordinary Parliamentary disallowance procedures, the committee reiterates its general concern about provisions which delegate setting of the maximum number of penalty units to regulations. The committee notes that the level of Parliamentary scrutiny of such regulations (i.e. the disallowance process) is often lower than that which would occur if the maximum penalty was set in the primary legislation.

As this amendment already forms part of the Act the committee makes no further comment in relation to this matter.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

Introduced into the Senate on 29 October 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 15 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 3 December 2015. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Criminal Code Act 1995* and the *Intelligence Services Act 2001* to:

- enable the Australian Federal Police to request, and an issuing court to make, a control order in relation to those who 'enable' and those who 'recruit' in relation to a 'terrorist act' or 'hostile activity';

- reduce the information required to be provided to the Attorney-General when seeking consent to request an interim control order;

- extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court;

- require the Attorney-General to advise the Parliamentary Joint Committee on Intelligence and Security before amending a regulation that lists a terrorist organisation and to allow the committee to review any proposed change during the disallowance period;

- provide that it is a function of the Australian Secret Intelligence Service (ASIS) to provide assistance to the Australian Defence Force (ADF) in support of military operations and to cooperate with the ADF on intelligence matters; and

- amend arrangements for emergency ministerial authorisations which apply to ASIS, the Australian Signals Directorate and the Australian Geospatial Intelligence Organisation.

Attorney-General's general comment - extract

My responses to the 10 matters on which your Committee has sought my further advice are provided at Enclosure 1.

I have also taken the liberty of providing two additional documents at **Enclosure 2**, which may be of assistance to the Committee in completing its examination of the proposed amendments in Schedule 2 to the Bill, regarding the *Intelligence Services Act 2001*. These are unclassified submissions from my Department (AGD) to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the Bill, which tabled an advisory report on the Bill on 20 November 2014. The PJCIS recommended that the Bill be passed, subject to a small number of targeted amendments to strengthen safeguards and oversight measures. The Government has released a response to that report, accepting all recommendations in full or in principle. A copy of that response is provided at **Enclosure 3**.

[A copy of Enclosures 2 and 3 are included with the Attorney-General's response and is attached at the back of this report]

I trust that this information is of assistance to your Committee. I look forward to considering your Committee's report on the Bill in due course.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties—control orders
Schedule 1, item 7, proposed paragraphs 104.2(2)(c) and 104.2(2)(d) of the *Criminal Code*
Schedule 1, item 11, proposed subparagraphs 104.4(1)(c)(vi) and 104.4(1)(c)(vii) of the *Criminal Code*

As the committee has recently stated:

> The control order regime established by Division 104 of Part 5.3 of the *Criminal Code* constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence upon a conviction.
>
> In contrast, control orders provide for restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a

> court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised (at least, as a matter of degree). The extraordinary nature of the control order regime is recognised in the current legislation by the setting of a sunset period, due to expire in December 2015 (*14th Report of 2014*, p. 797).

In view of this general concern, any proposal to extend the grounds on which an interim control order can be requested, or issued, must be subject to close scrutiny.

Two further preliminary matters may also be noted. First, the committee has expressed its concurrence with the position stated by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that a new sunset date of 24 months after the next federal election would enable the Parliament sufficient time to fully consider the appropriateness of the current control order regime, and that this consideration 'should be done through a thorough public review of each power by the PJCIS to be completed 18 months after the next federal election' (*14th Report of 2014*, p. 800).

Second, in its original comment on the continuation and expansion of the control order regime in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the committee also noted that it was a matter of concern that objections raised by the INSLM in relation to the existing control order regime (chapter II of the INSLM's second annual report, 20 December 2012, pp 6–44) had not been addressed in the explanatory memorandum to that bill (*14th Report of 2014*, p. 798).

At a general level, the committee expresses reservations about expanding the grounds upon which a control order can be requested and issued in the absence of a comprehensive public review of the operation of the existing provision (which, as noted above, is to occur within 18 months after the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

In light of this background, the committee is concerned that item 7 proposes to introduce two new grounds upon which a senior AFP member can seek the Attorney-General's consent to request an interim control order. The first of these grounds is that the senior AFP member 'suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing the provision of support for the facilitation of a terrorist act' (proposed paragraph 104.2(2)(c)). It is important to note that item 11 also proposes to expand the grounds upon which an issuing court can make an interim control order consistent with the amendments proposed in item 7 (proposed paragraph 104.4(1)(c)(vi)).

Existing paragraph 104.2(2)(a) provides that a ground for seeking the Attorney-General's consent to request an interim control order is a that the senior member 'suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act'. The explanatory materials do not fully explain the extent to which proposed paragraph 104.2(2)(c) would be a ground for seeking a control order

beyond circumstances already covered by existing paragraph 104.2(2)(a). In particular, it is unclear whether an order sought on the basis of a reasonable suspicion that the order would substantially assist in preventing the provision of support for the facilitation of a terrorist act would be available even if the intended support would, in fact, not substantially assist an intended perpetrator in undertaking a terrorist act. **The committee therefore requests further clarification from the Attorney-General in relation to the extent to which:**

- **consent may be sought to request an interim control order under proposed paragraph 104.2(2)(c); or**
- **an interim control order may be issued under subparagraph 104.4(1)(c)(vi)**

even if the order would, in fact, not substantially assist in preventing a genuine terrorist threat.

Attorney-General's response - extract

(1) Additional grounds for requesting and issuing a control order (Items 7 and 11)

The committee therefore requests further clarification from the Attorney-General in relation to the extent to which,

- *consent may be sought to request an interim control order under proposed paragraph 104.2(2)(c), or*
- *an interim control order may be issued under subparagraph 104.4(l)(c)(vi) even if the order would, in fact, not substantially assist in preventing a genuine terrorist threat.*

The Bill would amend the *Criminal Code Act 1995* (the Criminal Code) to authorise the AFP to seek the Attorney-General's consent to request an interim control order on the grounds that the order in the terms requested would substantially assist in preventing the provision or support of a terrorist act (paragraph 104.2(2)(c)).

The issuing court can only make an interim control order in response to such a request if the issuing court is satisfied on the balance of probabilities of one of the matters listed in paragraph 104.4(1)(c)(i) to (vii) and the issuing court is also satisfied that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of one of the matters listed in paragraphs 104.4(1)(d).

In other words, the issuing court must be satisfied on the balance of probabilities either:

(i) that making the order would substantially assist in preventing a terrorist act, or

(ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation, or

(iii) that the person has engaged in a hostile activity in a foreign country, or

(iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1), or

(v) that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the *Crimes Act 1914*), or

(vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act, or

(vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country

and that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of either:

(i) protecting the public from a terrorist act, or

(ii) preventing the provision of support for or the facilitation of a terrorist act, or

(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

The addition of subparagraphs 104.4(1)(d)(ii) and (iii) reflect that to prevent a genuine terrorist threat in the current security environment, it may be necessary for law enforcement to intervene earlier and disrupt activities before there is sufficient evidence that would satisfy a court on the balance of probabilities that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes protecting the public from a terrorist act. Subparagraphs 104.4(1)(d)(ii) and (iii) ensure that this does not limit the ability of the AFP to ensure public safety and prevent a genuine terrorist threat in such circumstances.

Committee Response

The committee thanks the Attorney-General for this response and, in particular, notes the Attorney-General's statement that additional grounds for requesting and issuing a control order are necessary because 'it may be necessary for law enforcement to intervene earlier and disrupt activities before there is sufficient evidence that would satisfy a court on the balance of probabilities that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes protecting the public from a terrorist act.'

continued

The committee reiterates its view that any decision to expand the grounds upon which a control order can be requested and issued must be subject to close scrutiny as the control order regime may be considered to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

The second of the new grounds upon which a senior AFP member can seek the Attorney-General's consent to request an interim control order is that the member 'suspects on reasonable grounds that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country' (proposed paragraph 104.2(2)(d)). Again, item 11 also proposes to expand the grounds upon which an issuing court can make an interim control order consistent with the amendments proposed in item 7 (proposed paragraph 104.4(1)(c)(vii)).

The explanatory memorandum (at pp 19 and 21) suggests that it:

> …is appropriate to include this additional ground on the basis that a person who has actually provided support or facilitated a hostile activity in a foreign country has not only a demonstrated ability but also a demonstrated propensity to engage in conduct in support or facilitation of conduct akin to a terrorist act.

Given the general reservations about the control order regime stated above, it is a matter of concern that there is no requirement that the support for, or facilitation of, engagement in a hostile activity be substantial. This means that control orders could conceivably be imposed in relation to actions which were not important contributors to another person undertaking hostile activities in a foreign country. Nor is it clear whether the expression of support in conventional or social media would be covered by this provision. Neither the nature nor extent of support or facilitation is defined. The result is that this expansion of the operation of the control order regime is of broad yet uncertain operation. Noting the committee's general comments about the potential for the control order regime to unduly trespass on personal rights and liberties, **the committee requests the Attorney-General's advice as to the rationale for the proposed approach, including whether consideration has been given to more precisely defining what may constitute 'support for' a hostile activity in a foreign country, for example, a requirement aimed at limiting the application of the provision to substantial support for a hostile activity in a foreign country.**

Attorney-General's response - extract

(2) Additional grounds for requesting and issuing a control order (Items 7 and 11)

The committee requests the Attorney-General's advice as to the rationale for the proposed approach, including whether consideration has been given to more precisely defining what may constitute 'support for' a hostile activity in a foreign country, for example, a requirement aimed at limiting the application of the provision to substantial support for a hostile activity in a foreign country.

Although an interim control order can be requested on the grounds that the person 'has provided' support for or otherwise facilitated the engagement in a hostile activity in a foreign country, an order can only be made where the order would meet a protective or preventative threshold. Specifically, an order can only be made if it would 'protect' the public from a terrorist act, 'prevent' support or facilitation of a terrorist act, or 'prevent' the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. In other words, the fact that a person has engaged in the relevant conduct is not sufficient for the making of an order.

From 1 December 2014, when the relevant provisions of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* come into effect, 'engage in a hostile activity' will be defined in section 117.1 of the Criminal Code to mean:

> engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):
>
> (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);
>
> (b) the engagement, by that or any other person, in action that:
>
> (i) falls within subsection 100.1(2) but does not fall within subsection 100.1(3); and
>
> (ii) if engaged in in Australia, would constitute a serious offence;
>
> (c) intimidating the public or a section of the public of that or any other foreign country;
>
> (d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);

(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

Accordingly, the new ground for applying for an interim control order will be available in relation to a person who engages in conduct of the type described above. The terms 'support' and ' facilitation' have their ordinary meaning and are appropriately left for the courts to determine. They have not been defined for a number of reasons including that defining them for the purposes of Division 104 could undermine the operation of the provisions by removing the flexibility to request a control order for different types of conduct which may amount to support or facilitation. In addition, given those expressions are used elsewhere in the Criminal Code, defining them for the purposes of the control order regime could have unintended consequences for the interpretation of those terms in other Criminal Code offences. This includes in the context of a number of terrorism offences, including intentionally providing to an organisation support or resources that would help the organisation engage in an activity providing support to a terrorist organisation (section 102.7), providing or collecting funds, reckless as to whether the funds will be used to facilitate or engage in a terrorist act (section 103.1), making funds available to another person reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (section 103.2). It also includes offences for conduct unrelated to terrorism, including organising or facilitating the entry of another person into a foreign country (section 73.1) and making, providing or possessing a false travel or identity document with the intention that the document will be used to facilitate the entry of another person into a foreign country (section 73.8).

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's statement which emphasises that while an interim control order can be requested on the grounds that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country, an order can only be made where the order would meet a protective or preventative threshold. The Attorney-General states that 'an order can only be made if it would 'protect' the public from a terrorist act, 'prevent' support or facilitation of a terrorist act, or 'prevent' the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. In other words, the fact that a person has engaged in the relevant conduct is not sufficient for the making of an order.'

continued

The committee reiterates its view that any decision to expand the grounds upon which a control order can be requested and issued must be subject to close scrutiny as the control order regime may be considered to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. This is particularly the case where neither the nature nor extent of 'support' or 'facilitation' is defined and the expansion may therefore mean that the operation of the control order regime is of a broad or uncertain operation.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

The committee also notes that a further potential difficulty with this new ground for the imposition of control orders is that the activities on which it is based need not be linked to terrorism. **Given that 'hostile activity' might cover a wide range of activities, the committee also requests further clarification from the Attorney-General as to:**

- **why support for, or facilitation of engagement in, a 'hostile activity' can be seen as demonstrating a propensity 'to engage in conduct in support or facilitation of conduct akin to a terrorist act'; and**
- **whether 'hostile activity' can be explicitly connected to terrorism in the bill.**

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

(3) Additional grounds for requesting and issuing a control order (Items 7 and 11)

Given that 'hostile activity' might cover a wide range of activities, the committee also requests further clarification from the Attorney-General as to,

- *why support for, or facilitation of engagement in, a 'hostile activity' can be seen as demonstrating a propensity 'to engage in conduct in support or facilitation of conduct akin to a terrorist act', and*

- *whether 'hostile activity' can be explicitly connected to terrorism in the bill.*

When considering a request for an interim control order on the either of the 'support' and 'facilitation' grounds, the issuing court will first need to determine whether the proposed subject's conduct amounts to support or facilitation or both.

Once the issuing court has determined which ground is being relied upon (support or facilitation or both), it will need to consider whether the control order obligations, prohibitions and restrictions to be imposed on the person are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing that support or facilitation.

The Independent National Security Legislation Monitor (INSLM) reviewed the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) in his fourth annual report on the basis that Foreign Incursions Act was related to Australia's counter-terrorism and national security legislation for the purposes of subparagraph 6(1)(a)(ii) of the *Independent National Security Legislation Monitor Act 2010*[1]. In that report, he noted:

> The Criminal Code provisions of the CT laws overlap considerably with the provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ... [The CT Laws and the Foreign Incursions Act present some anomalies and mismatches that detract from their effectiveness as laws to criminalize terrorism.

The conduct criminalised by both the Foreign Incursions Act, which will be inserted into a new Part 5.5 of the Criminal Code on 1 December 2014, and Part 5.3 of the Criminal Code is similar and, in some instances will be the same (noting that terrorism offences require the additional motivational element to be satisfied).

Australians who participate in foreign conflicts may be involved in the perpetration of violence, which at its most serious could involve unlawful death or an intention to cause unlawful death. Moreover, those returning from foreign conflicts to Australia may have enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia. Accordingly, the Government considers it appropriate that control orders be able to be made in relation to Australians who have supported, facilitated or engaged in hostile activities overseas.

The definition of 'hostile activity' set out above will be inserted into Division 117 of the Criminal Code on 1 December 2014. At that time, section 100.1(1) will be amended to include a definition of 'engage in a hostile activity' which will provides that, for the

1 Subparagraph 6(l)(a)(ii) provides that the Independent National Security Legislation Monitor's function is to review, on his or her own initiative, the operation, effectiveness and implications of any law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation.

purposes of Part 5.3 of the Criminal Code, that expression has the meaning given by subsection 117.1(1).

Committee Response

The committee thanks the Attorney-General for this response and **notes that it would have been useful had the above information been included in the explanatory memorandum**.

The committee reiterates its view that any decision to expand the grounds upon which a control order can be requested and issued must be subject to close scrutiny as the control order regime may be considered to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties—control orders
Schedule 1, item 8, proposed replacement subsections 104.2(3), 104.2(3A) and 104.2(4) of the *Criminal Code*

Items 8 and 9 both propose amendments to the process for seeking an interim control order: first relating to obtaining the Attorney-General's consent to request an interim control order, and secondly (once consent has been granted) when providing information to a court outlining the basis on which the issue of the interim control order is sought.

The purpose of item 8 is said to be to provide 'greater flexibility when seeking the Attorney-General's consent [to request an interim control order]' (explanatory memorandum, p. 19). Whereas the current provisions require the AFP to provide the Attorney-General with *all* documents that will be provided to the issuing court, the replacement provisions will only require the AFP to provide a draft of the interim order, information (if any) concerning the person's age, and a summary of the grounds on which the order should be made.

The explanatory memorandum states (at p. 1) that this amendment (along with other amendments in relation to the control order regime) have been developed 'in response to

operational issues identified following…counter-terrorism raids'. It is further stated that 'it is not necessary for the Attorney-General to consider all material' and the 'role of the Attorney-General is to be satisfied that it is appropriate for an application for an interim control order to be made, rather than to exercise the same role as the issuing court in considering the application' (p. 19). Beyond this, there is no detailed justification specifically directed to the proposed amendments to subsections 104.2(3), 104.2(3A) and 104.2(4).

In view of the general concerns about the control order regime stated above, any proposal which may be considered to diminish safeguards associated with the process for obtaining a control order must be subject to close scrutiny. On one view it is appropriate and useful for the Attorney-General to undertake a process similar to that subsequently required of the court, which will ensure that a thorough preliminary process is in place and the effort involved will be directly relevant to the material to be presented to the court. Further, even if the current provisions do involve a degree of redundancy (by requiring both the Attorney-General and the issuing court to consider all the material) prior to making their respective decisions, this redundancy may be justified given the extraordinary nature of the control orders and the severe risks posed to individual liberty.

The committee therefore seeks a fuller justification from the Attorney-General in relation to the necessity of, and the rationale for, removing what appears to be a safeguard in the existing regime. The committee also restates its concern that these changes are in the absence of a comprehensive public review (which will occur within 18 months after the next federal election) of the operation of the existing provision and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

> *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

(4) Seeking the Attorney-General's Consent to request an interim control order (Item 8)

The committee therefore seeks a fuller justification from the Attorney-General in relation to the necessity of, and the rationale for, removing what appears to be a safeguard in the existing regime. The committee also restates its concern that these changes are in the absence of a comprehensive public review (which will occur within 18 months after the next federal election) of the operation of the existing provision and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

The roles of the Attorney-General and the issuing court in the making of an interim control order differ in both their nature and their impact on the person. Reducing the amount of documentation that must be provided to the Attorney-General when seeking consent does not remove an important safeguard.

The current requirement for the AFP to provide all documents and material that will be provided to the issuing court to the Attorney-General when seeking consent is unnecessary and creates duplication. It is appropriate and necessary for the issuing court to consider all information available when deciding whether to make a control order given a decision by an issuing court to make an interim control order has an immediate and direct impact on the person the subject of the order.

However, consistent with similar processes—such as obtaining the Attorney-General's consent to prosecute—there is no need for the Attorney-General to consider all information. However, in light of evidence provided at the PJCIS hearing and a recommendation of the PJCIS, the Government will propose amendments to the Bill to implement PJCIS recommendation 3 which would require the AFP to also provide the Attorney-General with both a statement of the facts as to why the order should be made, and, if the member is aware of any facts relating to why the order should not be made—a statement of those facts.

While it would be ideal to be able to undertake a full review of the amended control order regime before making any further changes, advice from law enforcement based on recent operational activities is that there are a number of individuals of potentially very serious security concern who are not covered by either the existing or the recently added grounds. Some of those people are not directly involved in terrorism in Australia or hostile activities overseas but they provide the necessary support for terrorists and foreign fighters or their activities facilitate others to engage in terrorism or foreign fighting. Placing control orders on such individuals will help the AFP disrupt the activities of enablers, thereby preventing acts of terrorism and hostile activities overseas. This was demonstrated in law enforcement operations conducted in Brisbane and Sydney in September 2018. In those cases, the AFP decided to intervene early to disrupt planned terrorist activity in the interests of public safety and security. That early intervention meant the AFP and state police were unable to allow the planning to unfold to allow evidence for a prosecution to be collected over a longer period of time. Had law enforcement continued to monitor the individuals of security concern in order to continue to collect evidence that could ultimately have been used in the prosecution of a number of those persons, this could have resulted in the commission of a terrorist act, with the loss of life and the public panic that accompanies such an incident.

Committee Response

The committee thanks the Attorney-General for this response and welcomes the implementation of PJCIS recommendation 3 which would require the AFP to at least provide the Attorney-General with both a statement of the facts as to why the order should be made, and, if the AFP is aware of any facts relating to why the order should not be made—a statement of those facts.

The committee also welcomes the Attorney-General's statement that 'it would be ideal to be able to undertake a full review of the amended control order regime before making any further changes' and notes the Attorney-General's rationale for not undertaking a full review prior to the implementation of these further measures.

However, as a matter of general principle, the committee reiterates its view that any decision to expand the grounds upon which a control order can be requested and issued must be subject to close scrutiny as the control order regime may be considered to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties—control orders
Schedule 1, item 9, subsections 104.3(d)(i) and 104.3(d)(ii) of the *Criminal Code*

Once the Attorney-General's consent has been obtained to seek an interim control order from the court, the senior AFP officer needs to present specified information to the court. Currently in relation to each of the information obligations the AFP officer 'is required to provide the court with an explanation of 'each' obligation, prohibition and restriction as well as information regarding why 'any of those' obligations, prohibitions or restrictions should not be imposed' (explanatory memorandum, p. 20). However, the approach proposed in item 9 would only require that an AFP member provide a holistic explanation as to why the proposed obligations, prohibition or restrictions should be imposed, rather than addressing each of the items individually. Although the explanatory materials explain the effect of this amendment there is no detailed justification provided.

The committee therefore seeks a detailed justification of the necessity of removing the requirement that an AFP officer provide the court with an explanation of each individual obligation, prohibition or restriction as well as information regarding why any of those obligations, prohibitions or restrictions should not be imposed. The committee also notes that it is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

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

(5) AFP explanation of proposed obligations, prohibitions or restrictions to be imposed by a control order (Item 9)

The committee therefore seeks a detailed justification of the necessity of removing the requirement that an AFP officer provide the court with an explanation of each individual obligation, prohibition or restriction as well as information regarding why any of those obligations, prohibitions or restrictions should not be imposed The committee also notes that it is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

The Government will introduce amendments to the Bill to implement PJCIS recommendation 6, which proposes amending the bill to require the AFP to explain each requested obligation, prohibition and restriction to the issuing court when requesting an interim control order. This would revert to the current process as set out in the Criminal Code.

Committee Response

The committee thanks the Attorney-General for this response and notes that the amendments implementing recommendation 6 of the PJCIS inquiry into the bill address the committee's concerns in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties—control orders
Schedule 1, item 12, proposed replacement paragraph 104.4(1)(d) of the *Criminal Code*

Currently, it is necessary for the issuing court to be satisfied on the balance of probabilities that 'each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division (explanatory memorandum, p. 22). Proposed replacement paragraph 104.4(1)(d) replaces this itemised approach so that the court needs only to be 'satisfied on the balance of probabilities that 'the order' is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division' (explanatory memorandum, p. 22). This item is related to item 9, which reduces the burden on a senior AFP member when requesting an interim control order. Consequently, item 12 changes the test for the issuing court when making an interim control order (explanatory memorandum, pp 21 and 22).

It may be apprehended that the current approach, which requires an issuing court to address each individual obligation, prohibition or restriction provides a greater level of accountability and minimises the risk that a control order will be more restrictive of individual liberty than is strictly necessary. Although the explanatory materials explain the effect of this amendment there is no detailed justification provided. Indeed, the statement of compatibility (in a passage arguing that the amendments which expand the grounds for seeking a control order are a reasonable and proportionate limitation on free movement) points to the existing terms of 104.4(1)(d), which require that each of the obligations, prohibitions or restrictions be justified (see p. 8 [35]).

The committee therefore seeks a detailed justification of the necessity of removing the requirement that each individual obligation, prohibition or restriction be assessed by the court to ensure that it is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division. The committee also restates its view that it is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

> *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

(6) Issuing court consideration of proposed obligations, prohibitions or restrictions to be imposed by a control order (Item 12)

The committee therefore seeks a detailed justification of the necessity of removing the requirement that each individual obligation, prohibition or restriction be assessed by the court to ensure that it is reasonably necessary and reasonably appropriate and adapted, for the purpose of one of the objects of the Division. The committee also restates its view that is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCJS.

The Government will introduce amendments to the Bill to implement PJCIS recommendation 5, which proposes amending the bill to require the issuing court to be satisfied in relation to each of those obligations, prohibitions and restrictions before making an order. This would revert to the current process as set out in the Criminal Code.

Committee Response

The committee thanks the Attorney-General for this response and notes that the amendments implementing recommendation 5 of the PJCIS inquiry into the bill address the committee's concerns in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties—control orders
Schedule 1, item 20, subsections 104.10(1) and 104.10(2) of the *Criminal Code*

This item proposes to amend subsection 104.10(1) so that, where an urgent interim control order has been requested without the Attorney-General's consent, the senior AFP member who made the request must seek the Attorney-General's consent within 12 hours of making the request. The existing time within which consent must be sought is 4 hours.

The explanatory memorandum justifies this increase as follows:

> The amendment … reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.

In light of the significance of the increase in time, the committee seeks a more comprehensive analysis of why this proposal is necessary, including whether, in an emergency situation, it is impossible or merely inconvenient to contact the Attorney-General if he or she is in transit. In addition, the committee seeks advice as to whether it may be possible to seek another minister's consent in such situations instead of increasing the amount of time in which consent must be sought. The committee again expresses its concern that this proposal is being put forward in the absence of a comprehensive public review.

> *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

(7) Obtaining the Attorney-General's consent for an urgent interim control order (Item 20)

In light of the significance of the increase in time, the committee seeks a more comprehensive analysis of why this proposal is necessary, including whether, in an emergency situation, ii is impossible or merely inconvenient to contact the Attorney-General if he or she is in transit. In addition, the committee seeks advice as to whether it may be possible to seek another minister 's consent in such situations instead of increasing the amount of time in which consent must be sought. The committee again expresses its concern that this proposal is being put forward in the absence of a comprehensive public review.

The Government will introduce amendments to the Bill to implement PJCIS recommendation 4, which proposes increasing the period between obtaining an urgent interim control order and seeking the Attorney-General's consent from 4 hours to 8 hours (rather than 12 hours as proposed by the Bill).

An increase is necessary and does not reduce the safeguards in the regime. This is because it may not always be practical—or even possible—for the Attorney-General to consider a request and give consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west

coasts of Australia and unable to be contacted for more than 4 hours. It is important that an urgent control order issued by an issuing court not lapse merely due to administrative and logistical reasons. Importantly, where the Attorney-General refuses to consent or has not given consent within the 8 or 12 hour period, to the AFP making the request to the issuing court, any urgent interim control order that was made by the issuing court immediately ceases to be in force.

Committee Response

The committee thanks the Attorney-General for this response and notes that the amendments implementing recommendation 4 of the PJCIS inquiry substantially reduce the time allowed between obtaining an urgent interim control order and seeking the Attorney-General's consent than was originally proposed in the bill (from 12 hours to 8 hours, although there remains a substantial increase from the 4 hours as contained in the existing legislation). Further, the committee notes that the Attorney-General's response does not directly address the question of whether it may be possible to seek another minister's consent in such situations instead of increasing the amount of time in which consent must be sought.

However, as this bill has already been passed by both Houses of Parliament the committee makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Undue trespass on personal rights and liberties and insufficiently defined administrative powers—class authorisations
Schedule 2, items 4, 8–11, 14, 17, 22, 26, 31 (amendments to the *Intelligence Services Act 2001*)

These items will 'enable the Minister responsible for ASIS to give an authorisation to undertake activities for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on a specified class of Australian persons or to undertake activities or a series of activities that will, or is likely to, have a direct effect on a specified class of Australian persons' (explanatory memorandum, p. 28).

Prior to issuing an authorisation, the Minister must have received a request from the Defence Minister for assistance to the Defence force in support of military operations (item 8, proposed paragraph 9(1)(d)). Further, in cases where the class of persons to which an authorisation relates is, or is likely to be, involved in a threat or likely threat to security, the Minister must also obtain the agreement of the Attorney-General (as the Minister responsible for administering the ASIO Act) (paragraph 9(1A)(b)). Item 14 proposes changes that will enable the Attorney-General to give his or her agreement in relation to any Australian person in a specified class.

