



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**TWELFTH REPORT**  
**OF**  
**2015**

**11 November 2015**

**ISSN 0729-6258 (Print)**

**ISSN 2204-3985 (Online)**



## **Members of the Committee**

### **Current members**

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator Katy Gallagher	ALP, Australian Capital Territory
Senator the Hon Bill Heffernan	LP, New South Wales
Senator Rachel Siewert	AG, Western Australia

### **Secretariat**

Ms Toni Dawes, Secretary  
Mr Glenn Ryall, Principal Research Officer  
Ms Ingrid Zappe, Legislative Research Officer

### **Committee legal adviser**

Associate Professor Leighton McDonald

### **Committee contacts**

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Phone: 02 6277 3050  
Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_scrutiny](http://www.aph.gov.au/senate_scrutiny)





## 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

## TWELFTH REPORT OF 2015

The committee presents its *Twelfth 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:

<b>Bills</b>	<b>Page No.</b>
Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015	693
Health Legislation Amendment (eHealth) Bill 2015	696
Migration Amendment (Charging for a Migration Outcome) Bill 2015	710
Migration and Maritime Powers Amendment Bill (No. 1) 2015	720
Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015	727



# Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

*This bill passed both Houses on 9 November 2015*

## ***Introduction***

The committee dealt with this bill in *Alert Digest No. 11 of 2015*. The Minister responded to the committee's comments in a letter dated 30 October 2015. A copy of the letter is attached to this report.

### ***Alert Digest No. 11 of 2015 - extract***

## **Background**

This bill amends the *Customs Act 1901* to introduce new rules of origin for goods that are imported into Australia from China to give effect to the China-Australia Free Trade Agreement.

### **Delegation of legislative power—incorporation by reference Schedule 1, item 1, proposed subsection 153ZOB(6)**

This provision provides that the regulations may adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time in the context of defining 'Chinese originating goods'.

The explanatory memorandum (at p. 43) states that new subsection 153ZOB(6) is 'included to ensure there is an appropriate delegation of legislative power should it be necessary in order to implement the Agreement to apply, adopt or incorporate an instrument or other writing that is not an Act or a disallowable legislative instrument.' The example given is that 'in implementing other free trade agreements, this provision has enabled the regulations to refer to the general accounting principles of a country other than Australia for the purposes of the regional value content calculations'.

The committee will have scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

**The committee therefore seeks the Minister's advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill.**

*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***

Subsection 153ZOB(6) is proposed to be inserted into the *Customs Act 1901* by the Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015. This provision contains the head of power to create regulations that may apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. The Committee has asked for my advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill.

I do not consider that it is necessary to include such a requirement in the Bill. However, I undertake that, should any such document or writing be included in the regulations, its inclusion will be especially highlighted in the explanatory material for the regulations. The incorporated material would also be made publicly available the Department of Immigration and Border Protection website and Department Of Immigration And Border Protection Notice would be issued indicating where the document can be obtained.

These commitments are in addition to section 26 of the *Legislative Instruments Act 2003* which requires that an explanatory statement for an instrument that incorporates a document by reference must contain a description of such documents and indicate how they may be obtained. Any explanatory material will, therefore, also include these requirements.

I trust that this commitment will address the Committee's concerns about the easy availability and accessibility of such documents or writing.

*Committee response*

The committee thanks the Minister for this response and for his commitment to (1) highlight the inclusion of any material incorporated by reference in the explanatory material accompanying the relevant regulation, and (2) make the incorporated material publicly available on the appropriate departmental website. **The committee notes that it would have been useful had this information been included in the explanatory memorandum.**

**As the bill allows the making of regulations which can incorporate material by reference the committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

**As the bill has already passed both Houses of the Parliament the committee makes no further comment.**

# Health Legislation Amendment (eHealth) Bill 2015

Introduced into the House of Representatives on 17 September 2015

Portfolio: Health

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 11 of 2015*. The Minister responded to the committee's comments in a letter dated 2 November 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 11 of 2015 - extract*

## **Background**

This bill amends the *Personally Controlled Electronic Health Records Act 2012*, *Healthcare Identifiers Act 2010*, *Privacy Act 1988*, *Copyright Act 1968*, *Health Insurance Act 1973* and *National Health Act 1953* to:

- change the name of the Personally Controlled Electronic Health Records (PCEHR) system to the My Health Record system;
- enable opt-out trials to be undertaken for individuals;
- abolish the PCEHR Jurisdictional Advisory Committee and the Independent Advisory Council;
- introduce new civil and criminal penalties;
- amend the privacy framework; and
- amend mandatory data breach notification requirements for participants.