Under the existing provisions any section 9 authorisation must be given on an individual basis. This means that the specific circumstances of each individual case must be considered by the Minister; the same point applies in relation to the Attorney-General's agreement under existing paragraph 9(1A)(b) which is required if the Australian person is, or is likely to be, involved in activities that are, or are likely to be, a threat to security.

The authorisation powers are apt to adversely affect the rights of individuals who are the subject of an authorisation in significant ways, for example, in relation to the right to privacy. The current provisions, which require individual authorisation, mean that the existing safeguards in the IS Act, such as the thresholds for granting authorisations, reporting requirements, and the oversight of the Inspector-General of Intelligence and Security (IGIS) are likely to operate more effectively. A clear risk of class authorisations is that they may be overly-inclusive. The idea that an entire class of persons, as opposed to an individual, are or are likely to be involved in certain activities or pose particular threats—in the absence of individual consideration to each member of the class—may be based on generalisations. Another related risk is that the class may not be specified with adequate precision.

The explanatory memorandum states the Minister must be satisfied that '*all* persons in the class of Australian persons will or are likely to be involved in one or more of the activities

set out in paragraph 9(1A)(a)' (p. 28). However, paragraph 9(1A)(a), as it is proposed to be amended, would require that the Minister be satisfied that 'the Australian person, or the class of Australian persons, mentioned…is, or is likely to be, involved in one or more of the following activities' (listed in subparagraphs 9(1A)(a)(i)–(vii)). If it were the case that the Minister must be satisfied that all of the persons in the class met the threshold requirements (as indicated in the explanatory memorandum) the practical case for class authorisations would be unclear, as the Minister would be required to consider individual cases in any event. If the intention is that the threshold requirements must be met in relation to *all* of the members of the class, then an amendment to the bill may need to be considered to put this beyond doubt.

The explanatory memorandum contains very little justification for the extension of these powers and, in particular, why it is considered necessary to expand these authorisation powers so they may be exercised in relation to classes of Australian persons. For this reason, the committee considers that the amendments risk undue trespass on personal rights and liberties. Further, the explanatory materials do not provide examples of the sorts of classes that may be specified or why some limitations should not be placed on how classes are specified. A class of persons may be specified in a variety of ways and there is a risk that membership in the class may not be clear or may be too broad, given the nature of the powers being exercised. To the extent specification of a class is insufficiently clear, this may diminish the efficacy of the oversight of the IGIS. For this reason, the amendments may make rights and liberties depend on insufficiently clear administrative powers.

The committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach in light of the above comments, including in relation to the impact that class authorisations may have on oversight by the IGIS and whether it is intended that the Minister must be satisfied that *all* of the persons in a class meet the threshold requirements set out in paragraph 9(1A)(a).

Attorney-General's response - extract

(8) Class authorisations and class agreements (Items 4, 8-11, 14, 17, 22, 26, 31)

The explanatory memorandum contains very little justification for the extension of these powers and, in particular, why it is considered necessary to expand these authorisation powers so they may be exercised in relation to classes of Australian persons. For this reason, the committee considers that the amendments risk undue trespass on personal rights and liberties. further, the explanatory materials do not provide examples of the sorts of classes that may be specified or why some limitations should not be placed on how classes are specified A class of persons may be specified in a variety of ways and there is a risk that membership in the class may not be clear or may he too broad, given the nature of the powers being exercised. To the extent specification of a class is insufficiently clear, this

may diminish the efficacy of the oversight of the JGJS. For this reason, the amendments may make rights and liberties depend on insufficiently clear administrative powers.

The committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach in light of the above comments, including in relation to the impact that class authorisations may have on oversight by the IGIS and whether it is intended that the Minister must be satisfied that all of the persons in a class meet the threshold requirements set out in paragraph 9(1A)(a).

The Committee has sought my advice on the rationale for these proposed amendments, the limitations imposed on the classes of Australian persons in relation to which Ministerial authorisations may be issued or agreements may be given, and any implications for the conduct of independent oversight by the Inspector-General of Intelligence and Security (IGIS) of such authorisations or agreements. My remarks under the below subheadings address each of these matters in turn.

In addition, I note that the PJCIS recently considered, and made recommendations in relation to, these issues in its advisory report on the Bill, tabled on 20 November 2014.[2] My Department and relevant intelligence agencies provided detailed evidence to the PJCIS on the rationale for, and limitations of, the proposed class authorisation provisions.

The PJCIS supported the need for these provisions, subject to the inclusion of some further information in the Explanatory Memorandum.[3] The Government accepts this recommendation and will table a revised Explanatory Memorandum including this content (also taking into account the comments of this Committee in Alert Digest 15). I have enclosed, for the Committee's further background, two unclassified, supplementary submissions to the PJCIS from my Department.[4] The commentary at pp. 3-9 of the first supplementary submission and pp. 5-9 of the second supplementary submission may be of particular assistance to the Committee in considering the issue of class authorisations.

Rationale for class authorisations – ASIS assistance to the ADF

The Committee has described the proposed class authorisation amendments as an extension of powers. I do not agree with this characterisation. Class authorisations would apply exclusively to the function of the Australian Secret Intelligence Service (ASIS) in providing assistance to the Australian Defence Force (ADF) in support of military operations, as requested in writing by the Defence Minister. As noted in the Explanatory Memorandum, ASIS can already provide assistance to the ADF under its existing statutory functions of general application, in particular paragraphs 6(1)(a), (b) and (e) of the *Intelligence Services Act 2001* (IS Act). The proposed amendments make this function

2 PJCIS, Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, 20 November 2014 (Advisory Report), recommendation 7 and pp 47-49.

3 PJCIS, *Advisory Report*, recommendation 7.

4 Attorney-General's Department, Supplementary Submission 5.1 and Supplementary Submission 5.2.

explicit, thereby removing the need for the foreign Minister to issue a direction under paragraph 6(1)(e) and further increasing transparency in the activities undertaken by ASIS.

What is proposed to be changed is the existing limitation which means that the Foreign Minister may only issue an authorisation for ASIS to engage in such activities in respect of individual Australian persons who are, or are considered likely to be, involved in activities of a type prescribed by paragraph 9(1A)(a) and not in relation to a class of such Australian persons.

Under the proposed amendments, the Foreign Minister would need to be satisfied that all members of the class are involved in such an activity. Indeed, the class is defined solely by reference to the engagement of its members in a particular activity, of a type specified in paragraph 9(1A)(a). A person who is not so involved is, by definition, outside the class of persons the subject of the authorisation. As my department noted in its submission to the PJCIS:

> [T]he proposed amendments will streamline the arrangements for the issuing of authorisations in respect of Australian persons, where the relevant activities are undertaken for the purpose of ASIS providing support to, or cooperating with, the ADF. Currently, the combined effect of subsection 8(1) and paragraph 9(1A)(a) is that Ministerial authorisations must be issued in respect of an individual Australian person. There is no ability to issue an authorisation in respect of classes of Australian persons, such as Australians who are, or who are suspected of, fighting with or otherwise providing support to the Islamic State terrorist organisation in Iraq. This means that multiple, simultaneous Ministerial authorisations would need to be sought and issued on identical grounds; or that Ministerial authorisations would be unable to be issued because a particular Australian person fighting with that organisation was not known in advance of the commencement of operations.[5]

ASIS also provided the following information in its unclassified submission to the PJCIS:

> Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL. As such, it is likely that ASIS's support to ADF operations would require ASIS to produce intelligence on and undertake activities, subject to the limits on ASIS's functions, which may have a direct effect on these Australian persons. ASIS considers that under such circumstances the current provisions in the ISA enabling ASIS to undertake activities to produce intelligence or have a direct effect on an Australian person engaged in terrorist activity could severely limit ASIS's ability to contribute to the force protection of ADF personnel and the conduct of ADF operations. In a swiftly changing operational environment the ADF can act immediately, but ASIS is unable to act as nimbly to support the ADF.
>
> The following scenario illustrates the constraints on ASIS and the potential impacts on ADF operations.

5 Attorney-General's Department, *Submission 5* to the PJCIS inquiry (p 16), also extracted in *Supplementary Submission 5.2* (p 5) (enclosed with this response).

> **Scenario** - Intelligence is received that a previously unidentified Australian member of ISIL plans to imminently undertake a suicide terrorist attack against ADF and other partner elements providing 'advise and assist' support to Iraqi security forces at an Iraqi base. The ADF requests ASIS to urgently produce intelligence on the Australian person and that ASIS liaise with approved partner agencies it has responsibility for in order to alert them to the planned attack, noting that this may have a direct effect on the Australian person. Depending on the circumstances, ASIS may be able to immediately undertake some activity to collect intelligence (with agreement from ASIO received in due course) on the Australian person. However, before ASIS could do anything further to alert the approved partner agencies of the planned attack, ASIS would first have to consult with ASIO in order to obtain the agreement of the Attorney-General and then seek a Ministerial authorisation from the Foreign Minister to produce intelligence and to undertake activities likely to have a direct effect on the Australian person. Even if the Ministers and relevant ASIO staff were readily available, this process would take considerable time when there is an operational need to act quickly to prevent loss of life.[6]

As such, identical requirements apply to the identification of classes of Australian persons as they do to individual Australians under section 9 of the IS Act. (Further details on the limitations of classes of Australian persons are set out under the relevant subheading below.)

Rationale for class agreements by the Attorney-General

To the extent that the Committee's comments at p. 37 of the Alert Digest on the 'extension of powers' proposed to be conferred by the Bill are intended to apply to the proposed class agreement amendments, I similarly disagree with this characterisation. The same defining criterion in paragraph 9(1A)(b) applies to individual Australians and classes of Australian persons who may be the subject of an agreement given by the Attorney-General to the issuing of a Ministerial authorisation. That provision requires the agreement of the Attorney-General to be sought where the relevant person, or class of persons, is involved or is likely to be involved in an activity or activities that are, or are likely to be, a threat to security, as that term is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). This means that a class agreement can only relate to a group of Australian persons who are or are likely to be involved in activities, that are or are likely to be a threat to security. A person who was not involved, or likely to be involved in, the following activities cannot, definition, be a member of the class in relation to which an agreement applies:

(a) activities of a kind that satisfy the 'security test' in paragraph 9(1A)(b), and

(b) activities which are specified in the definition of the class of Australian persons by the Attorney-General.

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6 ASIS, *Submission 17* to the PJCIS inquiry (p 3), also extracted in *Supplementary Submission 5.2* of the Attorney-General's Department (pp 5-6) (enclosed with this response). Further examples of class authorisations are provided in Attorney-General's Department, *Supplementary Submission 5.1* to the PJCJS, pp 7-8 (enclosed with this response).

My Department commented in its submission to the PJCIS on the need for the class agreement provisions in the following terms:

> Presently, the Attorney-General may only provide his or her agreement to the issuing of an authorisation in respect of the activities of an individual Australian person. As with the issuing of Ministerial authorisations, this means that the Attorney-General would be required to provide multiple, simultaneous agreements on identical grounds. For example, as individual Australians are identified as known or suspected to be fighting with the Islamic State terrorist organisation in Iraq, agreement from the Attorney-General needs to be obtained on an individual basis to one or more authorisations for each individual even though the basis in each case is the same. This places a significant limit on the ability of the ISA agencies and in particular ASIS to be nimble in responding to ADF operational requirements in Iraq, including in time critical circumstances.[7]

I note that the PJCIS, in its advisory report on the Bill, also supported the ability of the Attorney-General to provide agreement in relation to classes of Australian persons. The Government accepts the Committee's recommendation that the Explanatory Memorandum to the Bill be amended to include more detailed explanation of the rationale, along the lines of the above. The Government will release a Revised Explanatory Memorandum doing so.[8]

Limitations on classes of Australian persons

As noted at pp. 4-7 of my Department's first supplementary submission to the PJCIS, four principal limitations apply to the process of identifying classes of Australian persons, for the purpose of issuing Ministerial authorisations (or agreement, where required). These are discussed extensively in the enclosed submission, and in summary are:

(1) The class must be specifically identified by the Defence Minister in requesting ASIS's assistance to the ADF in support of a military operation.

(2) The Foreign Minister must be satisfied that the class of persons is or is likely to be involved in an activity of the type specified by paragraph 9(1A)(a), in addition to the authorisation criteria in subsection 9(1) (focusing on the necessity and proportionality of the proposed activity).

(3) The Attorney-General must further provide his or her agreement, noting that activities to assist the ADF in support of a military operation will, invariably, relate to security such that paragraph 9(1A)(b) is enlivened. (By this point, three Ministers will have scrutinised the proposed class of persons).

(4) ASIS must then make decisions about whether individual Australians in relation to whom it proposes to undertake activities in reliance on a class authorisation are within the class specified in the authorisation. These decisions are subject to

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7 Attorney-General's Department, *Submission 5* to the PJCIS inquiry, p 17, also extracted in *Supplementary Submission 5.2* (p 5) (enclosed with this response).

8 PJCIS, *Advisory Report*, pp 47-49. See further, recommendation 7.

> oversight by the Inspector-General of Intelligence and Security. ASIS's activities under a class authorisation are further subject to specific reporting obligations to the Foreign Minister. To the extent that ASIS purported to rely upon a Ministerial authorisation to undertake activities in relation to an Australian person who did not fall within the relevant class, it would have no lawful basis for its activities. ASIS would be subject to criticism by the IGIS and administrative accountability to the Minister and may be unable to rely on the protections from criminal and civil liability under the IS Act as the activity may not be in the proper performance of the functions of ASIS.

I note that these limitations were found acceptable to the PJCIS, which recommended that further explanation along these lines be included in the Explanatory Memorandum. As I have indicated, the Government has accepted this recommendation.[9]

IGIS oversight in relation to class authorisations and class agreements

The Committee has questioned whether the proposed class authorisation and agreement-related amendments in Schedule 2 to the Bill would diminish or otherwise alter the ability of the IGIS to conduct oversight in accordance with his or her statutory mandate under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).

The proposed amendments do not, in any way, diminish the ability of the IGIS to conduct rigorous, independent oversight of agencies' actions in seeking and undertaking activities in reliance on class authorisations, or other authorisations in relation to individual Australian persons issued on the basis of a class agreement provided by the Attorney-General.

The IGIS has the ability, under the IGIS Act, to conduct oversight of the way in which ASIS defines a class of persons in its application for Ministerial authorisations, its decision-making in relation to whether particular Australians are within a class of persons, and its reports to the Foreign Minister on activities undertaken in reliance on a class authorisation.[10] While the form of oversight will necessarily be different to that undertaken in relation to authorisations applying to individual Australian persons, it will remain rigorous. This was confirmed by the IGIS in her evidence to the PJCIS inquiry, in which the IGIS stated that she considers the oversight framework under the IGIS Act to provide an adequate legislative basis for conducting oversight of the proposed amendments, if enacted.[11]

9 PJCIS, *Advisory Report*, recommendation 7 and pp 47-49.

10 This reporting function is provided for in proposed subsection 10A(3).

11 IGIS, *Submission 12* to the PJCIS inquiry, p. 3.

Committee Response

The committee thanks the Attorney-General for this response and welcomes the implementation of PJCIS recommendation 7. The tabling of a revised explanatory memorandum which provides further information about how a class of Australian persons will be defined and to make it clearer that 'a class agreement can only relate to a group of Australian persons who are or are likely to be involved in activities, that are or are likely to be a threat to security' assists in addressing the committee's concerns about the lack of explanation of the rationale for the implementation of class authorisations.

The committee notes that the ability to issue authorisations in relation to a class of persons that *is likely to be* (in addition to those that *are*) involved in activities that may pose a threat to security should be subject to close supervision by the IGIS.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Two related matters of concern arise in relation to class authorisations. As noted above, the authorisations must be based on a request from the Defence Minister and, in some cases, are dependent on the agreement of the Attorney-General. These requests and agreements do not appear to be time-limited. **Given that the appropriateness of a request or agreement is dependent on factual matters which may change over time, the committee also seeks the Attorney-General's advice in relation to the rationale for this approach, and in particular, whether a request (by the Defence Minister) and agreement (from the Attorney-General) should expire after a defined period**

> *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. 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*

Attorney-General's response - extract

(9) Class authorisations and class agreements (Items 4, 8-11, 14, 17, 22, 26, 31)

Two related matters of concern arise in relation to class authorisations. As noted above, the authorisations must be based on a request from the Defence Minister and, in some cases, are dependent on the agreement of the Attorney-General. These requests and agreements do not appear to be time-limited.

Given that the appropriateness of a request or agreement is dependent on factual matters which may change over time, the committee also seeks the Attorney-General's advice in relation to the rationale for this approach, and in particular, whether a request (by the Defence Minister) and agreement (from the Attorney-General) should expire after a defined period.

As the Committee has observed, the Bill does not apply a fixed maximum duration to requests made by the Defence Minister for the assistance of ASIS to the ADF in support of a military operation. Nor does the Bill propose to provide a fixed maximum duration to a class agreement provided by the Attorney-General, in respect of a class of persons who are or are likely to be involved in activities that are, or are likely to be, a threat to security.

My Department addressed these matters in its first supplementary submission to the PJCIS (at pp. 21-22). In summary, and as the Committee has noted, the Defence Minister must specifically request an authorisation from the Foreign Minister for ASIS to undertake activities to support the ADF in a military operation. There is no fixed time limit on the duration of such a request made by the Defence Minister, but the grounds for authorisation are taken to cease if the Defence Minister withdraws the request, or if the ADF is no longer engaged in any military operations to which the request for authorisation related. On this basis it is not accurate to suggest that there is no time limit or no definition of the period of effect for a request made by the Defence Minister.

As noted in her evidence to the PJCJS inquiry, the IGIS has an expectation that agencies would periodically brief the Defence Minister about such operations, so as to provide him or her with a regular opportunity to consider whether the request should be withdrawn.[12] This is a relevant consideration to the IGIS's view on the propriety of Ministerial authorisations sought and executed on the basis of a request from the Defence Minister.

Consideration was given to placing a fixed time limit on the Defence Minister's requests. While this would have the benefit of placing a positive obligation on the Defence Minister to consider, at regular intervals, whether a request should remain in force, it is not considered essential for three reasons. First, a Ministerial authorisation issued by the

12 IGIS, *Submission 12* to the PJCIS Inquiry, p 5.

Foreign Minister for ASIS to provide assistance to the ADF in support of a military operation is limited to six months. In practice, before an authorisation would be issued in reliance on a Defence Minister's request, there would be appropriate consultation and consideration of whether it is appropriate to continue relying on a request that may have been made some time ago. (This consideration would include an assessment of whether the military operation specified in the Defence Minister's request is the same as that being presently carried out.)

Secondly, agencies operate on the basis that the propriety as well as the legality of their activities will be the subject of independent oversight by the IGIS. On that basis, and in light of the IGIS's evidence to the PJCIS about her expectations (noted above) appropriate Ministerial briefings are expected to occur as a matter of practice, and would likely be the subject of adverse findings if they did not.

Thirdly, there is a risk that a fixed term could be arbitrary or limit a legitimate need for operational flexibility because it may be difficult to identify a period of time, in the abstract, that will have a logical connection to the duration of all military operations conducted by the ADF, since this is a fact-specific circumstance. In addition, it is open to the Defence Minister to limit his or her request to the Foreign Minister to a particular period and for the Foreign Minister to issue an authorisation for a lesser period than six months in individual cases.

Identical comments apply to the duration of the Attorney-General's agreement, provided in relation to a class of Australian persons, to the issuing of a Ministerial authorisation.

I note that the PJCIS considered the issue of the duration of the Defence Minister's request and the Attorney-General's agreement, but did not make any recommendations about the enactment of a fixed maximum time limit.[13]

13 PJCIS, Advisory Report p 38.

Committee Response

The committee thanks the Attorney-General for this response and **notes that it would have been useful had the substance of the above information been included in the explanatory memorandum**.

The committee concurs with the view expressed by the IGIS that it would be appropriate for agencies to periodically brief the Defence Minister about relevant operations, so as to provide him or her with a regular opportunity to consider whether the request should be withdrawn. However, the committee notes that placing a fixed time limit (and thus a legislative requirement for regular review) on the Defence Minister's requests and the Attorney-General's agreement would provide a stronger safeguard.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 15 of 2014 - extract

Insufficiently defined administrative powers—emergency authorisations Schedule 2, item 18, proposed section 9B

Proposed section 9B provides for emergency authorisations by agency heads in the event that none of the ministers specified in subsection 9A(3) are readily available or contactable to issue an emergency authorisation under section 9A.

The committee notes that authorised ministers are able to give authorisations orally and through a variety of forms of electronic communication. The Minister responsible for the relevant ISA agency, the Prime Minister, Foreign Minister, Defence Minister or Attorney-General may all exercise authorisation powers under section 9A. In addition, it appears that sections 19 and 19A of the *Acts Interpretation Act 1901* operate to enlarge this category of authorised decision-makers holding ministerial office. **In light of these observations, the committee seeks further advice from the Attorney-General in relation to the necessity of conferring these emergency powers on agency heads.**

> *Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it 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.*

Attorney-General's response - extract

(10) Emergency authorisations by agency heads (Item 18)

Proposed section 9B provides for emergency authorisations by agency heads in the event that none of the ministers specified in subsection 9A(3) are readily available or contactable to issue an emergency authorisation under section 9A.

The committee notes that authorised ministers are able to give authorisations orally and through a variety of forms of electronic communication. The Minister responsible for the relevant ISA agency, the Prime Minister, Foreign Minister, Defence Minister or Attorney-General may all exercise authorisation powers under section 9A. In addition, it appears that sections 19 and 19A of the Acts Interpretation Act 1901 operate to enlarge this category of authorised decision-makers holding ministerial office. In light of these observations, the committee seeks further advice from the Attorney-General in relation to the necessity of conferring these emergency powers on agency heads.

Rationale for emergency authorisations by agency heads

My Department addressed this issue at length in its evidence to the PJCIS inquiry, including at pp. 14-17 of its first supplementary submission, and at pp. 12-13 of its second supplementary submission (enclosed with this response). I refer, in particular, to the following remarks in my Department's first supplementary submission (at pp. 14-16):

> The intention of proposed section 9D is not to undermine or depart from general principles of Ministerial responsibility and accountability for authorisation decisions under the IS Act, or the importance of ensuring that practical arrangements are in place to facilitate Ministerial availability, to the greatest possible extent.
>
> Rather, proposed section 9B is designed to make provision for contingency arrangements, in the event that the worst case scenario eventuates - despite best endeavours to prevent it - in which none of the relevant Ministers are readily available or contactable, and there arises an urgent need to collect intelligence. (For example, if there is only a very limited window of opportunity to collect the intelligence, such as a matter of hours, and none of the relevant Ministers are readily available or contactable in that limited window of time.) Under the current emergency authorisation provisions in section 9A, there is no lawful basis for agencies to collect intelligence in these circumstances.
>
> Proposed section 9B seeks to ameliorate the potentially significant, adverse impacts of this outcome, by enabling IS Act agencies to undertake activities in reliance on a strictly limited emergency authorisation provided by the relevant agency head, provided that rigorous statutory thresholds are satisfied. This includes a requirement that the agency head must be satisfied that none of the Ministers specified in proposed subsection 9A(3) are readily available or contactable. These cases are

likely to be very rare. Their exceptional nature is made clear via the extensive limitations and safeguards applying to agency heads' decisions, including:

- a strictly limited maximum duration of 48 hours, without any capacity for renewal;
- a close degree of Ministerial control by the responsible Minister for the agency, including a requirement that the responsible Minister must be notified as soon as practicable within 48 hours of the issuing by an agency head of an emergency authorisation;
- the responsible Minister is under a positive obligation to consider whether to terminate the emergency authorisation, including by replacing it with a Ministerial authorisation under section 9 or 9A;
- the independent oversight of the TGIS, who must be provided with notification as soon as practicable, and no later than three days after an emergency authorisation is issued by an agency head under section 9B; and
- the authorisation criteria, which require the agency head to be satisfied that:
    - It would be open to the responsible Minister to make the authorisation, and also that the responsible Minister would have made the authorisation decision. (This requires the agency head to consider and assess the weight that the Minister himself or herself would have been likely to place on particular considerations - including considering whether there are any matters that the Minister would have regarded as determinative of a decision not to issue an emergency authorisation, even though it would have been reasonably open to him or her to issue the authorisation.)
    - If the activity or series of activities is not undertaken before a Ministerial authorisation is given under section 9 or 9A, security would or is likely to be seriously prejudiced, or there will be or is likely to be a serious risk to a person's safety.

Statutory interpretation issue – responsible Ministers

The Committee has commented that sections 19 and 19A of the *Acts Interpretation Act 1901* (AIA) may operate to enlarge the category of 'responsible Ministers' in proposed new subsection 9A(3), with the result that there appears to be a diminished need for agency heads to be invested with an emergency power to issue authorisations.

Section 19 - acting Ministers

Section 19 of the AIA provides that statutory references to any Minister includes acting Ministers, with the result that acting Ministers can perform all of the functions and exercise all of the powers of the substantively appointed Ministers for whom they are acting . It is intended that this rule of interpretation should apply to the IS Act, with the result that Ministers acting for the responsible Minister can issue authorisations under section 9 (non-emergency authorisations) and section 9A (emergency authorisations).

However, as noted above, the material issue to which the proposed amendments are directed is to ensure that contingency arrangements are in place in the event that no

responsible Ministers – whether substantive or acting – are readily available or contactable for a period of time (perhaps a matter of hours) in which there arises an urgent intelligence-collection need. Currently, the absence of such arrangements in the ISA means that there is no lawful basis for IS Act agencies to collect intelligence in these circumstances. Section 19 does not, therefore, operate to extend the 'pool' of available Ministers in a way that addresses the limitation to which the proposed amendments are directed.

Section 19A - references to "the Minister" - inclusion of junior portfolio Ministers

Section 19A of the AIA establishes a general rule of statutory interpretation that, if a provision of an Act refers to a Minister by using the expression "the Minister" without specifying a particular Minister, then if two or more Ministers administer the provision in respect of the relevant matters, the reference is taken to be a reference to any one of those Ministers. (The reason that the senior Minister and any junior Ministers or Parliamentary Secretaries might be taken as administering the relevant provision in this case, being proposed paragraph 9A(3)(a) of the IS Act, is because there is a practice that Ministers are appointed by the Governor-General to administer particular Departments of State. A Minister administering a Department administers the legislation listed in the Administrative Arrangements Orders for that Department.)

Some submitters to the PJCIS inquiry made similar observations to those of the Committee at p. 39 of its Alert Digest about the application of section 19A of the AIA to proposed subsection 9A(3) of the IS Act. In response, my Department made the following submission:

> [T]he assumed application of the rule of interpretation in section l9A of the AIA to proposed section 9A(3)(a) is not beyond doubt. Section 19A is a general rule of statutory interpretation that is taken to apply to all provisions of Commonwealth legislation, unless particular provisions evince a contrary intention. (That is, an intention that the general rule of interpretation should not apply to that provision.) There are, in AGD and agencies' views, a number of characteristics of both the text and wider context of the relevant emergency authorisation provisions that could be taken to – and were intended to – evince a contrary intention. (That is, an intention to limit the responsible Minister to the single, senior portfolio Minister who in practice is responsible for the relevant agency - being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGD and ASD.)
>
> The very fact there have arisen, in the course of this inquiry, competing interpretations of the term suggests that the provision could benefit from clarification, in order to provide certainty as to which Ministers are within proposed paragraph 9A(3)(a). Such certainty will be critical to the effective operation of the emergency authorisation provisions, and their oversight by the IGIS. It would also remove any risk that a court, if ever called upon to construe the provision if enacted, could favour an interpretation contrary to the underlying policy intent.[14]

14 Attorney-General's Department, *Supplementary Submission 5.1* to the PJCIS inquiry, p 12 (copy enclosed with this document).

The PJCIS gave consideration to the suggestion that the term 'responsible Minister' would benefit from clarification, and recommended that it be narrowed to include only the senior portfolio Minister, to the exclusion of any junior or portfolio Ministers appointed to administer the Department responsible for the relevant intelligence agency. In taking this position, the PJCIS stated that:

> [T]he Committee does not consider it appropriate that junior Ministers and parliamentary secretaries without day-to-day responsibility for, or background in, national security or intelligence-related matters be called upon to make an emergency authorisation decision. The Committee also notes the potential operational implications that may arise in a time critical circumstance while an agency head attempts to contact a large number of ministers.[15]

PJCIS recommendations – emergency authorisations and agreements

The PJCIS made a handful of targeted recommendations in relation to emergency authorisations and agreements (recommendations 9-14), all of which have been accepted by the Government, and the Government will move amendments to implement them when the Bill is debated in the Senate.

The PJCIS's recommendations and the Government's response, will also address a number of this committee's comments in Alert Digest 15. The relevant PJCIS recommendations are as follows:

- Strengthen the degree of Ministerial control over emergency authorisations issued by agency heads, by requiring agency heads to notify the relevant responsible Minister within eight hours of an authorisation being issued under proposed section 9B (currently proposed to be as soon as practicable within 48 hours).[16]

- Strengthen the degree of Ministerial control over agreements to the issuing of emergency authorisations by the Director-General of Security (or the issuing of emergency authorisations in the absence of any agreement) where permitted by proposed section 9C, by requiring the agency head to notify the Attorney-General within eight hours of such an authorisation being issued on the basis of the Director-General's agreement (or no agreement), replacing the current proposed time limit of as soon as practicable within 48 hours of the authorisation being issued.[17]

- Strengthen arrangements for Parliamentary visibility of the use of emergency agency head authorisations, including compliance with legislative arrangements prescribed by section 9B, by requiring the IGIS to provide notification to the relevant responsible Minister and the PJCIS, within 30 days of the issuing of an s 9B authorisation, as to

15 PJCIS *Advisory Report*, p 55. See also Attorney-General's Department, *Supplementary Submission 5.1* to the PJCIS inquiry, p 12.

16 PJCJS, *Advisory Report*, recommendation 9.

17 PJCIS, *Advisory Report*, recommendation 12.

whether (in his or her view) that authorisation complied with the requirements of s 9B.[18]

- Strengthen arrangements for Parliamentary visibility of the use of emergency agreements by the Director-General of Security to the issuing of an emergency authorisation (or the making of emergency authorisations in the absence of such agreement) where permitted by proposed section 9C, by way of a notification requirement to the PJCIS identical to that applying to proposed section 9B (noted above).[19]

- Clarify that the 'responsible Minister' for the purpose of the IS Act is the senior portfolio Minister, to the exclusion of junior portfolio Ministers and Parliamentary secretaries (being the Foreign Affairs Minister for ASIS, the Defence Minister for AGD and ASD, and the Attorney-General for ASIO).[20]

Committee Response

The committee thanks the Attorney-General for this response and **notes that it would have been useful had the substance of the above information been included in the explanatory memorandum**.

The committee welcomes the implementation of PJCIS recommendations 9 – 14 relating to emergency authorisations which will strengthen ministerial, IGIS and parliamentary oversight of the emergency authorisation scheme.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

18 PJCIS, *Advisory Report*, recommendations 10-11.

19 PJCJS, *Advisory Report*, recommendations 13-14.

20 PJCIS, *Advisory Report*, recommendation 15.

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

Introduced into the House of Representatives on 17 July 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No. 17 of 2014*. The Minister responded to the committee's comments in a letter dated 20 January 2015. A copy of the letter is attached to this report.

Alert Digest No. 17 of 2014 - extract

Background

This bill amends the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995* (the Code), *Customs Act 1901* (the Customs Act), *Financial Transaction Reports Act 1988, International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*.

Schedule 1 amends the Code and the Customs Act to:

- introduce an offence for the importation of all substances that have a psychoactive effect that are not otherwise regulated or banned; and
- ensure that Australian Customs and Border Protection Service and Australian Federal Police officers have appropriate powers in relation to new offences.

Schedule 2 amends the Code and the Customs Act to introduce international firearms trafficking offences and mandatory minimum sentences and extend existing cross-border disposal or acquisition firearms offences.

Schedule 3 amends the *International Transfer of Prisoners Act 1997* in relation to the international transfer of prisoners regime within Australia.

Schedule 4 amends the Code to clarify that certain slavery offences have universal jurisdiction.

Schedule 5 validates access by the Australian Federal Police to certain investigatory powers in designated State airports from 19 March until 17 May 2014.

Schedule 6 makes minor and technical amendments to the Code, the *Financial Transaction Reports Act 1988* and the *Surveillance Devices Act 2004*.

Government amendment (2) on sheet GZ107 (proposed paragraph 122(3)(ga) of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act))

The supplementary explanatory memorandum states that the amendments to schedule 6 will, among other things:

> …clarify that the ATO can disclose certain information obtained under the AML/CTF Act to enable the ATO to share information received from regulated businesses about funds transfers with the taxpayer from whom, or to whom, the transfer was made (p. 6).

The supplementary explanatory memorandum continues by suggesting that the amendment will not limit the right to privacy 'as disclosures will be made to the person about whom the personal information relates' (p. 6). However, on its face, the proposed paragraph appears to allow broader disclosure so long as it relates to 'the performance of the entrusted investigating official's duties' (proposed subparagraph 122(3)(ga)(ii)).
In order to assess the impact that this amendment may have on the right to privacy, **the committee seeks the Minister's advice as to the circumstances in which information will be able to be disclosed under proposed paragraph 122(3)(ga), and, in particular, whether disclosures could be made to persons or organisations other than 'the person about whom the personal information relates'.**

> *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

The Committee has sought further information on Government amendment (2) on sheet GZ107, concerning the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

Proposed paragraph 122(3)(ga) will permit disclosures of information obtained under section 49 of the AML/CTF Act by a taxation officer provided it is made 'for the purposes of, or in connection with, the performance of the taxation officer's duties' . The Committee has sought further information in order to assess the impact that this amendment may have on the right to privacy. In particular, the Committee has requested advice as to the circumstances in which information will be able to be disclosed under proposed paragraph

122(3)(ga), and whether disclosures could be made to persons or organisations other than 'the person about whom the personal information relates'.

It is important to note that the Australian Taxation Office (ATO) has advised that the majority of disclosures under this provision will be to the taxpayer in order to inform them about their taxation obligations. The proposed amendment, along with proposed paragraph 122(3A), are primarily to clarify the ability of the ATO to share information with the affected taxpayer as there is some legal uncertainty about the circumstances in which it can be shared under the current legislation.

When can section 49 information be disclosed?

The proposed amendments provide that taxation officers can share information obtained under section 49 of the AML/CTF Act 'for the purposes of, or in connection with, the performance of the taxation officer's duties'.

In determining what disclosures are considered 'in the performance of the taxation officer's duties', proposed paragraph 122(3A) (item 4 of the Government amendments) clarifies that the disclosure grounds in section 355-50 of Schedule I to the *Taxation Administration Act 1953* (TAA) are disclosures permitted under the AMU/CTF Act.

In general terms, section 355-50 establishes that the disclosure must be for the purpose of a taxation law or for the making of an order under the *Proceeds of Crime Act 2002* (POC Act) that is related to a taxation law. It does not permit a general disclosure of personal information, but does enable disclosure to other people or organisations in limited circumstances.

Section 355-50 allows for disclosures to courts, tribunals, boards, law enforcement and intelligence agencies as well as government agencies such as the Australian Securities and Investments Commission and the Australian Bureau of Statistics, provided it is for the purpose of a taxation law or for the making of an order under the POC Act

It also potentially allows disclosure to another taxpayer where it would be necessary to understand their own tax obligations. For example, where a number of individual Australian taxpayers were participating in a tax avoidance scheme, individual transactions may appear legitimate, but when considered together the transactions are clearly artificial. In these circumstances, the ATO may need to disclose some information about the other transactions in order to fully inform a taxpayer regarding the ATO's assessment.

Impact on the right to privacy

The grounds for disclosure in section 355-50 of the TAA have been in operation since 2010, when the TAA was amended following the Treasury's Review of Taxation Secrecy and Disclosure Provisions in 2006. The proposed amendments have been deliberately linked to these grounds to ensure consistency with the ATO's disclosure protections and the disclosure grounds for information gathered under the Taxation Commissioner's other

powers to compel the production of information (for example under section 264 of the *Income Tax Assessment Act 1936*).

Therefore, while the amendments allow disclosure of information to people or organisations other than the person to whom the information relates, I consider that the safeguards and limitations of section 355-50 of the TAA ensure that the amendments do not trespass unduly on personal rights and liberties.

Committee Response

The committee thanks the Minister for this detailed response.

The committee requests that the key information above be included in the explanatory memorandum and leaves the overall question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Federal Courts Legislation Amendment Bill 2014

Introduced into the House of Representatives on 27 November 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 17 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 4 February 2015. A copy of the letter is attached to this report.

Alert Digest No. 17 of 2014 - extract

Background

This bill amends the *Federal Court of Australia Act 1976* to provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant.

The bill also amends the *Federal Circuit Court of Australia Act 1999* to:

- confer jurisdiction on the Federal Circuit Court of Australia to hear certain Commonwealth tenancy disputes;
- enable additional jurisdiction in relation to tenancy disputes to which the Commonwealth is a party to be conferred on the Federal Circuit Court of Australia by delegated legislation; and
- enable delegated legislation to be made to modify the applicable State and Territory law where appropriate.

Delegation of legislative power
Schedule 2, item 4, proposed section 10AA of the *Federal Circuit Court of Australia Act 1999*

This item confers jurisdiction on the Federal Circuit Court of Australia in relation to specified Commonwealth tenancy disputes.

The item provides that the Minister may, by legislative instrument, confer additional jurisdiction on the Federal Circuit Court of Australia in relation to Commonwealth tenancy disputes (proposed subsection 10AA(2)). The explanatory memorandum states that this approach 'aims to reduce the burden of making future legislative amendments to the *Federal Circuit Court of Australia Act 1999* if it is considered appropriate for the Federal Circuit Court to have jurisdiction to determine additional Commonwealth tenancy disputes' (p. 17).

The item also provides that the Minister may, by legislative instrument, make provision for and in relation to any of the matters listed in proposed subsection 10AA(3) in respect of a Commonwealth tenancy dispute. This 'aims to ensure, as far as possible, that the rights of the parties to the Commonwealth tenancy dispute are not substantially different from the rights of parties to tenancy disputes' by enabling the Minister to 'flexibly respond to particular issues in relation to particular state or territory regimes which might arise in the context of conferral of jurisdiction on a federal court' (p. 17).

The conferral of jurisdiction on federal courts and the modification of such jurisdiction are matters of considerable importance and thus may be more appropriately dealt with in primary legislation. In addition, these matters may raise complex legal issues. **In light of this, the committee seeks advice from the Attorney-General in relation to:**

- **the rationale for providing for the implementation of these important matters in delegated legislation (beyond the aim of 'reducing the burden of making future legislative amendments'); and**
- **if it is not proposed that these matters be dealt with in primary legislation—whether the bill can be amended to ensure that these matters are dealt with in *regulations* (rather than legislative instruments) as this would ensure that the regulations relating to these important (and potentially complex) matters are drafted by the OPC and considered by the Federal Executive Council.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Attorney-General's response - extract

Specifically, the Committee has sought my advice about the rationale for allowing the matters contained in proposed subsections 10AA(2) and (3) of item 4, schedule 2 of the Bill, being dealt with in delegated legislation, in addition to the justification provided in the Explanatory Memorandum of reducing the burden of making future legislative amendments.

The Committee has also sought my advice about whether these matters should be dealt with in 'regulations', rather than a 'legislative instrument'.

Rationale - proposed subsection 10AA(2)

As the Committee is aware, through amendments to the *Federal Circuit Court of Australia Act 1999*, the Bill confers jurisdiction on the Federal Circuit Court in relation to a 'Commonwealth tenancy dispute', as defined in item 1 of Schedule 2 of the Bill. The purpose of proposed subsection 10AA(2) is to allow further jurisdiction to be conferred on the Federal Circuit Court where it falls within the definition of 'Commonwealth tenancy dispute' and is broader than the jurisdiction conferred by proposed subsection 10AA(l).

For example, following further consultation within government, it may be determined to be appropriate for the Federal Circuit Court to have jurisdiction to deal with Commonwealth tenancy disputes where the Commonwealth is a sublessor, which would currently not be permitted under proposed subparagraph l0AA(l)(a)(i). I consider this to be appropriately dealt with in delegated legislation as it still falls within the broad category of jurisdiction relating to a 'Commonwealth tenancy dispute', that would be authorised under proposed section 5 in the primary legislation.

I consider that any minor adjustments to the category of 'Commonwealth tenancy dispute' are appropriately dealt with in delegated legislation, as, if the Bill is passed, the Parliament will have expressed its approval of the Federal Circuit Court having jurisdiction over these areas. It will also allow the Federal Circuit Court to develop its jurisdiction and practice in this area based on the narrower jurisdiction, before any decision is made to broaden it to cover the full scope of the jurisdiction envisaged by the definition of 'Commonwealth tenancy dispute'.

Further, any legislative instruments that sought to expand the Federal Circuit Court's jurisdiction beyond that granted by proposed subsection 10AA(l) would be subject to parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003.* In this way, Parliament can ensure that the proposed jurisdiction to be conferred does not go beyond the scope of that allowed by the definition of 'Commonwealth tenancy dispute'.

Rationale - proposed subsection 10AA(3)

Proposed subsection 10AA(3) would permit a legislative instrument to be made about the following matters:

- the rights of the parties to the Commonwealth tenancy dispute
- the law (whether a law of the Commonwealth or a law of the State or Territory) to be applied in determining the Commonwealth tenancy dispute
- any modifications to the applicable law that are to apply in relation to the Commonwealth tenancy dispute

- the powers that the Federal Circuit Court of Australia may exercise under the applicable law, and

- if the Federal Circuit Court of Australia makes an order when exercising jurisdiction over the Commonwealth tenancy dispute - the powers that may be exercised when executing the order or a class of orders.

As set out in the Explanatory Memorandum, the provision is intended to ensure, as far as possible, that the rights of the parties to a Commonwealth tenancy dispute are not substantially different from the rights of parties to tenancy disputes determined under state and territory law. In practice, it is state and territory law which governs tenancies and this law differs around Australia. It also differs in the remedies and orders that are available to the relevant decision maker when resolving a tenancy dispute.

I expect that a range of minor and technical adjustments will be required in order to ensure that the Federal Circuit Court can make orders that are equivalent to those available to state and territory tenancy tribunals. It may also be necessary to adjust the application of state and territory law to a Commonwealth tenancy dispute in order to ensure that there are not significant differences in how disputes in different states and territories are resolved. This is highly desirable in order to ensure a consistent approach across the country and to allow for the development of a coherent and consistent body of case law within the Federal Circuit Court's jurisdiction.

These amendments are expected to be minor, technical and possibly frequently required as tenancy legislation is updated and amended in the states and territories. I consider it desirable for legislative instruments to be able to be made quickly to respond to any changes of state and territory tenancy legislation to ensure that parties to a Commonwealth tenancy dispute heard in the Federal Circuit Court are treated consistently with parties in state and territory tribunals on an ongoing basis, rather than needing to make changes to primary legislation which is a slower process.

In addition, any legislative instruments made under proposed subsection 10AA(3) would be subject to parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003.*

Specific reference to 'regulations'

Consistent with the Office of Parliamentary Counsel's drafting direction on subordinate instruments (Drafting Direction No.3.8), subordinate instruments should generally be made in the form of legislative instruments, rather than regulations, unless there is a good reason to depart from this. The Office of Parliamentary Counsel has advised that it will usually be appropriate to specifically refer to 'regulations' in the primary Act where an instrument to be made under the power covers any of the following:

(a) offence provisions

(b) powers of arrest or detention

(c) entry provisions

(d) search provisions

(e) seizure provisions

(f) civil penalties

(g) impositions of taxes

(h setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount, and

(i) amendments of the text of an Act.

As none of the matters listed above are anticipated to be required to be made under the powers in proposed subsections 10AA(2) and (3), I do not consider it necessary that they be made as regulations. However, if any matter listed above were to be required, the relevant legislative instrument would be made as a Regulation which falls within the definition of 'legislative instrument' in the Legislative Instruments Act.

Legislative instruments are subject to the same level of Parliamentary scrutiny as regulations. The Office of Parliamentary Counsel is available to be involved in the drafting of any particular instruments where it is considered that the skills of a professional drafter are required. In practice, my department engages the Office of Parliamentary Counsel to draft legislative instruments of this nature and I do not envisage departing from that practice for instruments proposed to be made under subsections 10AA(2) and (3).

I would be happy to discuss this matter further with the Committee and I thank you for seeking my advice.

Committee Response

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

The committee leaves the question of whether the proposed approach to the delegation of legislative power in proposed section 10AA is appropriate to the Senate as a whole.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Omnibus Repeal Day (Spring 2014) Bill 2014

Introduced into the House of Representatives on 22 October 2014
Portfolio: Prime Minister

Introduction

The committee dealt with this bill in *Alert Digest No. 15 of 2014*. The Parliamentary Secretary to the Prime Minister responded to the committee's comments in a letter dated 15 January 2015. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends or repeals legislation across nine portfolios.

The bill includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No. 2) 2014 and the Amending Acts 1970-1979 Bill 2014.

The bill also abolishes the following bodies:

- the Fishing Industry Policy Council;
- the Product Stewardship Advisory Group; and
- the Oil Stewardship Advisory Council.

Inappropriate delegation of legislative power
Schedule 2, item 5, subsection 87A(9) of the *Broadcasting Services Act 1992*
Schedule 2, item 6, section 126 of the *Broadcasting Services Act 1992*
Schedule 2, item 10, clause 32 of schedule 6 of the *Broadcasting Services Act 1992*
Schedule 2, item 17, subsection 378(1) and 378(5) of the *Telecommunications Act 1997*
Schedule 2, item 18, section 379 of the *Telecommunications Act 1997*
Schedule 2, item 19, subsections 382(1), 382(5), 386(1), 386(5), 405(1), 405(5), 422(1) and 422(5) of the *Telecommunications Act 1997*
Schedule 2, item 20, sections 460 and 464 of the *Telecommunications Act 1997*
Schedule 2, item 21, subsection 572E(8) of the *Telecommunications Act 1997*

Item 5 of schedule 2 seeks to repeal subsection 87A(9) of the *Broadcasting Services Act 1992* which provides that the 'ACMA must, before imposing, varying or revoking a condition [on a community television licence] under this section, seek public comment on the proposed condition or the proposed variation or revocation'. The explanatory memorandum states that the 'current consultation provision is considered unnecessary in light of the consultation requirements in section 17 of the [*Legislative Instruments Act 2003* (LI Act)]' (p. 11). No justification is given for this conclusion in the explanatory memorandum.

The consultation requirements under the LI Act do not coincide with the requirement to 'seek public comment' under subsection 87A(9). **The committee therefore seeks the Parliamentary Secretary's advice as to the justification for the repeal of subsection 87A(9) that addresses the differences between this requirement and those under section 17 of the LI Act. In particular, the committee is interested as to whether there may be situations under the LI Act requirements that mean that public comment need not be sought.**

Section 19 of the LI Act provides that the 'fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument'. It does not appear that a similar 'no-invalidity clause' is applicable to the consultation requirement under subsection 87A(9). In these circumstances it may be that compliance with the requirement is a condition of a valid exercise of power under section 87A. **The committee therefore seeks the Parliamentary Secretary's advice as to why compliance with consultation requirements in this context is not sufficiently important that breach should result in an invalid decision.**

The committee notes that similar issues arise in relation to items 6, 10 and 17–21 and also seeks the Parliamentary Secretary's similar advice in relation to each of these proposed amendments.

> *Pending the Parliamentary Secretary's reply, the committee draws Senators' attention to these 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.*

Inappropriate delegation of legislative power
Procedural fairness
Schedule 2, item 7, subsections 130R(3), 130T(4), 130U(4), 130ZCA(5), 130ZCA(6) and 130ZD(2) of the *Broadcasting Services Act 1992*
Schedule 2, item 8, subclauses 68(3), 70(4) and 71(4) of schedule 5 of the *Broadcasting Services Act 1992*
Schedule 2, item 9, clause 77 of schedule 5 of the *Broadcasting Services Act 1992*
Schedule 2, item 11, subclauses 91(3), 93(4) and 94(4) of schedule 7 of the *Broadcasting Services Act 1992*
Schedule 2, item 12, clauses 99 and 100 of schedule 7 of the *Broadcasting Services Act 1992*
Schedule 2, item 13, subsections 44(3), 46(4) and 47(4) of the *Interactive Gambling Act 2001*
Schedule 2, item 14, subsections 44A(5) and 44A(7) of the *Radiocommunications Act 1992*
Schedule 2, item 15, subsections 123(3), 125(4), 125AA(3), 125A(3) and 125B(3) of the *Telecommunications Act 1997*

Item 7 seeks to repeal subsections 130R(3), 130T(4), and 130U(4) of the *Broadcasting Services Act 1992*. Each of these subsections set out consultation requirements for the ACMA in determining certain industry standards. The explanatory memorandum indicates that these consultation requirements are directed to a relevant industry body or association. The explanatory memorandum states that these consultation provisions are 'considered unnecessary in light of the consultation requirements in section 17 of the LI Act' (p. 12). No justification is given for this conclusion in the explanatory memorandum.

In each case, as the consultation requirement concerns an industry body or association that will have a direct interest in the standard, the consultation requirements are analogous to procedural fairness requirements: that is, the provisions require an appropriate representative of affected interests to be consulted prior to a decision being made.

In light of the role that sections 130R(3), 130T(4), and 130U(4) may be considered to play in ensuring affected interests are afforded a fair hearing, compliance with consultation requirements could be considered necessary to ensure a fair hearing. It may be noted that, in general, fair hearing requirements (at common law and under statute) are a mandatory element of making a valid decision. **The committee therefore seeks further information from the Parliamentary Secretary in relation the adequacy of section 17 of the LI Act as a replacement for these specific consultation obligations given that section 19 of that Act provides that the fact 'that consultation does not occur does not affect the validity or enforceability of a legislative instrument'.**

Item 7 also repeals subsections 130ZCA(5), 130ZCA(6) and 130ZD(2), provisions which set out consultation requirements for the ACMA in formulating conditional access schemes. In particular, subsections 130ZCA(5) and 130ZCA(6) require the ACMA, before registering a conditional access scheme, to publish a draft of the scheme on its website, invite written submissions within a period not shorter than 14 days and have due regard to

submissions received. Again, the explanatory memorandum states that these consultation provisions are 'considered unnecessary in light of the consultation requirements in section 17 of the LI Act' (p. 13).

The committee notes that similar issues to those set out above arise in relation this proposed amendment (in item 7) and in relation to items 8–9 and 11–15. The committee therefore seeks the Parliamentary Secretary's similar advice in relation to each of these proposed amendments.

> *Pending the Parliamentary Secretary's reply, the committee draws Senators' attention to these 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.*

Inappropriate delegation of legislative power
Schedule 2, item 16, sections 132 and 135 of the *Telecommunications Act 1997*

This item repeals sections 132 and 135 of the *Telecommunications Act 1997*, which set out consultation requirements for determining and varying industry standards.

Section 132 requires the ACMA to conduct public consultation, including making copies of the draft standard or variation available for inspection and to cause a notice to be published in newspapers inviting written comments. Significantly the ACMA must have due regard to comments received. Section 135 requires the ACMA to consult at least one body or association that represents the interests of consumers before determining, varying or revoking an industry standard.

The explanatory memorandum states that these sections are 'considered unnecessary in light of the consultation requirements in section 17 of the Legislative Instruments Act' (at p. 17). No justification is given for this conclusion in the explanatory memorandum.

The consultation requirements under the LI Act do not coincide with the requirements under these sections. **The committee therefore seeks the Parliamentary Secretary's advice as to the rationale for the repeal of sections 132 and 135 which addresses the differences between the requirements in these sections and those under section 17 of the LI Act.**

As previously noted, section 19 of the LI Act provides that the 'fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument'. It does not appear that a similar 'no-invalidity clause' is applicable to the consultation requirement under sections 132 and 135. In these circumstances it may be that compliance with the requirement is a condition of a valid standard. **The committee therefore seeks the Parliamentary Secretary's advice as to why compliance with consultation requirements in this context is not considered to be a mandatory element of making a valid standard.**

Pending the Parliamentary Secretary's reply, the committee draws Senators' attention to these 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.

Parliamentary Secretary's response - extract

The Committee seeks advice on the proposed repeal of specific consultation provisions in the Broadcasting Services Act 1992, the Interactive Gambling Act 2001, the Radiocommunications Act 1992 and the Telecommunications Act 1997. In particular, the Committee has sought advice on differences between the consultation requirements being repealed and the consultation provisions that exist for all legislative instruments under section 17 of the Legislative Instruments Act 2003 (LI Act).

The proposed removal of the consultation requirements in the Acts mentioned above is considered justified on the basis that the requirements unnecessarily duplicate consultation requirements in section 17 of the LI Act which sets the standard consultation requirements for all Commonwealth legislative instruments.

It is the case that nearly all of the individual consultation provisions proposed for repeal date from a time before the enactment of the LI Act. These provisions served a strong independent purpose prior to the LI Act but now, while not identical, largely duplicate the effect of the LI Act. The proposed repeal of these provisions would simplify, shorten and harmonise the law.

One significant advantage of Part 3 of the LI Act is that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken and allows for flexibility. The various provisions proposed to be repealed, by contrast, are prescriptive rules. The consultation periods in question range from 14 days to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. The maintenance of such provisions would provide for inconsistency, inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.

The Committee has also raised concerns about reliance on the LI Act, on the basis that section 19 of that Act provides that failure to consult does not affect the validity or enforceability of a legislative instrument. On this point, it should be noted that Part 5 of the LI Act also sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments.

The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament is dissatisfied with that consultation, the instrument may be disallowed.

Committee Response

The committee thanks the Parliamentary Secretary for this response. The committee notes that while repealing the current consultation requirements in favour of the general consultation requirements in the LI Act may allow for increased flexibility, the LI Act requirements are not identical to the current consultation requirements. Furthermore, the committee notes that the 'no invalidity' clause in section 19 of the LI Act will now apply to consultation undertaken in relation to these provisions and therefore failure to consult will not affect the validity or enforceability of the legislative instruments.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

Parliamentary scrutiny
Schedule 3, items 26–27 and 38–40, section 4, subsections 62(1) and 62(2) and the Schedule to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*

The Schedule to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the HW Act) contains the English text of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (the Basel Convention).

The explanatory memorandum (at p. 27) states that:

> Duplicating the text of the Basel Convention in the HW Act requires amendments to the HW Act each time the Basel Convention is amended to ensure that the Schedule remains contemporaneous (see section 62(2) of the HW Act, which enables the regulations to amend the Schedule). The inclusion of the text of the Basel Convention also adds unnecessary length to the HW Act.
>
> Item 40 will repeal the Schedule to the HW Act to remove the full text of the Basel Convention. Instead, Item 27 will insert a note at the end of the definition of the Basel Convention in section 4 of the HW Act to direct readers to the website where the Convention can be viewed.

As a consequence of the removal of the English text of the Convention from the Schedule to the Act, item 26 seeks to amend the definition of 'Basel Convention' in section 4 of the HW Act so that 'Basel Convention' will mean 'the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *as amended and in force for Australia from time to time*.'

The committee notes that under the current provisions where the text of the Basel Convention changes it is necessary for a regulation, which can be disallowed by either House of the Parliament, to be made under subsection 62(2) of the HW Act. Removing this process may therefore be said to have the potential to impact on parliamentary scrutiny. It may also make the terms of the law less accessible given that readers of the legislation would be directed to another source (the AustLII website—which may not be permanently available) to access the full terms of the Convention. **The committee therefore seeks the Parliamentary Secretary's advice as to how often it has been necessary to update the text of the Basel Convention utilising the mechanism in subsection 62(2). The committee also seeks advice as to the original rationale for providing that the text of the Convention be included as a Schedule to the Act (rather than providing a reference to the Convention as is proposed in this bill).**

> *Pending the Parliamentary Secretary's reply, the committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Parliamentary Secretary's response - extract

In relation to proposed amendment to the Hazardous Waste (Regulation of Exports and Imports) Act 1989 (the Hazardous Waste Act), the Committee seeks advice on how often it has been necessary to update the text of the Basel Convention utilising the mechanism in subsection 62(2).

Regulations amending the text of the Schedule to the Hazardous Waste Act have been made three times, although this is not as often as amendments have been made to the Basel Convention. This discrepancy is a result of the resources required and process involved to make a legislative instrument to amend the Schedule to the Hazardous Waste Act, which has meant that the Schedule no longer aligns with the current text of the Basel Convention.

The Committee also seeks advice on the original rationale for providing the text of the Basel Convention as a Schedule to the Hazardous Waste Act, rather than by reference to the Convention as proposed by the Bill.

The text of the Basel Convention was set out in a Schedule to the Hazardous Waste Act, as part of a suite of amendments made by the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1995. The explanatory memorandum gives the rationale that inclusion of the Convention text enables convenient reference and transparency by eliminating the need for the reader to refer to another source. It was also considered common practice in legislation implementing international Conventions.

However, as noted the inclusion of the text of the Basel Convention adds unnecessary length to the Hazardous Waste Act. In addition, making regulations to update the text is resource intensive in practice, and as these resources are not always available, the Schedule is currently out of date. As a result, the current arrangement has not provided greater transparency or convenience to the reader, than that which is provided through other sources. The proposed amendment would refer the reader to the Australian Treaties Library on the AustLII website, as an authoritative database of Australia's treaties, and which receives financial funding and provision of content by the Department of Foreign Affairs and Trade.

The proposed amendment would not impact on parliamentary scrutiny, as Australia's consent to any change to the text of the Basel Convention would continue to be considered by the Joint Standing Committee on Treaties.

Committee Response

The committee thanks the Parliamentary Secretary for this response.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Regulator of Medicinal Cannabis Bill 2014

Introduced into the Senate on 27 November 2014
By: Senators Di Natale, Macdonald, Leyonhjelm and Urquhart

Introduction

The committee dealt with this bill in *Alert Digest No. 17 of 2014*. A joint response was received on 27 January 2015 to the committee's comments to the bill. A copy of the letter is attached to this report.

Alert Digest No. 17 of 2014 - extract

Background

This bill provides for the establishment of a Regulator of Medicinal Cannabis who is responsible for formulating rules for licensing the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

Delegation of legislative power
General comment

This bill may be characterised as framework legislation, which aims to introduce a regulatory regime for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

The subject matter of the bill is of considerable significance and it is therefore a matter of concern, based on the committee's scrutiny principles, that core elements of the regulation of medicinal cannabis are left to be established and defined through the rules (rather than primary legislation). The rules will play a significant role in the operation of the registration scheme established under Division 2 of the bill. Even more significantly the schemes for:

- the licensing of medicinal cannabis (Division 3);
- the authorisation of patients and carers (Division 4);
- experimental licensing (Division 5); and
- import and export (Division 7)

are all to be determined in the rules. These schemes are central to the operation of the legislation. Division 6 provides for the making of medicinal cannabis standards.

Leaving so much substantive detail to be rules limits the role that the committee can undertake in examining the legislation. For example, subclause 59(2) provides that the rules may provide that a decision made under the rules is a merits reviewable decision. However, the committee cannot examine the appropriateness of the approach to review rights that may be taken under the rules.

Noting the above, there is a question as to whether the approach of providing that all of these significant matters be dealt with in the rules constitutes an appropriate delegation of legislative power. Clause 63 confers the rule-making power on regulator. **The committee therefore seeks the Senators' advice as to why the medicinal cannabis standards and the core schemes for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis should not be included in the primary legislation.**

If it is not proposed that these matters be dealt with in the primary legislation, the committee also seeks the Senators' advice as to whether the bill can be amended to ensure that the matters are dealt with in regulations (rather than rules) as this would ensure that the regulations (which, in effect, establish core elements of the scheme) are drafted by the OPC and considered by the Federal Executive Council.

> *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.*

Senators' response - extract

In order for the Regulator of Medicinal Cannabis to effectively carry out its functions, it requires its members to hold expertise in relevant clinical or scientific fields as prescribed in Section 34 of the Bill. This section also confers that the expert members are to be appointed by the Minister.

As certain aspects of the Bill, in particular the production, manufacture and supply of medicinal cannabis will only be determined following State and Territory Government negotiations, primary legislation that would pre-empt this process and bind the Regulator could create potential problems with the negotiations.

The Regulator also requires flexibility to consult broadly in developing appropriate standards for its operation, and to respond quickly and proactively to changing circumstances. Prescriptive primary legislation could hinder the Regulator's ability to effectively perform certain functions.

The model for this Bill is consistent with the Canadian approach which established a *Marijuana for Medical Purposes Regulations* to process applications and regulate the distribution of cannabis for medical purposes through commercial Licensed Producers. Licenced Producers are required to demonstrate compliance with regulatory requirements such as quality control standards, record-keeping of all activities including inventories of marijuana, and physical security measures to protect against potential misuse.

Should a senate inquiry recommend amendments to the bill, to strengthen its application, then we would be happy to consider them.

Senator David Leyonhjelm and Senator Anne Urquhart concur with Senator Di Natale's response.

Senator Ian Macdonald asked that his comment be noted: I am happy with his reply but I do suggest we give serious consideration to making the "rules" regulations. I think that is a fair point by the Scrutiny of Bills Committee.

Committee Response

The committee thanks the Senators for this useful response.

The committee notes that the Senators consider that 'prescriptive primary legislation could hinder the Regulator's ability to effectively perform certain functions' and that it is therefore necessary that core elements of the regulation of medicinal cannabis are left to be established and defined through delegated legislation. **In this regard, the committee notes the points made, but reiterates its general view that it will have scrutiny concerns where framework legislation leaves the core elements of a regulatory scheme to delegated legislation. Given this principle, the committee continues to be concerned that core elements of this regulatory scheme have not been included in the bill.**

The committee also retains the view that if the core elements of the regulation of medicinal cannabis are left to be established and defined through delegated legislation it would be appropriate for these detailed and complex matters to be dealt with in regulations (rather than rules) as this would ensure that the regulations are drafted by the OPC and considered by the Federal Executive Council.

The committee draws these issues to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Introduced into the House of Representatives on 25 September 2014
Received Assent 12 December 2014
Portfolio: Social Services

Introduction

The committee dealt with this matter in the amendment section of *Alert Digest No. 13 of 2014*. The Assistant Minister responded to the committee's comments in a letter dated 5 December 2015. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2014 - extract

Background

This bill seeks to amend the *Social Security (Administration) Act 1999* and the *Social Security Act 1991* to:

- suspend income support payments for failing to attend a regular appointment with an employment provider without a reasonable excuse from 1 July 2015;
- allow job seekers who are 55 years or older and have a full time mutual obligation requirement to meet that requirement by undertaking part-time voluntary work or paid work; and
- allow cohorts of job seekers who are specified in a legislative instrument to be precluded from these provisions.

Breadth of discretionary power
Schedule 1, items 4, 5 and 6

These items propose amendments to give effect to a purpose of this bill to provide that, from 1 January 2015, where a job seeker's payment is suspended following a failure to attend an appointment it would not be restored until the job seeker actually attends (as opposed to indicates an intention to attend) their next appointment. On attendance, the job seeker would receive full back pay.

The explanatory memorandum (at p. 12) notes that the power to issue 'reconnection requirements' has been delegated to employment providers so that they, not the Department of Human Services, can directly arrange a suitable time with the job seeker to

enable the job seeker to attend an appointment with the result of reinstating their entitlement. As further noted, however, 'in some cases it may not be possible for a job seeker to be issued with a reconnection appointment promptly, for example because an employment provider is not available for an appointment'. In relation to these problems, the explanatory memorandum points to the existing power of the Secretary (which would be unchanged by the bill), under paragraph 42SA(2)(b), to reinstate payment at an earlier date where this is deemed appropriate.

The committee notes that the power to issue reconnection requirements and schedule appointments is held by employment service providers and as such, the Department will not have direct control over their administration. Furthermore, given the changes are justified by reference to the fact that job seekers will have the practical means to remedy failures which result in the suspension of their entitlement, **the committee seeks the Minister's advice as to whether consideration has been given to an amendment which would require (rather than enable) the Secretary to reinstate payment when a job seeker is unable to be issued with a reconnection appointment within two business days from the date the person contacted their employment provider.**

> *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.*

Assistant Minister's response - extract

Breadth of discretionary power
Schedule 1, items 4, 5 and 6

> **The committee seeks my advice as to whether consideration has been given to an amendment which would require (rather than enable) the Secretary to reinstate payment when a job seeker is unable to be issued with a reconnection appointment within two business days from the date the person contacted their employment provider.**

I inform the Committee that the Government has agreed to an amendment which would enshrine in legislation the current practice that a job seeker's payment suspension is lifted if they are unable to be offered a reconnection appointment within two business days from the date the person contacted their employment provider.

Committee Response

The committee thanks the Assistant Minister for this response and notes that the amendment outlined by the Assistant Minister addresses the committee's concerns in relation to this matter.

Alert Digest No. 13 of 2014 - extract

Breadth of discretionary power
Schedule 1, item 8

A similar issue arises in relation to this item. The explanatory memorandum (at p. 14) explains the effect of this item is that more of a person's payment may be withheld than is currently the case and thus that there is 'a greater financial incentive for job seekers to re-engage quickly with their employment provider'. The explanatory memorandum adds that 'it is intended that in practice flexible arrangements would be put in place to ensure that these amendments would not result in a job seeker experiencing any undue delay in receiving payment.' Given the potentially significant impact of this item, **the committee seeks clarification from the Minister about these 'flexible arrangements' (including whether the Department or employment service providers will be responsible for their implementation) and also asks whether consideration has been given to including protections against undue delay in the legislation.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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

Breadth of discretionary power
Schedule 1, item 8

> **The committee seeks clarification about these 'flexible arrangements' (including whether the Department or employment service providers will be responsible for their implementation) and also asks whether**

consideration has been given to including protections against undue delay in the legislation.

The amendment outlined above will protect job seekers against any undue delay in being offered a reconnection appointment. Consistent with the current practice, there will continue to be flexibility for employment providers to conduct the reconnection appointment either face to face or over the phone. This will ensure that job seekers are supported to reengage with their employment provider as quickly as possible where they are unable to attend in person.

Committee Response

The committee thanks the Assistant Minister for this response and notes that the amendment outlined by the Assistant Minister addresses the committee's concerns in relation to this matter.

Alert Digest No. 13 of 2014 - extract

Merits review
Items 10 and 11

These items have the effect that internal and merits review are not available for decisions under subsections 42SA(1) or (2A).

The justification provided for this approach is as follows:

> [I]n practice it would be appreciably easier for a person to attend a reconnection appointment with their employment provider than seek review of the decision to suspend their payment. For this reason, the Bill would also mean that a decision to suspend a person's payment for certain failures would not be subject to review, either by the Secretary or the Social Security Appeals Tribunal' (explanatory memorandum, p. 6).

Noting the above concerns raised about ensuring that job seekers are in practice able to arrange reconnection appointments promptly, **the committee draws the issue to the attention of Senators and leaves the appropriateness of not providing for merits review of these decisions to the Senate as a whole.**

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

Minister's response - extract

Merits review
Items 10 and 11

The committee draws the issue to the attention of Senators and leaves the appropriateness of not providing for merits review of these decisions to the Senate as a whole.

The Government has agreed to an amendment to allow merits review of payment suspension.

Committee Response

The committee thanks the Assistant Minister for this additional information and notes that the amendment outlined by the Assistant Minister addresses the committee's concerns in relation to this matter.

Alert Digest No. 13 of 2014 - extract

Delegation of legislative power
Items 13-19

The explanatory memorandum (at p. 16) explains that these items would make amendments in relation to the circumstances in which relief would be available for certain job seekers from the activity test (for people on newstart allowance and special benefit) or suitable paid work requirements (for people on parenting payment with participation requirements).

Currently, job seekers on newstart allowance or special benefit who are aged 55 or over are taken to satisfy the activity test if they are engaged in at least 30 hours per fortnight of approved voluntary work, paid work (including self-employment), or a combination of

these in a fortnight – unless the Secretary considers that they should not be exempt from the activity test due to the opportunities for employment available to the person. There are also, currently, similar provisions regarding parenting payment recipients aged 55 or over with participation requirements.

The amendments will empower the Secretary to make a legislative instrument that specifies a class of persons to whom these provisions (i.e. those which provide that in certain circumstance job seekers aged over 55 are taken to satisfy the activity test) do not apply.

The explanatory memorandum (at p. 8) indicates that the government's present intention is that an instrument will be made that will specify job seekers aged 55-59 who are receiving services from Job Services Australia for the purpose of this provision. It appears that the result of implementing this intention may, in practical effect, be that the age threshold for exempting older job seekers from requirements associated with the activity test in limited circumstances will be raised from 55 (as set in the primary legislation) to 60 (as a result of the legislative instrument).

This change is of considerable significance in terms of the operation of the legislation and, in general the committee would therefore expect that it be achieved through an amendment to the primary legislation rather than through a legislative instrument.

The explanatory memorandum suggests that it is appropriate that the policy change be made through a legislative instrument on the basis that this will 'provide greater flexibility to take account of continuing adjustments in Government policy and the use of trial programmes to test new approaches' (at p. 17). Further, it is suggested that the use of a legislative instrument will also 'avoid unnecessarily adding to the length or complexity of the SS Act' and that the 'approach is consistent with the SS Act as a whole, which makes provision for many legislative instruments'.

The committee considers that none of these factors provide strong reasons for implementing an important policy decision (i.e. raising the age requirement for a significant concession to older job seekers) through delegated legislation. The rationale for the approach based on flexibility and the possible use of trial programs is not developed in the explanatory memorandum. The nature of the policy change being contemplated would not, on its face, appear to require lengthy or complex amendments. Finally, although social security legislation does authorise the making of many legislative instruments, it is to be hoped that in most instances significant policy questions will be settled in the primary legislation by the Parliament.

For the above reasons, the committee requests further advice from the Minister as to why such a potentially significant policy change could not be included in primary, rather than secondary, legislation.

> *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

Delegation of legislative power
Items 13-19

> **The committee considers that none of these factors provide strong reasons for implementing an important policy decision (i.e. raising the age requirement for a significant concession to older job seekers) through delegated legislation. The rationale for the approach based on flexibility and the possible use of trial programs is not developed in the explanatory memorandum. The nature of the policy change being contemplated would not, on its face, appear to require lengthy or complex amendments. Finally, although social security legislation does authorise the making of many legislative instruments, it is to be hoped that in most instances significant policy questions will be settled in the primary legislation by the Parliament. For the above reasons, the committee requests further advice as to why such a potentially significant policy change could not be included in primary, rather than secondary, legislation.**

The Government has agreed to an amendment which removed items 13 to 19 from the Bill.

Thank you for bringing these issues to my attention.

Committee Response

The committee thanks the Assistant Minister for this response and notes that the amendment outlined by the Assistant Minister addresses the committee's concerns in relation to this matter.

Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014

Introduced into the House of Representatives on 30 October 2014
Received Assent 12 December 2014
Portfolio: Treasury

Introduction

The committee dealt with this bill in *Alert Digest No. 15 of 2014*. The Assistant Treasurer responded to the committee's comments in a letter dated 2 December 2014. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill seeks to amend the law relating to taxation and grants.

Schedule 1 seeks to extend the existing business restructure roll-overs available where a member of a company or unitholder in a unit trust can defer the income tax consequences of transactions that occur in the course of a business restructure.

Schedule 2 ensures that foreign pension funds can access the managed investment trust (MIT) withholding tax regime and the associated lower rate of withholding tax on income from certain Australian investments.

Schedule 3 provides an exemption from Australian tax on income derived by certain entities engaged by the Government of the United States of America in connection with Force Posture Initiatives in Australia.

Schedules 4 and 5 ensure that changes to the amount of excise and excise-equivalent customs duty payable by taxpayers as a result of any tariff proposals tabled in the House of Representatives are taken into account in calculating fuel tax credits and the cleaner fuels grant for biodiesel and renewable diesel.

Retrospective application
Schedule 1, item 39

Schedule 1 of the bill proposes a number of amendments to the *Income Tax Assessment Act 1997* to extend the existing business restructure roll-overs available where a member of a

company or unitholder in a unit trust can defer the income tax consequences of transactions that occur in the course of a business restructure.

Item 39 provides for the date of effect for amendments made in Parts 1 and 2 (10 May 2011), Division 1 of Part 3 (10 May 2011), and Division 2 of Part 3 (1 November 2008). The explanatory memorandum states that 'broadly, the date of effect of all of these amendments is the date each change was announced by the then government'. The justification is that this 'protects taxpayers who have acted in accordance with the announcements about how the law will be changed' (p. 26). In the case of Division 2 of Part 3 amendments the application date is prior to the date of announcement (i.e. the amendments apply from 1 November 2008 but were announced on 10 May 2011). The explanatory memorandum, however, states that the relevant amendment is 'beneficial for interest holders' and that it 'applies retrospectively to align with the application date of the subdivision 126-G fixed trust roll-over' (p. 27).

It is of considerable concern that proposals to amend tax laws are taking so long to be brought before the Parliament after the time of announcement. Although the committee accepts that it is sometimes necessary for tax amendments to apply from the date of announcement it will generally only accept this approach as legitimate if amendments are introduced into the Parliament within six months. Where this is not done, the committee expects a detailed justification for why delay has been necessary. The longer amendments are delayed the less it can be assumed that taxpayers should reasonably expect that changes will indeed be made and the greater scope there may be for uncertainty. This is particularly so, where elections intervene between the date a proposal is announced and the date amendments are introduced. Although the current government indicated on 14 December 2013 that it would proceed with proposals previously announced, it may be noted the time frame to bring the amendments before the Parliament after this announcement itself well exceeds the committee's six-month expectation.

The committee also notes Senate procedural order of continuing effect 44 (Taxation bills—retrospectivity) which provides that where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by the Senate.

In light of the above comments, the committee seeks further information from the Assistant Treasurer as to why it was not possible to bring these proposals before the Parliament earlier to avoid such an extended period of retrospective application. The committee also seeks advice as to whether it is possible that some taxpayers may have relied on existing provisions to their detriment (and may therefore be adversely affected by the retrospective application of these amendments).

> *Pending the Assistant Treasurer'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.*

Assistant Treasurer's response - extract

The Committee has requested further advice about Schedule 1 to the Bill, which proposes to make a number of amendments to the *Income Tax Assessment Act 1997* to extend the availability of existing business restructure rollovers and makes some related technical amendments. Specifically, the Committee expressed concern about the retrospective application of these amendments.

I understand the Committee's concern about the significant retrospective application of these amendments. However, I consider that in this case it is appropriate. As the Committee notes, the application period for the various amendments is consistent with the dates set out in the announcements made by the then Government. If the changes did not apply from this time, taxpayers who had acted in reliance upon these announcements would be disadvantaged.

Further, I also note that in this case the retrospective application of the amendments to the availability of the rollover will not disadvantage any taxpayer. The business restructure rollovers are an optional concession. Retrospectively extending their availability allows taxpayer to opt for the rollover to apply, but in the rare situation where this might not provide an advantage to the taxpayer, the taxpayer can simply not make this choice. Similarly, the various technical amendments address problems with the law that might otherwise disadvantage taxpayers.

I also understand the Committee's more general concerns about the period it has taken for these amendments to be brought before Parliament. The Government appreciates the importance of ensuring that announced proposals to amend the tax law are brought promptly before the Parliament to provide certainty to taxpayers.

However, as you are aware, this measure is one of 96 proposals to amend the tax law that had been announced but had not been legislated at the time this Government was elected. Given the volume of proposals, it is not practical and would place an unreasonable demand on the time of Parliament to seek to resolve all of the announced but unenacted measures within six months.

Nonetheless, the Government is committed to providing taxpayers with certainty in relation to all of these proposals as soon as is practicable and is working to ensure that similar delays between announcement and the introduction of legislation do not arise in future. Of the announced but unenacted measures, the Government has now resolved a majority and expects to introduce legislation to address the remaining proposals over the 2015 Parliamentary sittings.

I trust this information addresses the concerns raided by the Committee.

Committee Response

The committee thanks the Assistant Treasurer for this useful response.

The committee notes the Assistant Treasurer's advice that if the changes did not apply retrospectively, taxpayers who had acted in reliance on the announcement of the changes would be disadvantaged. Although the committee accepts that this may be the case, it may be noted that this argument will apply generally (i.e. in all cases where announcements are made that the tax law will be amended). The committee reiterates its view that the appropriate response is to ensure that announced proposals to the tax law are brought promptly before the Parliament. In this regard the committee again highlights Senate procedural order of continuing effect 44 (Taxation bills—retrospectivity) which provides that where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by the Senate.

In this case, the committee notes the Assistant Treasurer's advice that the retrospective application of these amendments will not disadvantage any taxpayer. The committee also welcomes the Assistant Treasurer's recognition of the importance of ensuring that announced proposals to amend the tax law are brought promptly before the Parliament to provide certainty to taxpayers.

The committee notes that this bill has already been passed by both Houses of Parliament and therefore makes no further comment in relation to this matter.

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Introduced into the House of Representatives on 30 October 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 16 of 2014*. The Attorney-General responded to the committee's comments in a letter dated 4 February 2015. A copy of the letter is attached to this report.

Alert Digest No. 16 of 2014 - extract

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications Act 1997* to introduce a statutory obligation for telecommunications service providers to retain defined telecommunications data for two years.

Attorney-General's general comment

The Committee has indicated concerns about the impact of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in relation to the right to privacy. It has also recommended that the Bill be amended so that a range of matters are dealt with in the primary legislation rather than through delegated legislation and instruments.

Alternatively, if the Bill is not amended, the Committee has requested advice from the Government about other mechanisms to increase Parliamentary oversight in relation to regulations prescribing the data set, those prescribing additional services to which the data set will apply and Ministerial declarations of further authorities and bodies to be a 'criminal law enforcement agency'.

Right to privacy

The Committee's analysis of the Bill refers to the *Fifteenth Report on the 44th Parliament* by the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR has requested further information about the Bill to which I will shortly respond separately.

However, I take this opportunity to note that the Bill contains significant oversight mechanisms designed to safeguard privacy and other fundamental freedoms.

The retention of a limited set of telecommunications data that is required to support investigations serves the legitimate objective of protecting national security, public safety and addressing crime. To avoid unlawful and arbitrary interference with the right to privacy, the Bill sets out the types of data which will be retained, reduces the number and range of agencies which can access telecommunications data and extends the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of telecommunications data under Chapter 4 of the TIA Act. These safeguards supplement existing controls limiting the purposes for which telecommunications data may be used, and offences for the unlawful use of telecommunications data.

Committee Response

The committee thanks the Attorney-General for this additional information.

The committee welcomes measures in the bill designed to avoid unlawful and arbitrary interference with the right to privacy, such as the reduction in the number and range of agencies which can access telecommunications data and the extension of the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of, telecommunications data under Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

In relation to the extension of the Ombudsman's remit, the committee notes that the efficacy of the increased oversight will depend upon the Ombudsman being appropriately resourced to undertake its increased oversight responsibilities. More generally, a similar case may be made in relation to oversight of intelligence agencies by the IGIS.

The committee therefore seeks the Attorney-General's advice in relation to whether any additional funding or resources will be provided to the Ombudsman and/or the IGIS to ensure that they are able to conduct their important oversight responsibilities effectively.

Alert Digest No. 16 of 2014 - extract

Inappropriate delegation of legislative power
Insufficiently defined administrative powers
Schedule 1, item 1, proposed section 187A

The purpose of the amendments in schedule 1 is to require providers of telecommunications services to retain particular data for all communications for a period of two years to facilitate access being granted to that data by specified agencies.

Subsection 187A(1) defines the data that must be retained by a telecommunication service provider as '(a) information of a kind prescribed by the regulations' or '(b) documents containing information of that kind' relating to any communication carried by means of the service. Subsection 187A(2) provides that the kinds of information prescribed for the purposes of paragraph 187A(1)(a) must fall into one or more of a number of categories:

- the subscriber, accounts, telecommunications devices and other relevant services relating to a relevant service (proposed paragraph 187A(2)(a));
- the source of a communication (proposed paragraph 187A(2)(b));
- the destination of a communication (proposed paragraph 187A(2)(c));
- the date, time and duration of a communication (proposed paragraph 187A(2)(d));
- the type of communication (proposed paragraph 187A(2)(e)); and
- the location of the line, equipment or telecommunications device (proposed paragraph 187A(2)(f)).

Subsection 187A(3) sets out the services to which the data retention obligations will apply. Significantly, paragraph 187A(3)(b)(iii) enables the regulations to prescribe services, beyond those specified in subsection 187A(3), to which the obligations will apply. That is, there will be a regulation making-power that can be used to expand the operation of the scheme.

Finally, it should be noted that subsection 187A(4) provides that service providers cannot be required to collect and retain the 'contents or substance of a communication' or information that would reveal web browsing history (explanatory memorandum, p. 44).

Definition of the scope of data

Two scrutiny concerns arise in relation to the definition of the scope of the data which must be retained under the scheme.

First, the bill does not itself contain a clear definition of the specific types of data that are covered by the data retention scheme. The types of data that must be collected, therefore,

need to be specified by a regulation made pursuant to paragraph 187A(1)(a). The explanatory memorandum justifies the delegation of legislative power on the basis that this is necessary to ensure that data retention obligations remain 'sufficiently flexible to adapt to rapid and significant future changes in communications technology' (statement of compatibility, p. 7; see also the explanatory memorandum, p. 36).

In light of this, the committee does not consider paragraph 187A(1)(a) to be an appropriate delegation of legislative power. As noted by the Parliamentary Joint Committee on Human Rights (PJCHR) in its *Fifteenth Report of the 44th Parliament* (p. 12), a scheme which requires that data be collected on every customer 'just in case that data is needed for law enforcement purposes is very intrusive of privacy'. Given this, it seems appropriate for Parliament (not the executive) to take responsibility for ensuring that the scheme is adequately responsive to technological change in the telecommunications industry. Although the committee accepts that regulation-making powers are in some cases justified by the necessity to build in scope for flexible regulatory responses to changing circumstances, whether this scheme—which is highly intrusive of individual privacy—should be applied in a new technological context is a matter which will raise significant questions of policy. The committee generally expects that significant matters will be included in primary legislation—they are not appropriately delegated by the Parliament to the executive government.

A related concern is that the category of services that will be subject to the data retention obligations can be expanded by regulation, pursuant to subparagraph 187A(3)(b)(iii). The explanatory memorandum suggests that this power to expand the application of the obligations through delegated legislation is appropriate on the basis that:

> The telecommunications industry is highly innovative and increasingly converged. Sophisticated criminals and persons engaged in activities prejudicial to security are frequently early adopters of communications technologies that they perceive will assist them to evade lawful investigations. As such, a regulation-making power is required to ensure the data retention regime is able to remain up-to-date with rapidly changes to communications technologies, business practices, and law enforcement and national security threat environments (explanatory memorandum, p. 43).

Again, although the committee accepts that regulation-making powers are in some cases justified by the necessity to build in scope for flexible regulatory responses to changing circumstances, how this scheme—which is highly intrusive of individual privacy—should be applied in a new technological context is a matter which will raise significant questions of policy that are not appropriately delegated by the Parliament to the executive government.

For the above reasons, the committee considers paragraph 187A(1)(a) and subparagraph 187A(3)(b)(iii) to inappropriately delegate legislative power.

In light of the above comments, the committee recommends that consideration be given to amending the bill to provide that these important matters are dealt with in the primary legislation rather than allowing for expansion of the scope of obligations by delegated legislation.

If the bill is not so amended, the committee seeks the Attorney-General's advice as to the rationale for the proposed approach in light of the above comments, including more detailed information about the appropriateness of this delegation of power and whether the disallowance process can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*).**

Pending the Attorney-General'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.

Attorney-General's response - extract

Regulating the data set

The Committee has indicated concerns that the types of data to be retained will be specified by a regulation made pursuant to proposed section 187A(1)(a). The Government believes the combination of primary and delegated legislation is appropriate in this context. It will ensure the primary legislation contains the range of telecommunications data that must be retained and allow the regulations to prescribe the details. This approach allows technical detail, conventionally reserved for regulations, to be adjusted expeditiously in response to technological change.

The data set will remain subject to Parliamentary oversight. The primary legislation limits the kinds of information that may be prescribed by regulation to information that falls within six categories listed in proposed section 187A(2). The Bill also provides that service providers are *not* required to keep, or to cause to be kept particular kinds of information, including information that is the contents or substance of a communication or a person's web-browsing history. Any alteration to the types or kinds of information that could be prescribed would require an amendment to the primary legislation. Consequently, any significant change to the range of data to be retained requires full Parliamentary consideration.

The Government is currently working with the telecommunications industry to support the implementation of the proposed measure. In this regard I note that the Government has established a joint Government industry Implementation Working Group (IWG) to refine the proposed data set. The IWG has prepared a first report in which it recommends,

amongst other matters, that any change to the regulations prescribing the data set not commence until the Parliamentary disallowance period has expired.

I have referred the IWG' s report to the Parliamentary Joint Committee on Intelligence and Security, which is currently inquiring into the Bill and data set. I look forward to considering the Committee's recommendations in this regard when it reports on 27 February 2015, and am aware that the Committee is mindful of this Committee's recommendations.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the approach proposed in the bill in relation to the types of data to be retained 'allows technical detail, conventionally reserved for regulations, to be adjusted expeditiously in response to technological change'. While setting out the types of data to be retained under the scheme may involve some technical detail, **the committee considers that this 'data set' is a core element of the proposed scheme and therefore reiterates its conclusion that the types of data to be retained should be set out in the primary legislation to allow full Parliamentary scrutiny.**

The committee, however, notes recommendation 5 in Report 1 of the Data Retention Implementation Working Group (IWG) referred to by the Attorney-General in which the IWG recommends 'that any proposed change to the regulations should not enter into force immediately, but rather come into effect only after Parliament has had an opportunity to review the proposed change and the disallowance period has expired' (p. 10). **While the committee has concluded that the 'data set' should be provided for in the primary legislation; if this is not agreed, the committee recommends that the bill be amended to ensure that any regulation under paragraph 187A(1)(a) setting out the types of data to be retained under the scheme does not come into effect until the regulation has been positively approved by each House of the Parliament (see, for example, s 10B of the *Health Insurance Act 1973*). At a minimum, the committee considers that such regulations should not come into effect until after the disallowance period has expired (as recommended by the IWG).**

The committee draws Senators' attention to proposed paragraph 187A(1)(a), as the committee considers that this provision delegates legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Regulations prescribing 'a service'

The Committee has recommended amending the Bill so that the definition of a service to which the retention obligation applies is defined entirely in the primary legislation. If the Bill is not amended, the Committee has requested advice from the Government about other mechanisms to increase Parliamentary oversight.

The proposed section 187A(3)(b) provides that the data retention obligation applies to a service if it is operated by a carrier (within the meaning of the TIA Act), operated by an internet service provider (within the meaning of Schedule 5 of the *Broadcasting Services Act 1992)* or prescribed in regulations.

The proposed section 187A(3)(b) is intended to ensure that the data retention obligation broadly applies to the telecommunications industry, unless excluded by proposed section 187A(3)(a) or (c), or an exemption under proposed section 187B applies. The definitions of carrier and an internet service provider will cover current industry participants to be the subject of data retention.

However, due to the rapid pace of changing technology and business practices, new types of businesses may emerge in the future. Accordingly, the ability to define another type of service provider through regulations is contained in proposed section 187A(3)(b)(iii).

Importantly, a service will only be able to be prescribed by the regulation-making power in section 187A(3)(b)(ii) if it also satisfies the other two limbs in sections 187A(3)(a) and (c); that is it must be a service for carrying communications, or enabling communications to be carried, by means of guided or unguided electromagnetic energy or both and the person operating the service must own or operate, in Australia, infrastructure that enables the provision of any of its relevant services.

The usual disallowance processes are appropriate in the context of prescribing a 'service' by regulation under this scheme. They provide Parliament with considerable oversight over regulations. Parliament can disallow a regulation within 15 sitting· days of it being tabled, and if a motion is not resolved in 15 sitting days, the regulation is automatically disallowed. This mechanism ensures that objections to a regulation are resolved.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that 'a service will only be able to be prescribed by the regulation-making power in section 187A(3)(b)(iii) if it also satisfies the other two limbs in sections 187A(3)(a) and (c); that is it must be a service for carrying communications, or enabling communications to be carried, by means of guided or unguided electromagnetic energy or both and the person operating the service must own or operate, in Australia, infrastructure that enables the provision of any of its relevant services.' While this limitation in the primary legislation is welcome, **the committee considers that the range of communications service providers to which the data retention obligations will apply is a core element of the proposed scheme and therefore reiterates its conclusion that the types of service providers subject to the data retention obligations should be set out in the primary legislation to allow full Parliamentary scrutiny.**

While the committee has concluded that the types of communications services providers should be provided for in the primary legislation; if this is not agreed, the committee recommends that the bill be amended to ensure that any regulation setting out a kind of service under subparagraph 187A(3)(b)(iii) does not come into effect until the regulation has been positively approved by each House of the Parliament (see, for example, s 10B of the *Health Insurance Act 1973*). At a minimum, the committee considers that such regulations should not come into effect until after the disallowance period has expired.

The committee draws Senators' attention to proposed subparagraph 187A(3)(b)(iii), as the committee considers that this provision delegates legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The committee also draws this provision to the attention of the Regulations and Ordinances Committee for information.

Alert Digest No. 16 of 2014 - extract

Second, although the bill excludes 'content' from the operation of the scheme (subsection 187A(4)), the bill does not clearly define what constitutes the 'content' of a communication for the purposes of the data retention scheme. For this reason there is a real risk that personal rights and liberties will be unduly dependent on insufficiently defined administrative powers.

The committee therefore recommends that consideration be given to amending the bill to provide a clear definition of 'content' in the primary legislation. If the bill is not so amended, the committee seeks the Attorney-General's advice as to why the bill should not be amended to include a clear definition of 'content' so the scope of the provision, and the extent of its impact on personal rights and liberties, can be assessed.

> *Pending the Attorney-General'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.*

Attorney-General's response - extract

Defining 'content'

The Committee has recommended that the Bill be amended to provide a clear definition of 'content' in the primary legislation.

This recommendation may result in the opposite of the Committee's desired effect. The Australian Law Reform Commission (ALRC) effectively recognised this risk in its report on *Australian Privacy Law and Practice (ALRC Report 108).* The ALRC report concluded that the TIA Act should not exhaustively define what constitutes telecommunications data, in order to allow it to continue to apply in the face of rapid technological change within the telecommunications industry. The merits of technological neutrality in the context of data are equally applicable to defining content. The broad definition in the TIA Act is capable of being interpreted in light of rapid changes in communications technology in a way that an exhaustive, static definition would not.

If the legislation were to include an exhaustive list of that which comprises 'content' it would likely result in the legislation failing to keep pace with rapid changes in the technology offered by the telecommunications industry. Any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content, and the extensive protections that apply to content.

The TIA Act includes provisions which, when read in conjunction with a broad definition of content, create a strong incentive for the telecommunications industry and agencies to take a conservative approach to accessing content. In particular:

- any person who believes that the content or substance of their communications has been unlawfully accessed under a data authorisation can challenge that access and, if successful, seek remedies under Part 3-7 of the TIA Act

- apart from limited exceptions, it is a criminal offence for a service provider to disclose the content or substance of a communication without lawful authority
- it is a criminal offence for officials of law enforcement and national security agencies to use or disclose unlawfully accessed stored communications except in strictly limited circumstances, and
- there is no discretion for a court to admit unlawfully accessed stored communications,· which includes information that has been wrongfully retained as data.

The TIA Act will continue to maintain a general and effective prohibition on the interception of, and other access to, telecommunications content except in limited 'special circumstances'.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice which suggests that 'if the legislation were to include an exhaustive list of that which comprises 'content' … any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content, and the extensive protections that apply to content.'

While the committee acknowledges this point, the committee notes that as long as the bill does not contain a clear definition of 'content' there is a real risk that personal rights and liberties will be unduly dependent on insufficiently defined administrative powers.

The committee draws Senators' attention to proposed subsection 187A(4), as it 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.

Alert Digest No. 16 of 2014 - extract

Inappropriate delegation of legislative power—expanding the meaning of 'criminal law-enforcement agency' and 'enforcement agency'
Schedule 2, item 3, proposed section 110A
Schedule 2, item 4, proposed section 176A

Proposed subsection 110A(3) empowers the minister to declare, by legislative instrument, further authorities or bodies to be a 'criminal enforcement agency' thereby enabling agencies beyond those listed in subsection 110A(1) to access metadata under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). Proposed subsection 176A(3) similarly empowers the minister to expand the meaning of 'enforcement agency'.

Before making a declaration to expand the meanings of 'criminal law-enforcement agency' and 'enforcement agency', the minister must consider a number of listed factors, including:

- whether the agency undertakes investigative or public protection responsibilities which would necessitate access to data;
- whether the agency has processes and procedures that would satisfy the minister that the information accessed would be used in a manner which seeks to minimise the privacy impacts on the persons to whom it relates or is of relevance; and
- whether the declaration would be in the public interest.

The statement of compatibility suggests that the 'ministerial declaration scheme reinforces the right to privacy in that it ensures that enforcement agency access to telecommunications data is strictly circumscribed and subject to ministerial scrutiny' (at p. 21).

However, given the highly intrusive nature of the scheme, it may be considered that any expansion of the agencies that can access telecommunications data should be determined by Parliament not legislative instrument. **In light of these observations, the committee seeks further advice from the Attorney-General to explain why the number of agencies who may access data under the scheme should be able to be enlarged through ministerial declaration, rather than including this important measure in primary legislation.**

If the proposed approach is to be retained, the committee seeks the Attorney-General's advice as to whether the disallowance process can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*).**

Pending the Attorney-General'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.

Attorney-General's response - extract

Agency declarations

The Committee has requested an explanation as to why the number of agencies that can access data under the data retention scheme should be able to be expanded by Ministerial declaration rather than by amending the primary legislation.

Under the Bill, the Minister will be able to declare a particular agency or body to be either a criminal law enforcement agency or as an enforcement agency. Such a declaration is a legislative instrument within the meaning given in the LIA Act. Agencies in either category may access data. However, importantly, the Bill places limits on the Minister's ability to declare that an agency should be able to access stored communications and telecommunications data. Before making a declaration, I am required to consider several factors, including whether:

- the functions of the authority or body include investigating serious contraventions (in the case of stored communications) or the functions of the authority or body include enforcing the criminal law, administering a pecuniary penalty or protecting the public revenue (in the case of telecommunications data)
- whether access to stored communications or telecommunications data would be reasonably likely to assist the authority or body in that regard, and
- whether the authority or body is required to comply with the Australian Privacy Principles, or a comparable binding scheme, and
- the declaration would be in the public interest.

These prescribed considerations represent a substantial limitation on the range of bodies or authorities that may be subject to a declaration. Furthermore a declaration may be subject to conditions, enabling the Minister to limit agencies' access to data to avoid an undue impact upon individual privacy. In addition, I note that the proposed declaration

mechanism complements a substantial reduction in the number of agencies that may seek to access stored communications and telecommunications data by replacing existing, broad definitions with more prescriptive definitions that clearly identify the range of agencies so empowered.

The Minister is empowered to revoke authorisations where the circumstances no longer require that authority or body to access telecommunications data, thereby ensuring that only those agencies that continue to require access to data are empowered to do so on an ongoing basis. Unlike primary legislation, legislative instruments sunset after a period of time, enabling periodic reconsideration of the regulations by Parliament.

The Ministerial declaration process ensures the mandatory data retention scheme accounts for changing agency functions and structures. If agencies were to be listed exclusively on the face of the legislation, they could lose the ability to access stored communications and telecommunications data during a subsequent machinery of government change. Ministerial declarations ensure access provisions keep pace with structural changes in agencies.

In that context, and for the reasons given earlier, I consider the disallowance processes are appropriate in the context of declaring additional agencies for the purposes of this scheme.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the proposed mechanism for declaring additional agencies will be complemented by a 'substantial reduction in the number of agencies that may seek to access stored communications and telecommunications data'. **Noting the potential impact on the right to privacy, the committee welcomes this reduction in the number of agencies that may access stored data.**

The committee also notes that the proposed declaration mechanism requires the Minister to consider a number of factors before declaring that an agency can access data under the data retention scheme. While this requirement in the primary legislation is welcome, the committee notes that the nature of the requirement does not establish jurisdictional preconditions for the valid exercise of power but instead requires the Minister to 'consider' several factors. It would be possible for the legislation to be amended so that the existence of the various factors (with the exception of the public interest consideration) would operate as jurisdictional preconditions (sometimes called jurisdictional facts). The legal effect of this would be that these matters must be established before the power is enlivened rather than merely being given consideration. For example, rather than requiring the Minister to consider whether the authority or body is required to comply with the Australian Privacy Principles or a comparable binding scheme, the legislation could provide that the power to make a declaration depends upon that matter being established.

continued

Nevertheless, even if it is accepted that the requirements in the bill constitute 'a substantial limitation' on the exercise of the power, **the committee considers that the question of which agencies will be able to access stored data is a core element of the proposed scheme and therefore reiterates its conclusion that the agencies who may access data under the scheme should be set out in the primary legislation to allow full Parliamentary scrutiny.**

The committee further notes the Attorney-General's advice that 'legislative instruments sunset after a period of time, enabling periodic reconsideration of the regulations by Parliament'. **The committee agrees that periodic reconsideration of which agencies are able to access stored data would be valuable and notes that a provision requiring such reconsideration (such as a sunset provision) could be included in the primary legislation. The committee would welcome the inclusion of such a provision in the bill.**

While the committee has concluded that the agencies that will be able to access stored data should be provided for in the primary legislation; if this is not agreed, the committee recommends that the bill be amended to ensure that any ministerial determination under proposed subsection 110A(3) or proposed subsection 176A(3) does not come into effect until the instrument has been positively approved by each House of the Parliament (see, for example, s 10B of the *Health Insurance Act 1973*). At a minimum, the committee considers that such instruments should not come into effect until after the disallowance period has expired.

The committee draws Senators' attention to proposed subsections 110A(3) and 176A(3), as the committee considers that these provisions delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The committee also draws these provisions to the attention of the Regulations and Ordinances Committee for information.

Trade Support Loans Bill 2014

Introduced into the House of Representatives on 4 June 2014
This bill received the Royal Assent on 17 July 2014
Portfolio: Industry

Introduction

The committee dealt with this bill in *Alert Digest No. 6 of 2014*. The Minister responded to the committee's comments in a letter dated 17 July 2014. The committee provided its responses to most aspects of the Minister's letter in its *Tenth Report of 2014*. A copy of the letter was attached to that report.

The committee deferred consideration of clause 106 of the bill pending detailed consideration by the Senate Regulations and Ordinances Committee of the issues raised by this clause. The Regulations and Ordinances Committee comprehensively reported on this and related matters in its *Delegated Legislation Monitor No. 17 of 2014* (tabled on 3 December 2014).

Delegation of legislative power
Clause 106

Please refer to the committee's response in relation to clause 59 of the Asset Recycling Fund Bill 2014 at pages 34–35 of this Report as the committee's response to the issues raised by both clause 106 of this bill and clause 59 of the Asset Recycling Fund Bill 2014 are identical.

Senator Helen Polley
Chair

ATTORNEY-GENERAL

CANBERRA

C 14/23549

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.11
Parliament House
CANBERRA ACT 2600

19 JAN 2015

Dear Senator Polley

Thank you for the letter from Ms Toni Dawes, Committee Secretary, advising my Office of the Senate Standing Committee for the Scrutiny of Bills' request for information regarding the Acts and Instruments (Framework Reform) Bill 2014.

I enclose my response to this request.

I trust this information will assist the Committee in its consideration of the Bill.

The responsible adviser for this matter in my Office is James Lambie, who can be contacted on 02 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Response to request for information from the Senate Standing Committee for the Scrutiny of Bills - Acts and Instruments (Framework Reform) Bill 2014

ACTS AND INSTRUMENTS (FRAMEWORK REFORM) BILL 2014

ATTORNEY-GENERAL'S RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS REQUEST FOR INFORMATION

Question 1

Given the importance of the disallowance process to Parliamentary scrutiny, the committee notes the current drafting practice of providing for a general instrument making power (for example, the power to make instruments that are 'required or permitted' or 'necessary or convenient'). In light of the similar character of instruments based on the general power (however described e.g. regulations, rules, determinations etc.), ***the committee seeks the Attorney General's advice as to why all instruments made on the basis of general instrument making powers should not be included in the definition of instruments and so deemed to be legislative instruments (so that disallowance and sunsetting requirements apply unless they are explicitly excluded).***

Response to Question 1

Consistent with the existing provisions of the Legislative Instruments Act, the Bill provides flexibility to specify an appropriate instrument-making power in an Act or instrument based on the nature of the proposed instruments and the particular subject matter they will deal with.

For general instrument-making powers, it is not practicable or desirable for new section 8 to provide a categorical declaration that instruments made under a broad instrument-making power are legislative instruments. This is because it would be difficult to formulate such a provision, and because it is preferable to determine the status of instruments in enabling legislation on a case-by-case basis, and to express that status clearly on the face of the enabling legislation.

For rule-making powers, which I understand to be of concern to the Committee, changing the definition of a legislative instrument to include all rules by default could have significant unintended consequences in relation to:

- rules of court, which are currently declared not to be legislative instruments, and
- rules that are not currently required to be registered or subject to disallowance, such as cabling provider rules made under subsection 421(1) of the *Telecommunications Act 1997*.

The rule-making power in this Bill has two limbs, based on the standard regulation-making power:

- rules 'required or permitted by this Act to be prescribed', and
- rules 'necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

The first limb requires a specific rule-making power to be found elsewhere in the Act to trigger the exercise of the power. This should not be of concern, since the specific power will in effect be no different from any other power to make a legislative instrument. Rule-making

powers can be appropriately limited by specifying the matters for which rules are required or permitted to be made in the enabling legislation. The rule-making power in new section 61A of the Legislation Act is limited in this way, and matters for which the rules are required or permitted to be made are set out in authorising provisions.

If there is a power to make rules that are 'necessary or convenient' for carrying out or giving effect to the Act, it is true that such rules are generally legislative in character, and in accordance with established government policy and drafting practice, the enabling legislation is required to declare such rules to be legislative instruments.

However, legislative instruments are described differently in different legislative contexts. The note to new subsection 8(1) of the Legislation Act gives examples of four types of instrument:

> Note: Instruments that can be legislative instruments may be described by their enabling legislation in different ways, for example as regulations, rules, ordinances or determinations.

The description of instruments by enabling legislation varies greatly, as indicated only briefly in the note. What may be called a 'rule' by one Act may be called a 'principle' in another and a 'standard' in yet another Act. Each may well be a legislative instrument under the various tests in new section 8, but need not be. It is considered that the greatest degree of transparency is achieved by including individual declarations of legislative instrument status in each enabling law, to ensure that users of the enabling law have greater certainty about the status of instruments under that law. Accordingly, the status of such instruments will be clear in the immediate context of the enabling law, without requiring users to be familiar with a generic provision in another Act (the Legislation Act).

Office of Parliamentary Counsel (OPC) Drafting Direction 3.8 addresses the use of legislative instruments. The First Parliamentary Counsel (FPC) has updated this Direction. The updated Drafting Direction takes into account issues relevant Senate Committees have raised about instrument-making powers.

Question 2

The committee therefore seeks the Attorney-General's advice as to:
a) why the requirement in relation to section 15D is for an explanation in general rather than specific terms?

Response to Question 2(a)

The Bill will give FPC two sorts of powers. The first is to correct errors on the Register (new section 15D). This is similar to the powers that FPC already has in relation to the Federal Register of Legislative Instruments, which is being replaced. The second is to make minor editorial changes to Acts and instruments to correct an error or bring the Act or instrument into line with current drafting practices (new sections 15V-X). Editorial changes include spelling, punctuation, grammar, numbering and gender-related language.

New section 15D preserves, and rewrites more clearly, the essential features of the *Legislative Instruments Act 2003*, section 23, and *Acts Publication Act 1905*, section 8, currently described as dealing with the 'rectification' of errors in the Federal Register of Legislative Instruments or the Acts database.

The FPC only corrects the existing Federal Register of Legislative Instruments in very clear cases, for example, the removal or insertion of text to correct an obvious oversight in the compilation process. In such cases it is considered imperative to act swiftly after the identification of an error to preserve the integrity of the Federal Register of Legislative Instruments and ensure proper access to a correct statement of the law.

The existing provisions require the Federal Register of Legislative Instruments or Acts database to be annotated with the nature, day and time of the rectification and the reason for the rectification. The highly detailed nature of the corrections involved, however, makes such specific annotation redundant and overly pedantic, particularly given the additional requirement to state the reason for the rectification. This can be seen from the following examples:

Examples of rectification of Acts database under *Acts Publication Act 1905*, section 8

Act	Annotation	Reason stated
Railway Agreement (Western Australia) Act 1961	To remove extra word 'the' that was repeated in the first paragraph of the Second Schedule.	The word 'the' was incorrectly repeated in the Second Schedule.
Parliamentary Entitlements Act 1990	To reinsert text at the end of subsection 49(1).	The amending legislation removed paragraph 49(1)(z), the text at the end of subsection 49(1) was incorrectly removed.

Highly specific explanations of corrections are unlikely to significantly assist users of the Register. The detail involved may actually impede users from finding more relevant information about the law. It is considered that a brief outline in general terms is sufficient, and will alert interested users to investigate further. OPC is always ready to respond to user queries.

The requirement to include 'a brief outline of the correction in general terms' is not intended to provide less information than is currently provided but to make it easier to provide a clear explanation of the correction in one place. To provide additional transparency, the incorrect version of the law is never removed from the Federal Register of Legislative Instruments or the Acts database. It will also never be removed from the new Federal Register of Legislation.

Editorial changes share with corrections (or rectifications) of the Register the same detailed characteristics. To appreciate the type of changes involved, consider that most amendments in the Statute Law Revision Bills routinely prepared by the OPC would be able to be made by the editorial change powers as proposed. Reporting at the level of detail currently required for rectification under the Legislative Instruments Act or the Acts Publication Act would have the same effect as described above for corrections of the Register. That is, highly specific explanations would not significantly assist users of the Register, and the detail involved may actually impede users from finding more relevant information about the law.

For the same reason, it is considered that for editorial changes, the requirement to include 'a brief outline of the changes made in general terms' is not intended to withhold information from users of the law, but to make it easier to provide a clear explanation of the editorial changes in one place.

b) how editorial powers operate in other jurisdictions, who exercises them and whether there is any mechanism for transparency or oversight, including any requirement to report on the extent to which the powers are used, or on particular uses of the power.

Response to Question 2(b)
All Australian jurisdictions except the Northern Territory and the Commonwealth (currently) allow for editorial changes to be made in the preparation of up-to-date consolidations of the law. A number of other Commonwealth jurisdictions (see table below) also allow for editorial changes.

The new editorial change provisions proposed in this Bill bring the Commonwealth's legislation into line with editorial powers in other jurisdictions. They closely follow the features of the comparable schemes listed in the table below. The nature of the changes allowed is similar in each case, and the legal safeguards and oversight of the process also follows a similar pattern.

The table sets out significant features of all comparable schemes, including the scheme proposed for the Commonwealth in the Acts and Instruments (Framework Reform) Bill.

Officers of the Attorney-General's Department and the OPC reviewed the comparable legislation in detail in the drafting process for the Bill. The following key points emerged:

- In most cases, the types of editorial change allowed are similar. The Bill is based on items covered in the most recently developed schemes, for example New Zealand and the Australian Capital Territory.

- In all cases except Hong Kong, the head of the Government's legislative drafting office (or an authorised employee) is responsible for making editorial changes in preparing laws for publication.

- In all cases editorial changes are not permitted if they would change the substantive effect of the law.

- Public notice of editorial change will be required by the proposed Commonwealth Legislation Act under new section 15P(1)(b). A registered compilation that incorporates editorial changes will be required to include a statement that editorial changes have been, and a brief outline of the changes in general terms.
  The proposed Commonwealth requirement will require as much, if not more, transparency as is required by any other comparable scheme set out below in terms of public notice requirements (similar to Queensland, New Zealand, Ontario). Some (eg the ACT) only require the recording of the fact of editorial changes. Others do not require any notice of editorial change at all to be included in the compilation.

- In no case is there any requirement for prior consultation with any particular person or body, or specific notice to a particular person or body after a change is made.

- In no case is there any requirement for reporting to Parliament on the use of the power.

Editorial powers in comparable jurisdictions			
Jurisdiction	**Legislation**	**Who exercises power**	**Public notice of editorial changes in compilation**
Commonwealth	*Legislation Act 2003*, Ch 2, Part 2, Div 2 and s 15P (proposed)	FPC	If any editorial changes are made in preparing a compilation, the compilation must include a statement that editorial changes have been made and a brief outline of the changes in general terms (s 15P(1)(b)).
ACT	*Legislation Act 2001*, Part 11.3	Parliamentary counsel	If a republication of a law is published incorporating any editorial change, the republication must indicate the fact of editorial change in a suitable place (s 118)
NSW	*Interpretation Act 1987*, s 45E	Parliamentary Counsel	None required
Qld	*Reprints Act 1992*, Part 4	Parliamentary counsel	If a reprint of a law is published incorporating any editorial change, the reprint must: (a) indicate the fact of editorial change in a suitable place; and (b) outline the nature of the editorial change in general terms, and in a suitable place. (s 7(2))
SA	*Legislation Revision and Publication Act 2002*, s 7	Commissioner for Legislation Revision and Publication (who is the Parliamentary Counsel or another person employed in the OPC)	None required
Vic	*Interpretation of Legislation Act 1987*, s 54A, Sch 1	Chief Parliamentary Counsel	None required
WA	*Reprints Act 1984*, s 7	Parliamentary Counsel or other authorised person employed in the PCO	None required
Hong Kong	*Legislation and Publication Ordinance*, CAP 614, ss 12 - 17 (not yet in operation)	Secretary for Justice	An editorially-amended law must indicate in a suitable place the fact that an editorial change has been made (s 14). Secretary for Justice to keep a record describing editorial amendments. An editorial change is ineffective unless recorded. There is no legal requirement to provide public access to the record, however. (ss 15-17)

Editorial powers in comparable jurisdictions			
Jurisdiction	**Legislation**	**Who exercises power**	**Public notice of editorial changes in compilation**
New Zealand	*Legislation Act 2012*, Part 2, Subpart 2	Chief Parliamentary Counsel	If a reprint of a law is published incorporating any editorial change, the reprint must: (a) indicate the fact of editorial change in a suitable place; and (b) outline the nature of the editorial change in general terms, and in a suitable place. (s 27)
Ontario, Canada	*Legislation Act 2006*, Part 5	Chief Legislative Counsel	CLC must publically notify significant editorial changes by stating the change or the nature of the change. CLC may publically notify other changes (s 43).

c) the proposed scope of the discretion for the First Parliamentary Counsel to make editorial changes to align an Act or instrument with legislative drafting practice, including how it would operate in conjunction with the existing process for Chair's amendments (and whether it would be reasonable for transparency and accountability requirements to apply to the use of this discretion).

Response to Question 2(c)

Proposed scope of discretion
At the broadest level, the FPC has the responsibility of providing the public with improved access to law by improvements in drafting practices and by the vigilant maintenance of the Register to maximise its usefulness. Having regard to the same principle, appropriate editorial changes will only be made if it is clear that they will make the law easier to use and to understand.

More specifically, in considering whether to make an editorial change to a law, the FPC must consider (under new section 15V(2)) whether the change is desirable:

- to bring the law into line, or more closely into line, with legislative drafting practice being used by the OPC, or
- to correct an error, or ensure that a misdescribed amendment is given effect to as intended.

An editorial change is not authorised unless it meets these specific criteria. Editorial changes cannot alter the effect of the legislation (new section 15V(6)).

The FPC will issue further guidance (in the form a Drafting Direction or other publically available document) about cases in which it would be appropriate to use the power.

The FPC only makes corrections to the existing Federal Register of Legislative Instruments in very clear cases. It is intended that the editorial change power will also be exercised very carefully and with due conservatism. This is the same approach that is taken to the decision about whether to include a formal amendment of a law in the regular Statute Law Revision Bills. Disputes about whether amendments made by Statute Law Revision Acts have changed the intended effect of the law are almost unheard of. The same rigorous oversight will be

extended to editorial changes in compilations to ensure that there is no perceived or actual change to the intended effect of the law concerned.

Interaction with existing process for Chair's amendments
In practice, it is rare for an OPC request for a Clerk's or Chair's correction of a Bill to be refused. In any case, the FPC would not seek to achieve by editorial amendment what could not be achieved by a parliamentary correction. On the other hand, while a Bill is before the Parliament, if a clear formal error is found, the OPC would seek to make the requisite correction by the established parliamentary process, to ensure that the Bill as enacted is correct.

The power to make editorial changes is designed to correct formal errors in the law after the time for making parliamentary corrections has passed, that is, after enactment. It is not considered that there would be any necessary interaction between the two processes.

Transparency and accountability
The provisions in the Bill will ensure that both corrections and editorial changes are required to be notified on the Register. New section 15D requires the FPC to 'include in the Register a statement that the correction has been made, and a brief outline of the correction in general terms'. New section 15P(1)(b) will apply to editorial changes a transparency requirement in the same terms.

This requirement is at the highest level of transparency of all the comparable jurisdictions listed above (see response to Question 2(b) and the table). As discussed in response to question 2(a), it is considered that this approach will be of more use to readers of legislation than a prescriptive requirement to describe each change individually.

To provide additional transparency, all compilations of the relevant law are retained on the Register (to enable point in time reference). This will preserve clear evidence of editorial changes on the public record.

Given the minor, formal and detailed nature of the changes involved, and the fact that public notice is required to be given in the Register of every use of the editorial change power, it is not intended to require the FPC to report to the Parliament on this matter. None of the comparable jurisdictions listed in the table require any specific reporting to Parliament on the use of the editorial change power.

The FPC and the OPC are subject to the normal annual reporting requirements applicable to other government agencies. Accordingly, OPC will include a section in its annual report summarising the use of the editorial powers each year.

An editorial change to a law has the status of an amendment of a law, albeit a minor formal amendment not having substantive effect (see new section 15W). The amendment of a law is a legislative action rather than an administrative action. So the decision to make an editorial change to the law would not be subject to administrative challenge. However, an individual suitably affected by an editorial change to the law may have a right to challenge the validity or effectiveness of the law as changed in a court. This may be possible by seeking judicial review of the change under section 39B of the *Judiciary Act 1903* or under section 75(v) of the *Constitution*.

In addition, any individual concerned by an editorial change could raise the matter with the FPC who would take any such concerns very seriously.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: B14/954

Senator Helen Polley
Chair of the Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the *Scrutiny of Bills Alert Digest No.6 2014* (19 June 2014) comments on the *Asset Recycling Fund Bill 2014*.

The Standing Committee for the Scrutiny of Bills has sought my advice on the general rule-making powers, such as clause 59, that would permit a rule-maker to make various other provisions, and whether there are any processes or procedure in place which provide for the Office of Parliamentary Counsel (OPC) to monitor compliance of all new legislative instruments with its drafting standards.

I have sought OPC advice on this matter, which I have attached to this letter. I consider that the First Parliamentary Counsel, Mr Peter Quiggan PSM, has provided a useful analysis of the issues and a thoughtful response to the questions raised by the Committee. I share his view that OPC resources should be dedicated to the highest risks and to drafting instruments that have the greatest impacts on the community.

I thank the Committee for its comments on the *Asset Recycling Fund Bill 2014*.

I have copied this letter to Mr Quiggan.

Kind regards

Mathias Cormann
Minister for Finance

4 August 2014

Australian Government
Office of Parliamentary Counsel

Our ref:
Your ref:

Senator the Hon. Mathias Cormann
Minister for Finance
Parliament House
CANBERRA ACT 2600

Dear Minister

Asset Recycling Fund Bill 2014—Request for information from Senate Standing Committee for the Scrutiny of Bills

Background

1 In Alert Digest No. 6 of 2014, the Senate Standing Committee for the Scrutiny of Bills asked you for information on matters relating to the general rule making power in clause 59 of the Asset Recycling Fund Bill 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) in relation to those matters.

2 Clause 59 is as follows:

59 Rules

The Finance Minister may, by legislative instrument, make rules prescribing matters:
(a) required or permitted by this Act to be prescribed by the rules; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The Committee's comments on the clause were as follows:

Delegation of legislative power
Clause 59

Clause 59 of this bill provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

> OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- **whether general rule-making powers, such as clause 59, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**

- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that**

would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).

Prescribing of matters by legislative rules

4 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).

Ramifications for the quality and scrutiny of legislative rules

5 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues. The information set out in the following paragraphs supplements the information previously provided to the Committee in a letter from me (the OPC Farm Household Support letter) responding to concerns raised by the Committee in Alert Digest No. 3 of 2014 in relation to clause 106 of the Farm Household Support Bill 2014. Extracts of my letter were set out in the Committee's Fifth Report of 2014. Similar supplementary information has already been provided to the Senate Standing Committee on Regulations and Ordinances.

1. OPC's drafting functions

(a) OPC's drafting functions generally

6 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

7 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

8 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

9 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the

> freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

10 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

11 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

12 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

13 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

14 *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

15 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

16 I am also required to govern OPC in a way that promotes proper use and management of public resources for which I am responsible (see section 15 of the *Public Governance, Performance and Accountability Act 2013*), including resources allocated for the drafting of subordinate legislation.

17 I consider that DD3.8 is an appropriate response to this responsibility in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

18 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

19 As mentioned in the OPC Farm Household Support letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

20 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies" . The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

21 In my view, the Council's statement is still accurate today.

22 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

23 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will

therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

24 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

25 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

26 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

(d) Proliferation of number and kinds of legislative instruments

27 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

28 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

29 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

30 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

31 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

32 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

33 In response to the material in OPC Farm Household Support letter the Committee has stated, in its Fifth Report of 2014:

> From the information available to the committee it appears that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process. It may also negatively impact on the standard to which important legislative instruments are drafted with flow-through impact on the ability of Parliament (and the public in general) to effectively scrutinise such instruments.

34 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

The first issue raised by the Committee: whether general rule-making powers would permit a rule-maker to make certain kinds of provisions

35 The Committee has asked whether a general rule-making power would permit the rule-maker to make the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(e) seizure provisions;

(f) provisions which make textual modifications to Acts;

(g) provisions where the operation of an Act is modified;

(h) civil penalty provisions;

(i) provisions which impose (or set or amend the rate) of taxes;

(j) provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

36 The standard form of a general rule-making power contains:

(a) a "required or permitted" power; and

(b) a "necessary or convenient" power.

37 The Committee's question needs to be considered separately in relation to each of those powers.

The "required or permitted" power

38 The "required or permitted" power authorises the rule-maker to make rules prescribing matters "required or permitted by this Act to be prescribed by the rules". This is not a power at large. Its scope is entirely dependent on what other provisions of the same Act expressly say must or may be done in the rules.

39 Could another provision of the same Act expressly authorise the rules to include provisions of the kinds identified by the Committee? In theory yes, but there are some significant constraints on this.

40 The first constraint is that the provision containing the express authorisation must have been passed by both Houses of the Parliament. A Bill introduced into Parliament may contain clauses purporting to expressly allow rules to contain provisions of one or more of these kinds, but the question whether the clauses are agreed to by the Parliament is of course a matter for each of the Houses.

41 The second constraint arises out of OPC's drafting policy as set out in DD3.8. This sets out OPC's approach to drafting instrument-making powers, including general rule-making powers. It contains a number of paragraphs affecting the approach that the drafter of a Bill should take when drafting provisions that will allow matters to be dealt with by rules or regulations.

The "necessary or convenient" power

42 The "necessary or convenient" power authorises the rule-maker to make rules prescribing matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act." Like the "required or permitted" power, this is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act…will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to

the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

43 The Committee's list of kinds of provisions differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (http://www.ags.gov.au/publications/legal-briefing/br102.html).

44 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions in the Committee's list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

45 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

46 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency.

47 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

The second issue raised by the Committee: whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards

48 The Committee has asked whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of DD3.8).

49 All OPC drafters are required to comply with DD3.8. This is part of their broader obligation to comply with all the Drafting Directions.

50 OPC does not monitor whether legislative instruments drafted outside OPC comply with drafting standards (or Drafting Directions). OPC does not have resources to perform a monitoring role in relation to all such instruments, nor is it appropriate for it do so. The responsibility for ensuring that an instrument is within power, and complies with drafting standards, should lie with the rule-maker. The options mentioned in paragraphs 45 and 46 would assist a rule-maker's ability to ensure instruments are within power, and would emphasise the rule-maker's responsibility.

Conclusion

51 I would be happy to provide further information if that would be of assistance.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
8 July 2014

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

Senator Helen Polley
Chair, Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
PARLIAMENT HOUSE ACT 2600

Proposed repeal of section 123A of the *Broadcasting Services Act 1992*

Dear Senator Polley

I am writing in response to comments made by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in its Alert Digest No. 15 of 2014 (pp20-21) in relation to the proposed repeal of section 123A of the *Broadcasting Services Act 1992* (the BSA) as proposed by the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014. The Committee has sought my advice as to why these amendments should not be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Policy reasons for the proposed repeal
The Government is proposing that section 123A of the BSA be repealed on the grounds that it is redundant and because there are other well established processes for ensuring the classification arrangements in certain industry codes reflect prevailing community standards. The relevant industry codes are required to be periodically reviewed, and before the Australian Communications and Media Authority (the ACMA) can register the code it must satisfy itself that the code provides relevant community safeguards.

The Government has a strong focus on deregulation including removing redundant provisions in legislation. It is notable that neither the ACMA, nor its precedent bodies, have undertaken a review under section 123A since the enactment of the provision in 1992.

Effect of section 123A
The BSA provides a co-regulatory framework for the development of television and radio codes of practice. Under this framework industry groups representing sectors of the broadcasting market may develop codes of practice in consultation with the ACMA, that are applicable to broadcasting operations in each section of the market (subsection 123(1)). The BSA also lists the matters that a code of practice may relate to (section 123(2)).

In developing codes of practice in relation to certain matters, industry groups representing commercial television licensees, community television licensees (subsection 123(3A)) and the providers of open narrowcasting television services (subsection 123(3C)) must ensure that their codes of practice:

- for the purpose of classifying films, apply the classification system provided by the *Classification (Publications, Films and Computer Games) Act 1995*;

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- provide methods for modifying films so that they are suitably classified to be broadcast at particular times;
- provide that films classified as "M" and "MA" are only broadcast within certain time zones; and
- have methods for the provision of advice to consumers on the reasons for a film's receipt of a particular classification.

Section 123A of the BSA places a statutory requirement on the ACMA to periodically conduct a review of the operation of sections 123(3A) and (3C) to see that they are in accordance with prevailing community standards (section 123A(1)). If the review concludes that either subsection 123(3A) or (3C) is not in accordance with prevailing community standards, then the ACMA must recommend appropriate amendments to the BSA that would ensure these subsections, as the case requires, are in accordance with prevailing community standards (subsection 123A(2)). Upon receiving such a recommendation, the Minister for Communications must table a copy of the recommendation in each House of the Parliament within 15 sitting days (subsection 123A(3)).

Subject legislative power to parliamentary scrutiny

I note that the advice that can be provided by the ACMA to the Minister under section 123A relates only to potential amendments to the BSA and not to the codes of practice themselves. As such the advice would not equate to the determination of the law, rather the ACMA would merely be recommending possible future changes to the BSA. The implementation of such advice can only be through amendment to the primary legislation. This would require relevant policy approvals, which would then be subject to parliamentary scrutiny through the normal processes of review and passage by the Parliament.

For these reasons, the proposed repeal of section 123A of the BSA should not be considered as depriving the Parliament of its function of scrutinising the exercise of legislative power in breach of principle 1(a)(v) of the Committee's terms of reference.

I hope that the information provided in this letter will assist the committee in further review of the proposed amendments to the repeal of section 123A to the BSA. The ACMA has been consulted in the preparation of this advice.

Yours sincerely

Malcolm Turnbull

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

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-3 DEC 2014

MC14-004806

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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Dear Senator Polley Helen

Thank you for your letter of 20 November 2014 concerning the *Building Energy Efficiency Disclosure (BEED) Amendment Bill 2014* and seeking a response to *Alert Digest No. 15 of 2014* (the Alert Digest).

The introduction of an exemption class for building owners who receive unsolicited offers for the sale or lease of their office space will lead to $0.3 million estimated reduction of regulatory burden.

The Office of Parliamentary Counsel was consulted on the issue raised in the Alert Digest and advised that the BEED Act already enables regulations to prescribe classes of cases in which the Secretary can grant exemptions from particular obligations under the BEED Act. Proposed paragraph 17(3)(c), referred to in the Alert Digest, closely resembles the same paragraph in the existing legislation and does not represent a significant departure from the current legislative scheme enacted by the Parliament in 2010.

Having a regulation-making power dealing with exemptions gives the Secretary of the Department of Industry flexibility to react to commercial circumstances in the industry. Unforeseeable changes may require revision of exemption classes at short notice in the future. If each different type of exemption resulted in an amendment to the BEED Act, the impact on business would be considerable.

The BEED Regulations will be tabled in Parliament in due course and subject to disallowance. They will also be scrutinised by the Senate Standing Committee for Regulations and Ordinances (SSCRO). As you would be aware, it is part of SSCRO's brief to consider whether instruments that come before it are appropriate exercises of delegated legislative power.

Yours sincerely

Ian Macfarlane

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The Hon Greg Hunt MP

Minister for the Environment

MC14-034757

Senator Helen Polley
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5 JAN 2015

Dear Senator Polley Helen

I refer to the letter of 27 November 2014 from Ms Toni Dawes, Committee Secretary, concerning Xenophon amendment (2) to the Carbon Farming Initiative Amendment Bill 2014 (the Bill), which is now the Carbon Farming Initiative Amendment Act 2014. Specifically, I refer to the request by the Senate Scrutiny of Bills Committee for my advice on section 22XF of the amendment in relation to:

- whether consideration has been given to providing for the number of penalty units that may be prescribed under the provision in the primary legislation; and
- if the number of penalty units is not to be determined in the primary legislation—the committee is interested in how the regulation-making power will be administered, for example, will any guidelines or policies ensure that the determination of the number of penalty units is conducted in a public and transparent manner (which would, in turn, assist in Parliamentary scrutiny of any relevant regulation)?

Firstly, I note that although Senator Xenophon's amendment delegates the maximum number of penalty units to the regulations, the amendment includes an important principle guiding the specification of the amount in paragraph 22XF(3)(a). To have full regard to this principle and determine 'the financial advantage the responsible emitter could reasonably be expected to derive from an excess emissions situation', it will be important that I consider the details to be included in the safeguard rules. The key safeguard rules must be in place by 1 October 2015 after consultation with stakeholders.

On the issue of facilitating Parliamentary scrutiny of the regulations, I note the requirement in subitem 60(2) of Schedule 2 to the Bill to set the maximum penalty amount in regulations before 1 October 2015. This requirement ensures appropriate Parliamentary scrutiny of the number of penalty units a full nine months before commencement of the safeguard mechanism provisions on 1 July 2016. Details of the regulations will also be included in the relevant explanatory statement and the ordinary Parliamentary disallowance procedures will apply.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

ATTORNEY-GENERAL

CANBERRA

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3 DEC 2014

Dear Chair

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

Thank you for your letter of 20 November 2014 regarding your Committee's consideration of the above Bill in Alert Digest No. 15 of 2014, tabled in the Senate on 19 November.

My responses to the 10 matters on which your Committee has sought my further advice are provided at **Enclosure 1.**

I have also taken the liberty of providing two additional documents at **Enclosure 2**, which may be of assistance to the Committee in completing its examination of the proposed amendments in Schedule 2 to the Bill, regarding the *Intelligence Services Act 2001*. These are unclassified submissions from my Department (AGD) to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the Bill, which tabled an advisory report on the Bill on 20 November 2014. The PJCIS recommended that the Bill be passed, subject to a small number of targeted amendments to strengthen safeguards and oversight measures. The Government has released a response to that report, accepting all recommendations in full or in principle. A copy of that response is provided at **Enclosure 3.**

I trust that this information is of assistance to your Committee. I look forward to considering your Committee's report on the Bill in due course.

Yours faithfully

(George Brandis)

Encl:

(1) Responses to Alert Digest No. 15 of 2014.
(2) Copies of two AGD submissions to the PJCIS, November 2014.
(3) Government Response to the PJCIS Advisory Report on the Bill, 24 November 2014

Enclosure 1

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 Responses to Senate Standing Committee for the Scrutiny of Bills: Alert Digest No. 15 of 2014 (tabled 19 November 2014)

Schedule 1 – *Criminal Code Act 1995* amendments (questions 1-7)

(1) Additional grounds for requesting and issuing a control order (Items 7 and 11)

Committee question (p 30)

The committee therefore requests further clarification from the Attorney-General in relation to the extent to which,

- *consent may be sought to request an interim control order under proposed paragraph 104.2(2)(c), or*
- *an interim control order may be issued under subparagraph 104.4(1)(c)(vi)*

even if the order would, in fact, not substantially assist in preventing a genuine terrorist threat.

Attorney-General's response

The Bill would amend the *Criminal Code Act 1995* (the Criminal Code) to authorise the AFP to seek the Attorney-General's consent to request an interim control order on the grounds that

the order in the terms requested would substantially assist in preventing the provision or support of a terrorist act (paragraph 104.2(2)(c)).

The issuing court can only make an interim control order in response to such a request if the issuing court is satisfied on the balance of probabilities of one of the matters listed in paragraph 104.4(1)(c)(i) to (vii) and the issuing court is also satisfied that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of one of the matters listed in paragraphs 104.4(1)(d).

In other words, the issuing court must be satisfied on the balance of probabilities either:

(i) that making the order would substantially assist in preventing a terrorist act, or

(ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation, or

(iii) that the person has engaged in a hostile activity in a foreign country, or

(iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1), or

(v) that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act 1914), or

(vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act, or

(vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country

and that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of either:

(i) protecting the public from a terrorist act, or

(ii) preventing the provision of support for or the facilitation of a terrorist act, or

(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

The addition of subparagraphs 104.4(1)(d)(ii) and (iii) reflect that to prevent a genuine terrorist threat in the current security environment, it may be necessary for law enforcement to intervene earlier and disrupt activities before there is sufficient evidence that would satisfy a court on the balance of probabilities that the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes protecting the public from a terrorist act. Subparagraphs 104.4(1)(d)(ii) and (iii) ensure that this does not limit the ability of the AFP to ensure public safety and prevent a genuine terrorist threat in such circumstances.

(2) Additional grounds for requesting and issuing a control order (Items 7 and 11)

Committee question (p 31)

The committee requests the Attorney-General's advice as to the rationale for the proposed approach, including whether consideration has been given to more precisely defining what may constitute 'support for' a hostile activity in a foreign country, for example, a requirement aimed at limiting the application of the provision to substantial support for a hostile activity in a foreign country.

Attorney-General's response

Although an interim control order can be requested on the grounds that the person 'has provided' support for or otherwise facilitated the engagement in a hostile activity in a foreign country, an order can only be made where the order would meet a protective or preventative threshold. Specifically, an order can only be made if it would 'protect' the public from a terrorist act, 'prevent' support or facilitation of a terrorist act, or 'prevent' the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. In other words, the fact that a person has engaged in the relevant conduct is not sufficient for the making of an order.

From 1 December 2014, when the relevant provisions of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* come into effect, 'engage in a hostile activity' will be defined in section 117.1 of the Criminal Code to mean:

> engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):
>
> (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);
>
> (b) the engagement, by that or any other person, in action that:
>
> (i) falls within subsection 100.1(2) but does not fall within subsection 100.1(3); and
>
> (ii) if engaged in in Australia, would constitute a serious offence;
>
> (c) intimidating the public or a section of the public of that or any other foreign country;
>
> (d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);
>
> (e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

Accordingly, the new ground for applying for an interim control order will be available in relation to a person who engages in conduct of the type described above. The terms 'support' and 'facilitation' have their ordinary meaning and are appropriately left for the courts to determine. They have not been defined for a number of reasons including that defining them for the purposes of Division 104 could undermine the operation of the provisions by removing the flexibility to request a control order for different types of conduct which may amount to support or facilitation. In addition, given those expressions are used elsewhere in the Criminal Code, defining them for the purposes of the control order regime could have unintended consequences for the interpretation of those terms in other Criminal Code

offences. This includes in the context of a number of terrorism offences, including intentionally providing to an organisation support or resources that would help the organisation engage in an activity providing support to a terrorist organisation (section 102.7), providing or collecting funds, reckless as to whether the funds will be used to facilitate or engage in a terrorist act (section 103.1), making funds available to another person reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (section 103.2). It also includes offences for conduct unrelated to terrorism, including organising or facilitating the entry of another person into a foreign country (section 73.1) and making, providing or possessing a false travel or identity document with the intention that the document will be used to facilitate the entry of another person into a foreign country (section 73.8).

(3) Additional grounds for requesting and issuing a control order (Items 7 and 11)

Committee question (p 32)

Given that 'hostile activity' might cover a wide range of activities, the committee also requests further clarification from the Attorney-General as to,

- *why support for, or facilitation of engagement in, a 'hostile activity' can be seen as demonstrating a propensity 'to engage in conduct in support or facilitation of conduct akin to a terrorist act', and*
- *whether 'hostile activity' can be explicitly connected to terrorism in the bill.*

Attorney-General's response

When considering a request for an interim control order on the either of the 'support' and 'facilitation' grounds, the issuing court will first need to determine whether the proposed subject's conduct amounts to support or facilitation or both.

Once the issuing court has determined which ground is being relied upon (support or facilitation or both), it will need to consider whether the control order obligations, prohibitions and restrictions to be imposed on the person are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing that support or facilitation.

The Independent National Security Legislation Monitor (INSLM) reviewed the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) in his fourth annual report on the basis that Foreign Incursions Act was related to Australia's counter-terrorism and national security legislation for the purposes of subparagraph 6(1)(a)(ii) of the *Independent National Security Legislation Monitor Act 2010*[1]. In that report, he noted:

> The Criminal Code provisions of the CT laws overlap considerably with the provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)... [T]he CT Laws and the Foreign Incursions Act present some anomalies and mismatches that detract from their effectiveness as laws to criminalize terrorism.

[1] Subparagraph 6(1)(a)(ii) provides that the Independent National Security Legislation Monitor's function is to review, on his or her own initiative, the operation, effectiveness and implications of any law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation.

The conduct criminalised by both the Foreign Incursions Act, which will be inserted into a new Part 5.5 of the Criminal Code on 1 December 2014, and Part 5.3 of the Criminal Code is similar and, in some instances will be the same (noting that terrorism offences require the additional motivational element to be satisfied).

Australians who participate in foreign conflicts may be involved in the perpetration of violence, which at its most serious could involve unlawful death or an intention to cause unlawful death. Moreover, those returning from foreign conflicts to Australia may have enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia. Accordingly, the Government considers it appropriate that control orders be able to be made in relation to Australians who have supported, facilitated or engaged in hostile activities overseas.

The definition of 'hostile activity' set out above will be inserted into Division 117 of the Criminal Code on 1 December 2014. At that time, section 100.1(1) will be amended to include a definition of 'engage in a hostile activity' which will provides that, for the purposes of Part 5.3 of the Criminal Code, that expression has the meaning given by subsection 117.1(1).

(4) Seeking the Attorney-General's Consent to request an interim control order (Item 8)

Committee question (p 33)

The committee therefore seeks a fuller justification from the Attorney-General in relation to the necessity of, and the rationale for, removing what appears to be a safeguard in the existing regime. The committee also restates its concern that these changes are in the absence of a comprehensive public review (which will occur within 18 months after the next federal election) of the operation of the existing provision and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

Attorney-General's response

The roles of the Attorney-General and the issuing court in the making of an interim control order differ in both their nature and their impact on the person. Reducing the amount of documentation that must be provided to the Attorney-General when seeking consent does not remove an important safeguard.

The current requirement for the AFP to provide all documents and material that will be provided to the issuing court to the Attorney-General when seeking consent is unnecessary and creates duplication. It is appropriate and necessary for the issuing court to consider all information available when deciding whether to make a control order given a decision by an issuing court to make an interim control order has an immediate and direct impact on the person the subject of the order.

However, consistent with similar processes—such as obtaining the Attorney-General's consent to prosecute—there is no need for the Attorney-General to consider all information.

However, in light of evidence provided at the PJCIS hearing and a recommendation of the PJCIS, the Government will propose amendments to the Bill to implement PJCIS recommendation 3 which would require the AFP to also provide the Attorney-General with both a statement of the facts as to why the order should be made, and, if the member is aware of any facts relating to why the order should not be made—a statement of those facts.

While it would be ideal to be able to undertake a full review of the amended control order regime before making any further changes, advice from law enforcement based on recent operational activities is that there are a number of individuals of potentially very serious security concern who are not covered by either the existing or the recently added grounds. Some of those people are not directly involved in terrorism in Australia or hostile activities overseas but they provide the necessary support for terrorists and foreign fighters or their activities facilitate others to engage in terrorism or foreign fighting. Placing control orders on such individuals will help the AFP disrupt the activities of enablers, thereby preventing acts of terrorism and hostile activities overseas. This was demonstrated in law enforcement operations conducted in Brisbane and Sydney in September 2018. In those cases, the AFP decided to intervene early to disrupt planned terrorist activity in the interests of public safety and security. That early intervention meant the AFP and state police were unable to allow the planning to unfold to allow evidence for a prosecution to be collected over a longer period of time. Had law enforcement continued to monitor the individuals of security concern in order to continue to collect evidence that could ultimately have been used in the prosecution of a number of those persons, this could have resulted in the commission of a terrorist act, with the loss of life and the public panic that accompanies such an incident.

(5) AFP explanation of proposed obligations, prohibitions or restrictions to be imposed by a control order (Item 9)

Committee question (p 34)

The committee therefore seeks a detailed justification of the necessity of removing the requirement that an AFP officer provide the court with an explanation of each individual obligation, prohibition or restriction as well as information regarding why any of those obligations, prohibitions or restrictions should not be imposed. The committee also notes that it is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

Attorney-General's response

The Government will introduce amendments to the Bill to implement PJCIS recommendation 6, which proposes amending the bill to require the AFP to explain each requested obligation, prohibition and restriction to the issuing court when requesting an interim control order. This would revert to the current process as set out in the Criminal Code.

(6) Issuing court consideration of proposed obligations, prohibitions or restrictions to be imposed by a control order (Item 12)

Committee question (p 35)

The committee therefore seeks a detailed justification of the necessity of removing the requirement that each individual obligation, prohibition or restriction be assessed by the court to ensure that it is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division. The committee also restates its view that it is a matter of considerable concern that a safeguard in the existing regime is being removed in the absence of a comprehensive public review (noting that it is anticipated that a review will occur within 18 months of the next federal election) and any detailed consideration of the objections raised by the INSLM and/or PJCIS.

Attorney-General's response

The Government will introduce amendments to the Bill to implement PJCIS recommendation 5, which proposes amending the bill to require the issuing court to be satisfied in relation to each of those obligations, prohibitions and restrictions before making an order. This would revert to the current process as set out in the Criminal Code.

(7) Obtaining the Attorney-General's consent for an urgent interim control order (Item 20)

Committee question (p 36)

In light of the significance of the increase in time, the committee seeks a more comprehensive analysis of why this proposal is necessary, including whether, in an emergency situation, it is impossible or merely inconvenient to contact the Attorney-General if he or she is in transit. In addition, the committee seeks advice as to whether it may be possible to seek another minister's consent in such situations instead of increasing the amount of time in which consent must be sought. The committee again expresses its concern that this proposal is being put forward in the absence of a comprehensive public review.

Attorney-General's response

The Government will introduce amendments to the Bill to implement PJCIS recommendation 4, which proposes increasing the period between obtaining an urgent interim control order and seeking the Attorney-General's consent from 4 hours to 8 hours (rather than 12 hours as proposed by the Bill).

An increase is necessary and does not reduce the safeguards in the regime. This is because it may not always be practical—or even possible—for the Attorney-General to consider a request and give consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for more than 4 hours. It is important that an urgent control order issued by an issuing court not lapse merely due to administrative and logistical reasons. Importantly, where the Attorney-General refuses to consent or has not given consent

within the 8 or 12 hour period, to the AFP making the request to the issuing court, any urgent interim control order that was made by the issuing court immediately ceases to be in force.

Schedule 2 – *Intelligence Services Act 2001* amendments (questions 8-10)

(8) Class authorisations and class agreements (Items 4, 8–11, 14, 17, 22, 26, 31)

Committee question (pp. 37-38)

The explanatory memorandum contains very little justification for the extension of these powers and, in particular, why it is considered necessary to expand these authorisation powers so they may be exercised in relation to classes of Australian persons. For this reason, the committee considers that the amendments risk undue trespass on personal rights and liberties. Further, the explanatory materials do not provide examples of the sorts of classes that may be specified or why some limitations should not be placed on how classes are specified. A class of persons may be specified in a variety of ways and there is a risk that membership in the class may not be clear or may be too broad, given the nature of the powers being exercised. To the extent specification of a class is insufficiently clear, this may diminish the efficacy of the oversight of the IGIS. For this reason, the amendments may make rights and liberties depend on insufficiently clear administrative powers.

The committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach in light of the above comments, including in relation to the impact that class authorisations may have on oversight by the IGIS and whether it is intended that the Minister must be satisfied that all of the persons in a class meet the threshold requirements set out in paragraph 9(1A)(a).

Attorney-General's response

The Committee has sought my advice on the rationale for these proposed amendments, the limitations imposed on the classes of Australian persons in relation to which Ministerial authorisations may be issued or agreements may be given, and any implications for the conduct of independent oversight by the Inspector-General of Intelligence and Security (IGIS) of such authorisations or agreements. My remarks under the below subheadings address each of these matters in turn.

In addition, I note that the PJCIS recently considered, and made recommendations in relation to, these issues in its advisory report on the Bill, tabled on 20 November 2014.[2] My Department and relevant intelligence agencies provided detailed evidence to the PJCIS on the rationale for, and limitations of, the proposed class authorisation provisions.

The PJCIS supported the need for these provisions, subject to the inclusion of some further information in the Explanatory Memorandum.[3] The Government accepts this recommendation and will table a revised Explanatory Memorandum including this content (also taking into account the comments of this Committee in Alert Digest 15). I have

[2] PJCIS, Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, 20 November 2014 (Advisory Report), recommendation 7 and pp 47-49.

[3] PJCIS, *Advisory Report*, recommendation 7.

enclosed, for the Committee's further background, two unclassified, supplementary submissions to the PJCIS from my Department.[4] The commentary at pp. 3-9 of the first supplementary submission and pp. 5-9 of the second supplementary submission may be of particular assistance to the Committee in considering the issue of class authorisations.

Rationale for class authorisations – ASIS assistance to the ADF

The Committee has described the proposed class authorisation amendments as an extension of powers. I do not agree with this characterisation. Class authorisations would apply exclusively to the function of the Australian Secret Intelligence Service (ASIS) in providing assistance to the Australian Defence Force (ADF) in support of military operations, as requested in writing by the Defence Minister. As noted in the Explanatory Memorandum, ASIS can already provide assistance to the ADF under its existing statutory functions of general application, in particular paragraphs 6(1)(a), (b) and (e) of the *Intelligence Services Act 2001* (IS Act). The proposed amendments make this function explicit, thereby removing the need for the Foreign Minister to issue a direction under paragraph 6(1)(e) and further increasing transparency in the activities undertaken by ASIS.

What is proposed to be changed is the existing limitation which means that the Foreign Minister may only issue an authorisation for ASIS to engage in such activities in respect of individual Australian persons who are, or are considered likely to be, involved in activities of a type prescribed by paragraph 9(1A)(a) and not in relation to a class of such Australian persons.

Under the proposed amendments, the Foreign Minister would need to be satisfied that all members of the class are involved in such an activity. Indeed, the class is defined solely by reference to the engagement of its members in a particular activity, of a type specified in paragraph 9(1A)(a). A person who is not so involved is, by definition, outside the class of persons the subject of the authorisation. As my department noted in its submission to the PJCIS:

> [T]he proposed amendments will streamline the arrangements for the issuing of authorisations in respect of Australian persons, where the relevant activities are undertaken for the purpose of ASIS providing support to, or cooperating with, the ADF. Currently, the combined effect of subsection 8(1) and paragraph 9(1A)(a) is that Ministerial authorisations must be issued in respect of an individual Australian person. There is no ability to issue an authorisation in respect of classes of Australian persons, such as Australians who are, or who are suspected of, fighting with or otherwise providing support to the Islamic State terrorist organisation in Iraq. This means that multiple, simultaneous Ministerial authorisations would need to be sought and issued on identical grounds; or that Ministerial authorisations would be unable to be issued because a particular Australian person fighting with that organisation was not known in advance of the commencement of operations.[5]

ASIS also provided the following information in its unclassified submission to the PJCIS:

> Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL. As such, it is likely that ASIS's support to ADF operations would require ASIS to produce intelligence on and undertake activities, subject to the limits on ASIS's functions, which may have a direct effect on these Australian persons. ASIS considers that under such circumstances the current provisions in the ISA

[4] Attorney-General's Department, Supplementary Submission 5.1 and Supplementary Submission 5.2.

[5] Attorney-General's Department, *Submission 5* to the PJCIS inquiry (p 16), also extracted in *Supplementary Submission 5.2* (p5) (enclosed with this response).

enabling ASIS to undertake activities to produce intelligence or have a direct effect on an Australian person engaged in terrorist activity could severely limit ASIS's ability to contribute to the force protection of ADF personnel and the conduct of ADF operations. In a swiftly changing operational environment the ADF can act immediately, but ASIS is unable to act as nimbly to support the ADF.

The following scenario illustrates the constraints on ASIS and the potential impacts on ADF operations.

Scenario – Intelligence is received that a previously unidentified Australian member of ISIL plans to imminently undertake a suicide terrorist attack against ADF and other partner elements providing 'advise and assist' support to Iraqi security forces at an Iraqi base. The ADF requests ASIS to urgently produce intelligence on the Australian person and that ASIS liaise with approved partner agencies it has responsibility for in order to alert them to the planned attack, noting that this may have a direct effect on the Australian person. Depending on the circumstances, ASIS may be able to immediately undertake some activity to collect intelligence (with agreement from ASIO received in due course) on the Australian person. However, before ASIS could do anything further to alert the approved partner agencies of the planned attack, ASIS would first have to consult with ASIO in order to obtain the agreement of the Attorney-General and then seek a Ministerial Authorisation from the Foreign Minister to produce intelligence and to undertake activities likely to have a direct effect on the Australian person. Even if the Ministers and relevant ASIO staff were readily available, this process would take considerable time when there is an operational need to act quickly to prevent loss of life.[6]

As such, identical requirements apply to the identification of classes of Australian persons as they do to individual Australians under section 9 of the IS Act. (Further details on the limitations of classes of Australian persons are set out under the relevant subheading below.)

Rationale for class agreements by the Attorney-General

To the extent that the Committee's comments at p. 37 of the Alert Digest on the 'extension of powers' proposed to be conferred by the Bill are intended to apply to the proposed class agreement amendments, I similarly disagree with this characterisation. The same defining criterion in paragraph 9(1A)(b) applies to individual Australians and classes of Australian persons who may be the subject of an agreement given by the Attorney-General to the issuing of a Ministerial authorisation. That provision requires the agreement of the Attorney-General to be sought where the relevant person, or class of persons, is involved or is likely to be involved in an activity or activities that are, or are likely to be, a threat to security, as that term is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). This means that a class agreement can only relate to a group of Australian persons who are or are likely to be involved in activities, that are or are likely to be a threat to security. A person who was not involved, or likely to be involved in, the following activities cannot, definition, be a member of the class in relation to which an agreement applies:

(a) activities of a kind that satisfy the 'security test' in paragraph 9(1A)(b), and

(b) activities which are specified in the definition of the class of Australian persons by the Attorney-General.

My Department commented in its submission to the PJCIS on the need for the class agreement provisions in the following terms:

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[6] ASIS, *Submission 17* to the PJCIS inquiry (p 3), also extracted in *Supplementary Submission 5.2* of the Attorney-General's Department (pp 5-6) (enclosed with this response). Further examples of class authorisations are provided in Attorney-General's Department, *Supplementary Submission 5.1* to the PJCIS, pp 7-8 (enclosed with this response).

> Presently, the Attorney-General may only provide his or her agreement to the issuing of an authorisation in respect of the activities of an individual Australian person. As with the issuing of Ministerial authorisations, this means that the Attorney-General would be required to provide multiple, simultaneous agreements on identical grounds. For example, as individual Australians are identified as known or suspected to be fighting with the Islamic State terrorist organisation in Iraq, agreement from the Attorney-General needs to be obtained on an individual basis to one or more authorisations for each individual even though the basis in each case is the same. This places a significant limit on the ability of the ISA agencies and in particular ASIS to be nimble in responding to ADF operational requirements in Iraq, including in time critical circumstances.[7]

I note that the PJCIS, in its advisory report on the Bill, also supported the ability of the Attorney-General to provide agreement in relation to classes of Australian persons. The Government accepts the Committee's recommendation that the Explanatory Memorandum to the Bill be amended to include more detailed explanation of the rationale, along the lines of the above. The Government will release a Revised Explanatory Memorandum doing so.[8]

Limitations on classes of Australian persons

As noted at pp. 4-7 of my Department's first supplementary submission to the PJCIS, four principal limitations apply to the process of identifying classes of Australian persons, for the purpose of issuing Ministerial authorisations (or agreement, where required). These are discussed extensively in the enclosed submission, and in summary are:

(1) The class must be specifically identified by the Defence Minister in requesting ASIS's assistance to the ADF in support of a military operation.

(2) The Foreign Minister must be satisfied that the class of persons is or is likely to be involved in an activity of the type specified by paragraph 9(1A)(a), in addition to the authorisation criteria in subsection 9(1) (focusing on the necessity and proportionality of the proposed activity).

(3) The Attorney-General must further provide his or her agreement, noting that activities to assist the ADF in support of a military operation will, invariably, relate to security such that paragraph 9(1A)(b) is enlivened. (By this point, three Ministers will have scrutinised the proposed class of persons).

(4) ASIS must then make decisions about whether individual Australians in relation to whom it proposes to undertake activities in reliance on a class authorisation are within the class specified in the authorisation. These decisions are subject to oversight by the Inspector-General of Intelligence and Security. ASIS's activities under a class authorisation are further subject to specific reporting obligations to the Foreign Minister. To the extent that ASIS purported to rely upon a Ministerial authorisation to undertake activities in relation to an Australian person who did not fall within the relevant class, it would have no lawful basis for its activities. ASIS would be subject to criticism by the IGIS and administrative accountability to the Minister and may be

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[7] Attorney-General's Department, *Submission 5* to the PJCIS inquiry, p 17, also extracted in *Supplementary Submission 5.2* (p 5) (enclosed with this response).

[8] PJCIS, *Advisory Report,* pp 47-49. See further, recommendation 7.

unable to rely on the protections from criminal and civil liability under the IS Act as the activity may not be in the proper performance of the functions of ASIS.

I note that these limitations were found acceptable to the PJCIS, which recommended that further explanation along these lines be included in the Explanatory Memorandum. As I have indicated, the Government has accepted this recommendation.[9]

IGIS oversight in relation to class authorisations and class agreements

The Committee has questioned whether the proposed class authorisation and agreement-related amendments in Schedule 2 to the Bill would diminish or otherwise alter the ability of the IGIS to conduct oversight in accordance with his or her statutory mandate under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).

The proposed amendments do not, in any way, diminish the ability of the IGIS to conduct rigorous, independent oversight of agencies' actions in seeking and undertaking activities in reliance on class authorisations, or other authorisations in relation to individual Australian persons issued on the basis of a class agreement provided by the Attorney-General.

The IGIS has the ability, under the IGIS Act, to conduct oversight of the way in which ASIS defines a class of persons in its application for Ministerial authorisations, its decision-making in relation to whether particular Australians are within a class of persons, and its reports to the Foreign Minister on activities undertaken in reliance on a class authorisation.[10] While the form of oversight will necessarily be different to that undertaken in relation to authorisations applying to individual Australian persons, it will remain rigorous. This was confirmed by the IGIS in her evidence to the PJCIS inquiry, in which the IGIS stated that she considers the oversight framework under the IGIS Act to provide an adequate legislative basis for conducting oversight of the proposed amendments, if enacted.[11]

(9) Class authorisations and class agreements (Items 4, 8–11, 14, 17, 22, 26, 31)

Committee question (p. 38)

Two related matters of concern arise in relation to class authorisations. As noted above, the authorisations must be based on a request from the Defence Minister and, in some cases, are dependent on the agreement of the Attorney-General. These requests and agreements do not appear to be time-limited.

Given that the appropriateness of a request or agreement is dependent on factual matters which may change over time, the committee also seeks the Attorney-General's advice in relation to the rationale for this approach, and in particular, whether a request (by the Defence Minister) and agreement (from the Attorney-General) should expire after a defined period.

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[9] PJCIS, *Advisory Report,* recommendation 7 and pp 47-49.

[10] This reporting function is provided for in proposed subsection 10A(3).

[11] IGIS, *Submission 12* to the PJCIS inquiry, p. 3.

Attorney-General's response

As the Committee has observed, the Bill does not apply a fixed maximum duration to requests made by the Defence Minister for the assistance of ASIS to the ADF in support of a military operation. Nor does the Bill propose to provide a fixed maximum duration to a class agreement provided by the Attorney-General, in respect of a class of persons who are or are likely to be involved in activities that are, or are likely to be, a threat to security.

My Department addressed these matters in its first supplementary submission to the PJCIS (at pp. 21-22). In summary, and as the Committee has noted, the Defence Minister must specifically request an authorisation from the Foreign Minister for ASIS to undertake activities to support the ADF in a military operation. There is no fixed time limit on the duration of such a request made by the Defence Minister, but the grounds for authorisation are taken to cease if the Defence Minister withdraws the request, or if the ADF is no longer engaged in any military operations to which the request for authorisation related. On this basis it is not accurate to suggest that there is no time limit or no definition of the period of effect for a request made by the Defence Minister.

As noted in her evidence to the PJCIS inquiry, the IGIS has an expectation that agencies would periodically brief the Defence Minister about such operations, so as to provide him or her with a regular opportunity to consider whether the request should be withdrawn.[12] This is a relevant consideration to the IGIS's view on the propriety of Ministerial authorisations sought and executed on the basis of a request from the Defence Minister.

Consideration was given to placing a fixed time limit on the Defence Minister's requests. While this would have the benefit of placing a positive obligation on the Defence Minister to consider, at regular intervals, whether a request should remain in force, it is not considered essential for three reasons. First, a Ministerial authorisation issued by the Foreign Minister for ASIS to provide assistance to the ADF in support of a military operation is limited to six months. In practice, before an authorisation would be issued in reliance on a Defence Minister's request, there would be appropriate consultation and consideration of whether it is appropriate to continue relying on a request that may have been made some time ago. (This consideration would include an assessment of whether the military operation specified in the Defence Minister's request is the same as that being presently carried out.)

Secondly, agencies operate on the basis that the propriety as well as the legality of their activities will be the subject of independent oversight by the IGIS. On that basis, and in light of the IGIS's evidence to the PJCIS about her expectations (noted above) appropriate Ministerial briefings are expected to occur as a matter of practice, and would likely be the subject of adverse findings if they did not.

Thirdly, there is a risk that a fixed term could be arbitrary or limit a legitimate need for operational flexibility because it may be difficult to identify a period of time, in the abstract, that will have a logical connection to the duration of all military operations conducted by the ADF, since this is a fact-specific circumstance. In addition, it is open to the Defence Minister

[12] IGIS, *Submission 12* to the PJCIS Inquiry, p 5.

to limit his or her request to the Foreign Minister to a particular period and for the Foreign Minister to issue an authorisation for a lesser period than six months in individual cases.

Identical comments apply to the duration of the Attorney-General's agreement, provided in relation to a class of Australian persons, to the issuing of a Ministerial authorisation.

I note that the PJCIS considered the issue of the duration of the Defence Minister's request and the Attorney-General's agreement, but did not make any recommendations about the enactment of a fixed maximum time limit.[13]

(10) Emergency authorisations by agency heads (item 18)

Committee question (p. 39)

Proposed section 9B provides for emergency authorisations by agency heads in the event that none of the ministers specified in subsection 9A(3) are readily available or contactable to issue an emergency authorisation under section 9A.

The committee notes that authorised ministers are able to give authorisations orally and through a variety of forms of electronic communication. The Minister responsible for the relevant ISA agency, the Prime Minister, Foreign Minister, Defence Minister or Attorney-General may all exercise authorisation powers under section 9A. In addition, it appears that sections 19 and 19A of the Acts Interpretation Act 1901 operate to enlarge this category of authorised decision-makers holding ministerial office. In light of these observations, the committee seeks further advice from the Attorney-General in relation to the necessity of conferring these emergency powers on agency heads.

Attorney-General's response

Rationale for emergency authorisations by agency heads

My Department addressed this issue at length in its evidence to the PJCIS inquiry, including at pp. 14-17 of its first supplementary submission, and at pp. 12-13 of its second supplementary submission (enclosed with this response). I refer, in particular, to the following remarks in my Department's first supplementary submission (at pp. 14-16):

> The intention of proposed section 9B is not to undermine or depart from general principles of Ministerial responsibility and accountability for authorisation decisions under the IS Act, or the importance of ensuring that practical arrangements are in place to facilitate Ministerial availability, to the greatest possible extent.
>
> Rather, proposed section 9B is designed to make provision for contingency arrangements, in the event that the worst case scenario eventuates – despite best endeavours to prevent it – in which none of the relevant Ministers are readily available or contactable, and there arises an urgent need to collect intelligence. (For example, if there is only a very limited window of opportunity to collect the intelligence, such as a matter of hours, and none of the relevant Ministers are readily available or contactable in that limited window of time.) Under the current emergency authorisation provisions in section 9A, there is no lawful basis for agencies to collect intelligence in these circumstances.
>
> Proposed section 9B seeks to ameliorate the potentially significant, adverse impacts of this outcome, by enabling IS Act agencies to undertake activities in reliance on a strictly limited emergency authorisation provided by the relevant agency head, provided that rigorous statutory thresholds are

[13] PJCIS, Advisory Report p 38.

satisfied. This includes a requirement that the agency head must be satisfied that none of the Ministers specified in proposed subsection 9A(3) are readily available or contactable. These cases are likely to be very rare. Their exceptional nature is made clear via the extensive limitations and safeguards applying to agency heads' decisions, including:

- a strictly limited maximum duration of 48 hours, without any capacity for renewal;
- a close degree of Ministerial control by the responsible Minister for the agency, including a requirement that the responsible Minister must be notified as soon as practicable within 48 hours of the issuing by an agency head of an emergency authorisation;
- the responsible Minister is under a positive obligation to consider whether to terminate the emergency authorisation, including by replacing it with a Ministerial authorisation under section 9 or 9A;
- the independent oversight of the IGIS, who must be provided with notification as soon as practicable, and no later than three days after an emergency authorisation is issued by an agency head under section 9B; and
- the authorisation criteria, which require the agency head to be satisfied that:
    - It would be open to the responsible Minister to make the authorisation, and also that the responsible Minister would have made the authorisation decision. (This requires the agency head to consider and assess the weight that the Minister himself or herself would have been likely to place on particular considerations – including considering whether there are any matters that the Minister would have regarded as determinative of a decision not to issue an emergency authorisation, even though it would have been reasonably open to him or her to issue the authorisation.)
    - If the activity or series of activities is not undertaken before a Ministerial authorisation is given under section 9 or 9A, security would or is likely to be seriously prejudiced, or there will be or is likely to be a serious risk to a person's safety.

Statutory interpretation issue – responsible Ministers

The Committee has commented that sections 19 and 19A of the *Acts Interpretation Act 1901* (AIA) may operate to enlarge the category of 'responsible Ministers' in proposed new subsection 9A(3), with the result that there appears to be a diminished need for agency heads to be invested with an emergency power to issue authorisations.

Section 19 – acting Ministers

Section 19 of the AIA provides that statutory references to any Minister includes acting Ministers, with the result that acting Ministers can perform all of the functions and exercise all of the powers of the substantively appointed Ministers for whom they are acting . It is intended that this rule of interpretation should apply to the IS Act, with the result that Ministers acting for the responsible Minister can issue authorisations under section 9 (non-emergency authorisations) and section 9A (emergency authorisations).

However, as noted above, the material issue to which the proposed amendments are directed is to ensure that contingency arrangements are in place in the event that no responsible Ministers – whether substantive or acting – are readily available or contactable for a period of time (perhaps a matter of hours) in which there arises an urgent intelligence-collection need. Currently, the absence of such arrangements in the ISA means that there is no lawful basis for IS Act agencies to collect intelligence in these circumstances. Section 19 does not, therefore, operate to extend the 'pool' of available Ministers in a way that addresses the limitation to which the proposed amendments are directed.

Section 19A – references to "the Minister" – inclusion of junior portfolio Ministers

Section 19A of the AIA establishes a general rule of statutory interpretation that, if a provision of an Act refers to a Minister by using the expression "the Minister" without specifying a particular Minister, then if two or more Ministers administer the provision in respect of the relevant matters, the reference is taken to be a reference to any one of those Ministers. (The reason that the senior Minister and any junior Ministers or Parliamentary Secretaries might be taken as administering the relevant provision in this case, being proposed paragraph 9A(3)(a) of the IS Act, is because there is a practice that Ministers are appointed by the Governor-General to administer particular Departments of State. A Minister administering a Department administers the legislation listed in the Administrative Arrangements Orders for that Department.)

Some submitters to the PJCIS inquiry made similar observations to those of the Committee at p. 39 of its Alert Digest about the application of section 19A of the AIA to proposed subsection 9A(3) of the IS Act. In response, my Department made the following submission:

> [T]he assumed application of the rule of interpretation in section 19A of the AIA to proposed section 9A(3)(a) is not beyond doubt. Section 19A is a general rule of statutory interpretation that is taken to apply to all provisions of Commonwealth legislation, unless particular provisions evince a contrary intention. (That is, an intention that the general rule of interpretation should not apply to that provision.) There are, in AGD and agencies' views, a number of characteristics of both the text and wider context of the relevant emergency authorisation provisions that could be taken to – and were intended to – evince a contrary intention. (That is, an intention to limit the responsible Minister to the single, senior portfolio Minister who in practice is responsible for the relevant agency – being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD.)
>
> The very fact there have arisen, in the course of this inquiry, competing interpretations of the term suggests that the provision could benefit from clarification, in order to provide certainty as to which Ministers are within proposed paragraph 9A(3)(a). Such certainty will be critical to the effective operation of the emergency authorisation provisions, and their oversight by the IGIS. It would also remove any risk that a court, if ever called upon to construe the provision if enacted, could favour an interpretation contrary to the underlying policy intent.[14]

The PJCIS gave consideration to the suggestion that the term 'responsible Minister' would benefit from clarification, and recommended that it be narrowed to include only the senior portfolio Minister, to the exclusion of any junior or portfolio Ministers appointed to administer the Department responsible for the relevant intelligence agency. In taking this position, the PJCIS stated that:

> [T]he Committee does not consider it appropriate that junior Ministers and parliamentary secretaries without day-to-day responsibility for, or background in, national security or intelligence-related matters be called upon to make an emergency authorisation decision. The Committee also notes the potential operational implications that may arise in a time critical circumstance while an agency head attempts to contact a large number of ministers.[15]

PJCIS recommendations – emergency authorisations and agreements

The PJCIS made a handful of targeted recommendations in relation to emergency authorisations and agreements (recommendations 9-14), all of which have been accepted by

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[14] Attorney-General's Department, *Supplementary Submission 5.1* to the PJCIS inquiry, p 12 (copy enclosed with this document).

[15] PJCIS *Advisory Report,* p 55. See also Attorney-General's Department, *Supplementary Submission 5.1* to the PJCIS inquiry, p 12.

the Government, and the Government will move amendments to implement them when the Bill is debated in the Senate.

The PJCIS's recommendations and the Government's response, will also address a number of this committee's comments in Alert Digest 15. The relevant PJCIS recommendations are as follows:

- Strengthen the degree of Ministerial control over emergency authorisations issued by agency heads, by requiring agency heads to notify the relevant responsible Minister within eight hours of an authorisation being issued under proposed section 9B (currently proposed to be as soon as practicable within 48 hours).[16]
- Strengthen the degree of Ministerial control over agreements to the issuing of emergency authorisations by the Director-General of Security (or the issuing of emergency authorisations in the absence of any agreement) where permitted by proposed section 9C, by requiring the agency head to notify the Attorney-General within eight hours of such an authorisation being issued on the basis of the Director-General's agreement (or no agreement), replacing the current proposed time limit of as soon as practicable within 48 hours of the authorisation being issued.[17]
- Strengthen arrangements for Parliamentary visibility of the use of emergency agency head authorisations, including compliance with legislative arrangements prescribed by section 9B, by requiring the IGIS to provide notification to the relevant responsible Minister and the PJCIS, within 30 days of the issuing of an s 9B authorisation, as to whether (in his or her view) that authorisation complied with the requirements of s 9B.[18]
- Strengthen arrangements for Parliamentary visibility of the use of emergency agreements by the Director-General of Security to the issuing of an emergency authorisation (or the making of emergency authorisations in the absence of such agreement) where permitted by proposed section 9C, by way of a notification requirement to the PJCIS identical to that applying to proposed section 9B (noted above).[19]
- Clarify that the 'responsible Minister' for the purpose of the IS Act is the senior portfolio Minister, to the exclusion of junior portfolio Ministers and Parliamentary secretaries (being the Foreign Affairs Minister for ASIS, the Defence Minister for AGO and ASD, and the Attorney-General for ASIO).[20]

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[16] PJCIS, *Advisory Report,* recommendation 9.

[17] PJCIS, *Advisory Report,* recommendation 12.

[18] PJCIS, *Advisory Report,* recommendations 10-11.

[19] PJCIS, *Advisory Report,* recommendations 13-14.

[20] PJCIS, *Advisory Report,* recommendation 15.

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/23548

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

20 JAN 2015

Dear Chair Helen

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills (the Committee) in *Alert Digest No. 17 of 2014* concerning the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

The Committee has sought further information on Government amendment (2) on sheet GZ107, concerning the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

Proposed paragraph 122(3)(ga) will permit disclosures of information obtained under section 49 of the AML/CTF Act by a taxation officer provided it is made 'for the purposes of, or in connection with, the performance of the taxation officer's duties'. The Committee has sought further information in order to assess the impact that this amendment may have on the right to privacy. In particular, the Committee has requested advice as to the circumstances in which information will be able to be disclosed under proposed paragraph 122(3)(ga), and whether disclosures could be made to persons or organisations other than 'the person about whom the personal information relates'.

It is important to note that the Australian Taxation Office (ATO) has advised that the majority of disclosures under this provision will be to the taxpayer in order to inform them about their taxation obligations. The proposed amendment, along with proposed paragraph 122(3A), are primarily to clarify the ability of the ATO to share information with the affected taxpayer as there is some legal uncertainty about the circumstances in which it can be shared under the current legislation.

When can section 49 information be disclosed?

The proposed amendments provide that taxation officers can share information obtained under section 49 of the AML/CTF Act 'for the purposes of, or in connection with, the performance of the taxation officer's duties'.

In determining what disclosures are considered 'in the performance of the taxation officer's duties', proposed paragraph 122(3A) (item 4 of the Government amendments) clarifies that the disclosure grounds in section 355-50 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) are disclosures permitted under the AML/CTF Act.

In general terms, section 355-50 establishes that the disclosure must be for the purpose of a taxation law or for the making of an order under the *Proceeds of Crime Act 2002* (POC Act) that is related to a taxation law. It does not permit a general disclosure of personal information, but does enable disclosure to other people or organisations in limited circumstances.

Section 355-50 allows for disclosures to courts, tribunals, boards, law enforcement and intelligence agencies as well as government agencies such as the Australian Securities and Investments Commission and the Australian Bureau of Statistics, provided it is for the purpose of a taxation law or for the making of an order under the POC Act.

It also potentially allows disclosure to another taxpayer where it would be necessary to understand their own tax obligations. For example, where a number of individual Australian taxpayers were participating in a tax avoidance scheme, individual transactions may appear legitimate, but when considered together the transactions are clearly artificial. In these circumstances, the ATO may need to disclose some information about the other transactions in order to fully inform a taxpayer regarding the ATO's assessment.

Impact on the right to privacy

The grounds for disclosure in section 355-50 of the TAA have been in operation since 2010, when the TAA was amended following the Treasury's Review of Taxation Secrecy and Disclosure Provisions in 2006. The proposed amendments have been deliberately linked to these grounds to ensure consistency with the ATO's disclosure protections and the disclosure grounds for information gathered under the Taxation Commissioner's other powers to compel the production of information (for example under section 264 of the *Income Tax Assessment Act 1936*).

Therefore, while the amendments allow disclosure of information to people or organisations other than the person to whom the information relates, I consider that the safeguards and limitations of section 355-50 of the TAA ensure that the amendments do not trespass unduly on personal rights and liberties.

I trust that this information is of assistance to your Committee.

Yours sincerely

Michael Keenan

ATTORNEY-GENERAL

CANBERRA

MC14/23556

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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-4 FEB 2015

Dear Senator

The Senate Scrutiny of Bills Committee has sought information about the Federal Courts Legislation Amendment Bill 2014.

Specifically, the Committee has sought my advice about the rationale for allowing the matters contained in proposed subsections 10AA(2) and (3) of item 4, schedule 2 of the Bill, being dealt with in delegated legislation, in addition to the justification provided in the Explanatory Memorandum of reducing the burden of making future legislative amendments.

The Committee has also sought my advice about whether these matters should be dealt with in 'regulations', rather than a 'legislative instrument'.

Rationale – proposed subsection 10AA(2)

As the Committee is aware, through amendments to the *Federal Circuit Court of Australia Act 1999,* the Bill confers jurisdiction on the Federal Circuit Court in relation to a 'Commonwealth tenancy dispute', as defined in item 1 of Schedule 2 of the Bill. The purpose of proposed subsection 10AA(2) is to allow further jurisdiction to be conferred on the Federal Circuit Court where it falls within the definition of 'Commonwealth tenancy dispute' and is broader than the jurisdiction conferred by proposed subsection 10AA(1).

For example, following further consultation within government, it may be determined to be appropriate for the Federal Circuit Court to have jurisdiction to deal with Commonwealth tenancy disputes where the Commonwealth is a sublessor, which would currently not be permitted under proposed subparagraph 10AA(1)(a)(i). I consider this to be appropriately dealt with in delegated legislation as it still falls within the broad category of jurisdiction relating to a 'Commonwealth tenancy dispute', that would be authorised under proposed section 5 in the primary legislation.

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I consider that any minor adjustments to the category of 'Commonwealth tenancy dispute' are appropriately dealt with in delegated legislation, as, if the Bill is passed, the Parliament will have expressed its approval of the Federal Circuit Court having jurisdiction over these areas. It will also allow the Federal Circuit Court to develop its jurisdiction and practice in this area based on the narrower jurisdiction, before any decision is made to broaden it to cover the full scope of the jurisdiction envisaged by the definition of 'Commonwealth tenancy dispute'.

Further, any legislative instruments that sought to expand the Federal Circuit Court's jurisdiction beyond that granted by proposed subsection 10AA(1) would be subject to parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003*. In this way, Parliament can ensure that the proposed jurisdiction to be conferred does not go beyond the scope of that allowed by the definition of 'Commonwealth tenancy dispute'.

Rationale – proposed subsection 10AA(3)

Proposed subsection 10AA(3) would permit a legislative instrument to be made about the following matters:

- the rights of the parties to the Commonwealth tenancy dispute
- the law (whether a law of the Commonwealth or a law of the State or Territory) to be applied in determining the Commonwealth tenancy dispute
- any modifications to the applicable law that are to apply in relation to the Commonwealth tenancy dispute
- the powers that the Federal Circuit Court of Australia may exercise under the applicable law, and
- if the Federal Circuit Court of Australia makes an order when exercising jurisdiction over the Commonwealth tenancy dispute – the powers that may be exercised when executing the order or a class of orders.

As set out in the Explanatory Memorandum, the provision is intended to ensure, as far as possible, that the rights of the parties to a Commonwealth tenancy dispute are not substantially different from the rights of parties to tenancy disputes determined under state and territory law. In practice, it is state and territory law which governs tenancies and this law differs around Australia. It also differs in the remedies and orders that are available to the relevant decision maker when resolving a tenancy dispute.

I expect that a range of minor and technical adjustments will be required in order to ensure that the Federal Circuit Court can make orders that are equivalent to those available to state and territory tenancy tribunals. It may also be necessary to adjust the application of state and territory law to a Commonwealth tenancy dispute in order to ensure that there are not significant differences in how disputes in different states and territories are resolved. This is highly desirable in order to ensure a consistent approach across the country and to allow for the development of a coherent and consistent body of case law within the Federal Circuit Court's jurisdiction.

These amendments are expected to be minor, technical and possibly frequently required as tenancy legislation is updated and amended in the states and territories. I consider it desirable for legislative instruments to be able to be made quickly to respond to any changes of state and territory tenancy legislation to ensure that parties to a Commonwealth tenancy dispute heard in the Federal Circuit Court are treated consistently with parties in state and territory tribunals on an ongoing basis, rather than needing to make changes to primary legislation which is a slower process.

In addition, any legislative instruments made under proposed subsection 10AA(3) would be subject to parliamentary scrutiny and disallowance in accordance with the *Legislative Instruments Act 2003*.

Specific reference to 'regulations'

Consistent with the Office of Parliamentary Counsel's drafting direction on subordinate instruments (Drafting Direction No.3.8), subordinate instruments should generally be made in the form of legislative instruments, rather than regulations, unless there is a good reason to depart from this. The Office of Parliamentary Counsel has advised that it will usually be appropriate to specifically refer to 'regulations' in the primary Act where an instrument to be made under the power covers any of the following:

(a) offence provisions
(b) powers of arrest or detention
(c) entry provisions
(d) search provisions
(e) seizure provisions
(f) civil penalties
(g) impositions of taxes
(h) setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount, and
(i) amendments of the text of an Act.

As none of the matters listed above are anticipated to be required to be made under the powers in proposed subsections 10AA(2) and (3), I do not consider it necessary that they be made as regulations. However, if any matter listed above were to be required, the relevant legislative instrument would be made as a Regulation which falls within the definition of 'legislative instrument' in the Legislative Instruments Act.

Legislative instruments are subject to the same level of Parliamentary scrutiny as regulations. The Office of Parliamentary Counsel is available to be involved in the drafting of any particular instruments where it is considered that the skills of a professional drafter are required. In practice, my department engages the Office of Parliamentary Counsel to draft legislative instruments of this nature and I do not envisage departing from that practice for instruments proposed to be made under subsections 10AA(2) and (3).

I would be happy to discuss this matter further with the Committee and I thank you for seeking my advice.

Yours faithfully

(George Brandis)

PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

15 JAN 2015

Reference: B14/3580

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your letter dated 20 November 2014 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Omnibus Repeal Day (Spring 2014) Bill 2014 (the Bill). Contained in this letter are responses to the Committee's questions on the Bill as presented in the Alert Digest No. 15 of 2014.

The Committee seeks advice on the proposed repeal of specific consultation provisions in the Broadcasting Services Act 1992, the Interactive Gambling Act 2001, the Radiocommunications Act 1992 and the Telecommunications Act 1997. In particular, the Committee has sought advice on differences between the consultation requirements being repealed and the consultation provisions that exist for all legislative instruments under section 17 of the Legislative Instruments Act 2003 (LI Act).

The proposed removal of the consultation requirements in the Acts mentioned above is considered justified on the basis that the requirements unnecessarily duplicate consultation requirements in section 17 of the LI Act which sets the standard consultation requirements for all Commonwealth legislative instruments.

It is the case that nearly all of the individual consultation provisions proposed for repeal date from a time before the enactment of the LI Act. These provisions served a strong independent purpose prior to the LI Act but now, while not identical, largely duplicate the effect of the LI Act. The proposed repeal of these provisions would simplify, shorten and harmonise the law.

One significant advantage of Part 3 of the LI Act is that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken and allows for flexibility. The various provisions proposed to be repealed, by contrast, are prescriptive rules. The consultation periods in question range from 14 days to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. The maintenance of such provisions would provide for inconsistency, inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.

The Committee has also raised concerns about reliance on the LI Act, on the basis that section 19 of that Act provides that failure to consult does not affect the validity or enforceability of a legislative instrument. On this point, it should be noted that Part 5 of the LI Act also sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments.

The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament is dissatisfied with that consultation, the instrument may be disallowed.

In relation to proposed amendment to the Hazardous Waste (Regulation of Exports and Imports) Act 1989 (the Hazardous Waste Act), the Committee seeks advice on how often it has been necessary to update the text of the Basel Convention utilising the mechanism in subsection 62(2).

Regulations amending the text of the Schedule to the Hazardous Waste Act have been made three times, although this is not as often as amendments have been made to the Basel Convention. This discrepancy is a result of the resources required and process involved to make a legislative instrument to amend the Schedule to the Hazardous Waste Act, which has meant that the Schedule no longer aligns with the current text of the Basel Convention.

The Committee also seeks advice on the original rationale for providing the text of the Basel Convention as a Schedule to the Hazardous Waste Act, rather than by reference to the Convention as proposed by the Bill.

The text of the Basel Convention was set out in a Schedule to the Hazardous Waste Act, as part of a suite of amendments made by the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1995. The explanatory memorandum gives the rationale that inclusion of the Convention text enables convenient reference and transparency by eliminating the need for the reader to refer to another source. It was also considered common practice in legislation implementing international Conventions.

However, as noted the inclusion of the text of the Basel Convention adds unnecessary length to the Hazardous Waste Act. In addition, making regulations to update the text is resource intensive in practice, and as these resources are not always available, the Schedule is currently out of date. As a result, the current arrangement has not provided greater transparency or convenience to the reader, than that which is provided through other sources. The proposed amendment would refer the reader to the Australian Treaties Library on the AustLII website, as an authoritative database of Australia's treaties, and which receives financial funding and provision of content by the Department of Foreign Affairs and Trade.

The proposed amendment would not impact on parliamentary scrutiny, as Australia's consent to any change to the text of the Basel Convention would continue to be considered by the Joint Standing Committee on Treaties.

Yours sincerely

CHRISTIAN PORTER

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Senate Standing Committee for the Scrutiny of Bills
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Regulator of Medicinal Cannabis Bill 2014
Introduced into the Senate on 27 November 2014
By: Senators Di Natale, Macdonald, Leyonhjelm and Urquhart

Background

This bill provides for the establishment of a Regulator of Medicinal Cannabis who is responsible for formulating rules for licensing the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

Delegation of legislative power

General comment

This bill may be characterised as framework legislation, which aims to introduce a regulatory regime for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

The subject matter of the bill is of considerable significance and it is therefore a matter of concern, based on the committee's scrutiny principles, that core elements of the regulation of medicinal cannabis are left to be established and defined through the rules (rather than primary legislation). The rules will play a significant role in the operation of the registration scheme established under Division 2 of the bill. Even more significantly the schemes for:

- the licensing of medicinal cannabis (Division 3);
- the authorisation of patients and carers (Division 4);
- experimental licensing (Division 5); and
- import and export (Division 7)

are all to be determined in the rules. These schemes are central to the operation of the legislation. Division 6 provides for the making of medicinal cannabis standards.

Leaving so much substantive detail to be rules limits the role that the committee can undertake in examining the legislation. For example, subclause 59(2) provides that the rules may provide that a decision made under the rules is a merits reviewable decision. However, the committee cannot examine the appropriateness of the approach to review rights that may be taken under the rules. Noting the above, there is a question as to whether the approach of providing that all of these significant matters be dealt with in the rules constitutes an appropriate delegation of legislative

power. Clause 63 confers the rule-making power on regulator. **The committee therefore seeks the Senators' advice as to why the medicinal cannabis standards and the core schemes for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis should not be included in the primary legislation.**

If it is not proposed that these matters be dealt with in the primary legislation, the committee also seeks the Senators' advice as to whether the bill can be amended to ensure that the matters are dealt with in regulations (rather than rules) as this would ensure that the regulations (which, in effect, establish core elements of the scheme) are drafted by the OPC and considered by the Federal Executive Council.

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.

Reply

In order for the Regulator of Medicinal Cannabis to effectively carry out its functions, it requires its members to hold expertise in relevant clinical or scientific fields as prescribed in Section 34 of the Bill. This section also confers that the expert members are to be appointed by the Minister.

As certain aspects of the Bill, in particular the production, manufacture and supply of medicinal cannabis will only be determined following State and Territory Government negotiations, primary legislation that would pre-empt this process and bind the Regulator could create potential problems with the negotiations.

The Regulator also requires flexibility to consult broadly in developing appropriate standards for its operation, and to respond quickly and proactively to changing circumstances. Prescriptive primary legislation could hinder the Regulator's ability to effectively perform certain functions.

The model for this Bill is consistent with the Canadian approach which established a *Marijuana for Medical Purposes Regulations* to process applications and regulate the distribution of cannabis for medical purposes through commercial Licensed Producers. Licenced Producers are required to demonstrate compliance with regulatory requirements such as quality control standards, record-keeping of all activities including inventories of marijuana, and physical security measures to protect against potential misuse.

Should a senate inquiry recommend amendments to the bill, to strengthen its application, then we would be happy to consider them.

Senator David Leyonhjelm and Senator Anne Urquhart concur with Senator Di Natale's response.

Senator Ian Macdonald asked that his comment be noted: I am happy with his reply but I do suggest we give serious consideration to making the "rules" regulations. I think that is a fair point by the Scrutiny of Bills Committee.

Senator Richard Di Natale

THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 2 October 2014 concerning the Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014. On 3 December 2014, the Bill passed the Parliament with amendments which have addressed the issues raised by the Committee. Further information is provided below.

Breadth of discretionary power
Schedule 1, items 4, 5 and 6

> **The committee seeks my advice as to whether consideration has been given to an amendment which would require (rather than enable) the Secretary to reinstate payment when a job seeker is unable to be issued with a reconnection appointment within two business days from the date the person contacted their employment provider.**

I inform the Committee that the Government has agreed to an amendment which would enshrine in legislation the current practice that a job seeker's payment suspension is lifted if they are unable to be offered a reconnection appointment within two business days from the date the person contacted their employment provider.

Breadth of discretionary power
Schedule 1, item 8

> **The committee seeks clarification about these 'flexible arrangements' (including whether the Department or employment service providers will be responsible for their implementation) and also asks whether consideration has been given to including protections against undue delay in the legislation.**

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The amendment outlined above will protect job seekers against any undue delay in being offered a reconnection appointment. Consistent with the current practice, there will continue to be flexibility for employment providers to conduct the reconnection appointment either face to face or over the phone. This will ensure that job seekers are supported to reengage with their employment provider as quickly as possible where they are unable to attend in person.

Merits review
Items 10 and 11

> **The committee draws the issue to the attention of Senators and leaves the appropriateness of not providing for merits review of these decisions to the Senate as a whole.**

The Government has agreed to an amendment to allow merits review of payment suspension.

Delegation of legislative power
Items 13–19

> **The committee considers that none of these factors provide strong reasons for implementing an important policy decision (i.e. raising the age requirement for a significant concession to older job seekers) through delegated legislation. The rationale for the approach based on flexibility and the possible use of trial programs is not developed in the explanatory memorandum. The nature of the policy change being contemplated would not, on its face, appear to require lengthy or complex amendments. Finally, although social security legislation does authorise the making of many legislative instruments, it is to be hoped that in most instances significant policy questions will be settled in the primary legislation by the Parliament. For the above reasons, the committee requests further advice as to why such a potentially significant policy change could not be included in primary, rather than secondary, legislation.**

The Government has agreed to an amendment which removed items 13 to 19 from the Bill.

Thank you for bringing these issues to my attention.

Yours sincerely

LUKE HARTSUYKER

- 5 DEC 2014

Minister for Finance
Acting Assistant Treasurer

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.11
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the letter of 20 November 2014, from the Secretary of the Senate Scrutiny of Bills Committee (the Committee) to my Office in relation to the *Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014* (the Bill).

In this letter, the Secretary raised the Committee's request for further information in relation to the Bill and advised that the Committee would appreciate receiving a response either in advance of detailed consideration of the Bill by the Senate or, if this does not occur, by the conclusion of the present sitting period (4 December 2014).

The Committee has requested further advice about Schedule 1 to the Bill, which proposes to make a number of amendments to the *Income Tax Assessment Act 1997* to extend the availability of existing business restructure rollovers and makes some related technical amendments. Specifically, the Committee expressed concern about the retrospective application of these amendments.

I understand the Committee's concern about the significant retrospective application of these amendments. However, I consider that in this case it is appropriate. As the Committee notes, the application period for the various amendments is consistent with the dates set out in the announcements made by the then Government. If the changes did not apply from this time, taxpayers who had acted in reliance upon these announcements would be disadvantaged.

Further, I also note that in this case the retrospective application of the amendments to the availability of the rollover will not disadvantage any taxpayer. The business restructure rollovers are an optional concession. Retrospectively extending their availability allows taxpayer to opt for the rollover to apply, but in the rare situation where this might not provide an advantage to the taxpayer, the taxpayer can simply not make this choice. Similarly, the various technical amendments address problems with the law that might otherwise disadvantage taxpayers.

I also understand the Committee's more general concerns about the period it has taken for these amendments to be brought before Parliament. The Government appreciates the importance of ensuring that announced proposals to amend the tax law are brought promptly before the Parliament to provide certainty to taxpayers.

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However, as you are aware, this measure is one of 96 proposals to amend the tax law that had been announced but had not been legislated at the time this Government was elected. Given the volume of proposals, it is not practical and would place an unreasonable demand on the time of Parliament to seek to resolve all of the announced but unenacted measures within six months.

Nonetheless, the Government is committed to providing taxpayers with certainty in relation to all of these proposals as soon as is practicable and is working to ensure that similar delays between announcement and the introduction of legislation do not arise in future. Of the announced but unenacted measures, the Government has now resolved a majority and expects to introduce legislation to address the remaining proposals over the 2015 Parliamentary sittings.

I trust this information addresses the concerns raised by the Committee.

Kind regards

MATHIAS CORMANN

2 December 2014

ATTORNEY-GENERAL

CANBERRA

MC14/23328

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 27 November 2014 seeking my response to matters raised by the Senate Scrutiny of Bills Committee in relation to proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

The Committee has indicated concerns about the impact of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in relation to the right to privacy. It has also recommended that the Bill be amended so that a range of matters are dealt with in the primary legislation rather than through delegated legislation and instruments.

Alternatively, if the Bill is not amended, the Committee has requested advice from the Government about other mechanisms to increase Parliamentary oversight in relation to regulations prescribing the data set, those prescribing additional services to which the data set will apply and Ministerial declarations of further authorities and bodies to be a 'criminal law enforcement agency'.

Right to privacy

The Committee's analysis of the Bill refers to the *Fifteenth Report on the 44th Parliament* by the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR has requested further information about the Bill to which I will shortly respond separately. However, I take this opportunity to note that the Bill contains significant oversight mechanisms designed to safeguard privacy and other fundamental freedoms.

The retention of a limited set of telecommunications data that is required to support investigations serves the legitimate objective of protecting national security, public safety and addressing crime. To avoid unlawful and arbitrary interference with the right to privacy, the Bill sets out the types of data which will be retained, reduces the number and range of agencies which can access telecommunications data and extends the remit of the Ombudsman to oversee agencies' compliance with the framework for access to, and use of telecommunications data under Chapter 4 of the TIA Act. These safeguards supplement existing controls limiting the purposes for which telecommunications data may be used, and offences for the unlawful use of telecommunications data.

Regulating the data set

The Committee has indicated concerns that the types of data to be retained will be specified by a regulation made pursuant to proposed section 187A(1)(a). The Government believes the combination of primary and delegated legislation is appropriate in this context. It will ensure the primary legislation contains the range of telecommunications data that must be retained and allow the regulations to prescribe the details. This approach allows technical detail, conventionally reserved for regulations, to be adjusted expeditiously in response to technological change.

The data set will remain subject to Parliamentary oversight. The primary legislation limits the kinds of information that may be prescribed by regulation to information that falls within six categories listed in proposed section 187A(2). The Bill also provides that service providers are *not* required to keep, or to cause to be kept particular kinds of information, including information that is the contents or substance of a communication or a person's web-browsing history. Any alteration to the types or kinds of information that could be prescribed would require an amendment to the primary legislation. Consequently, any significant change to the range of data to be retained requires full Parliamentary consideration.

The Government is currently working with the telecommunications industry to support the implementation of the proposed measure. In this regard I note that the Government has established a joint Government industry Implementation Working Group (IWG) to refine the proposed data set. The IWG has prepared a first report in which it recommends, amongst other matters, that any change to the regulations prescribing the data set not commence until the Parliamentary disallowance period has expired.

I have referred the IWG's report to the Parliamentary Joint Committee on Intelligence and Security, which is currently inquiring into the Bill and data set. I look forward to considering the Committee's recommendations in this regard when it reports on 27 February 2015, and am aware that the Committee is mindful of this Committee's recommendations.

Regulations prescribing 'a service'

The Committee has recommended amending the Bill so that the definition of a service to which the retention obligation applies is defined entirely in the primary legislation. If the Bill is not amended, the Committee has requested advice from the Government about other mechanisms to increase Parliamentary oversight.

The proposed section 187A(3)(b) provides that the data retention obligation applies to a service if it is operated by a carrier (within the meaning of the TIA Act), operated by an internet service provider (within the meaning of Schedule 5 of the *Broadcasting Services Act 1992*) or prescribed in regulations.

The proposed section 187A(3)(b) is intended to ensure that the data retention obligation broadly applies to the telecommunications industry, unless excluded by proposed section 187A(3)(a) or (c), or an exemption under proposed section 187B applies. The definitions of carrier and an internet service provider will cover current industry participants to be the subject of data retention.

However, due to the rapid pace of changing technology and business practices, new types of businesses may emerge in the future. Accordingly, the ability to define another type of service provider through regulations is contained in proposed section 187A(3)(b)(iii).

Importantly, a service will only be able to be prescribed by the regulation-making power in section 187A(3)(b)(ii) if it also satisfies the other two limbs in sections 187A(3)(a) and (c); that is it must be a service for carrying communications, or enabling communications to be carried, by means of guided or unguided electromagnetic energy or both and the person operating the service must own or operate, in Australia, infrastructure that enables the provision of any of its relevant services.

The usual disallowance processes are appropriate in the context of prescribing a 'service' by regulation under this scheme. They provide Parliament with considerable oversight over regulations. Parliament can disallow a regulation within 15 sitting days of it being tabled, and if a motion is not resolved in 15 sitting days, the regulation is automatically disallowed. This mechanism ensures that objections to a regulation are resolved.

Agency declarations

The Committee has requested an explanation as to why the number of agencies that can access data under the data retention scheme should be able to be expanded by Ministerial declaration rather than by amending the primary legislation.

Under the Bill, the Minister will be able to declare a particular agency or body to be either a criminal law enforcement agency or as an enforcement agency. Such a declaration is a legislative instrument within the meaning given in the LIA Act. Agencies in either category may access data. However, importantly, the Bill places limits on the Minister's ability to declare that an agency should be able to access stored communications and telecommunications data. Before making a declaration, I am required to consider several factors, including whether:

- the functions of the authority or body include investigating serious contraventions (in the case of stored communications) or the functions of the authority or body include enforcing the criminal law, administering a pecuniary penalty or protecting the public revenue (in the case of telecommunications data)
- whether access to stored communications or telecommunications data would be reasonably likely to assist the authority or body in that regard, and
- whether the authority or body is required to comply with the Australian Privacy Principles, or a comparable binding scheme, and
- the declaration would be in the public interest.

These prescribed considerations represent a substantial limitation on the range of bodies or authorities that may be subject to a declaration. Furthermore a declaration may be subject to conditions, enabling the Minister to limit agencies' access to data to avoid an undue impact upon individual privacy. In addition, I note that the proposed declaration mechanism complements a substantial reduction in the number of agencies that may seek to access stored communications and telecommunications data by replacing existing, broad definitions with more prescriptive definitions that clearly identify the range of agencies so empowered.

The Minister is empowered to revoke authorisations where the circumstances no longer require that authority or body to access telecommunications data, thereby ensuring that only those agencies that continue to require access to data are empowered to do so on an ongoing basis. Unlike primary legislation, legislative instruments sunset after a period of time, enabling periodic reconsideration of the regulations by Parliament.

The Ministerial declaration process ensures the mandatory data retention scheme accounts for changing agency functions and structures. If agencies were to be listed exclusively on the face of the legislation, they could lose the ability to access stored communications and

telecommunications data during a subsequent machinery of government change. Ministerial declarations ensure access provisions keep pace with structural changes in agencies.

In that context, and for the reasons given earlier, I consider the disallowance processes are appropriate in the context of declaring additional agencies for the purposes of this scheme.

Defining 'content'

The Committee has recommended that the Bill be amended to provide a clear definition of 'content' in the primary legislation.

This recommendation may result in the opposite of the Committee's desired effect. The Australian Law Reform Commission (ALRC) effectively recognised this risk in its report on *Australian Privacy Law and Practice (ALRC Report 108)*. The ALRC report concluded that the TIA Act should not exhaustively define what constitutes telecommunications data, in order to allow it to continue to apply in the face of rapid technological change within the telecommunications industry. The merits of technological neutrality in the context of data are equally applicable to defining content. The broad definition in the TIA Act is capable of being interpreted in light of rapid changes in communications technology in a way that an exhaustive, static definition would not.

If the legislation were to include an exhaustive list of that which comprises 'content' it would likely result in the legislation failing to keep pace with rapid changes in the technology offered by the telecommunications industry. Any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content, and the extensive protections that apply to content.

The TIA Act includes provisions which, when read in conjunction with a broad definition of content, create a strong incentive for the telecommunications industry and agencies to take a conservative approach to accessing content. In particular:

- any person who believes that the content or substance of their communications has been unlawfully accessed under a data authorisation can challenge that access and, if successful, seek remedies under Part 3-7 of the TIA Act
- apart from limited exceptions, it is a criminal offence for a service provider to disclose the content or substance of a communication without lawful authority
- it is a criminal offence for officials of law enforcement and national security agencies to use or disclose unlawfully accessed stored communications except in strictly limited circumstances, and
- there is no discretion for a court to admit unlawfully accessed stored communications, which includes information that has been wrongfully retained as data.

The TIA Act will continue to maintain a general and effective prohibition on the interception of, and other access to, telecommunications content except in limited 'special circumstances'.

I thank the Committee for its consideration of the Bill.

Yours faithfully

(George Brandis)

04 FEB 2015