## **Delegation of legislative power—important matters in regulations Schedule 1, item 34, proposed sections 20 and 25D**

Proposed section 20 'broadens the power to allow for future regulations to be made allowing prescribed entities to collect, use, disclose and adopt identifying information and healthcare identifiers' (explanatory memorandum, p. 54). The explanatory memorandum emphasises that this is only for limited purposes, which are specified in proposed subsection 20(3) which relate to 'the provision of healthcare or to assist people who because of health issues, require support' (p. 54).

The justification for the power in the explanatory memorandum points to examples of entities that could be authorised by this regulation-making power (such as the National Disability Insurance Agency and cancer registers). The explanatory memorandum states



that the ‘new power has been designed to allow the appropriate collection, use, disclosure and adoption of healthcare identifiers and identifying information by entities like NDIA and cancer registers, within tight limits related to providing healthcare and assisting individuals who require support because of health issues, without having to amend the Act each time a new entity needs to be authorised’ (p. 54).

The same issue arises in relation to proposed section 25D.

**In light of the explanation provided, the committee notes these matters and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*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***

I would like to take this opportunity to provide more information about the intention for proposed sections 20 and 25D.

In 2014 the HI Act was amended to allow use of healthcare identifiers as part of the Aged Care Gateway, which is a centralised online information resource for individuals seeking access to aged care services. The amendments permitted the verification of aged care clients’ identities, and the creation and maintenance of uniquely identifiable aged care client records. Identity verification and the protection of both client privacy and the integrity of Commonwealth systems were enhanced through the use of healthcare identifiers. In the future, it is intended that (with appropriate consent), aged care clients registered in the Aged Care Gateway system (who are also registered in My Health Record system) will be able to make relevant components of their aged care client record (including assessment outcomes and a summary of their services plan) accessible to healthcare professionals (who are participating in the My Health Record system). Establishing the key building blocks such as adoption of the healthcare identifier in the Aged Care Gateway system was an important step to enabling appropriate access to health-related information.

Individuals who are recipients of health-related or health-reliant services, such as aged care, disability, cancer screening, are clients of the health system and are in a category where they would benefit from having a My Health Record. Under an opt-out system, they would have a My Health Record unless they choose to opt-out. The use of healthcare identifiers can enable an individuals' health information to be shared in a manner that enables high identity integrity across the services. In the same way that the Aged Care Gateway can utilise healthcare identifiers to ensure accurate identification of individuals and their aged care records, entities that provide other appropriate health-related services

and their clients may be able to benefit from use of healthcare identifiers to accurately identify individuals and their records.

These entities could include, for example, the National Disability Insurance Agency (NDIA) and the national cancer screening registers, or other health related services that are not registered with a Health Provider Identifier for their Organisation. Healthcare identifiers are an accurate identifier of an individual, and such entities and individuals may benefit from the entity being able to associate health-related records with an individual's healthcare identifier. In the future this may allow, for example, the viewing of certain disability or cancer screening information as part of an individual's My Health Record (as is planned in connection with the Aged Care Gateway). Currently, entities such as NDIA are not authorised to handle healthcare identifiers or identifying information as they are not healthcare providers within the meaning of the HI Act.

Proposed new sections 20 and 25D of the HI Act allow for future regulations to be made allowing prescribed entities to collect, use, disclose and adopt identifying information and healthcare identifiers. However, there are strict limits on the ability to make regulations for these purposes. In summary, regulations may only be made authorising the collection, use or disclosure of identifying information and healthcare identifiers for purposes related to the provision of healthcare or to assist people who, because of health issues including illness, disability or injury, require support.

The proposed new regulation-making powers have been designed to allow the appropriate collection, use, disclosure and adoption of healthcare identifiers and identifying information by entities like NDIA and the national cancer screening registers, without having to amend the Act each time a new entity needs to be authorised as was necessary with the Aged Care Gateway. Given that the NDIA and the national cancer screening registers may wish to handle identifying information and healthcare identifiers over the next couple of years to improve healthcare and health-related services supplied to individuals, the ability to authorise this in regulations will allow timely authorisation without the need to amend the HI Act each time.

Any regulations made authorising other entities to collect, use and disclose identifying information and healthcare identifiers will be subject to Parliamentary scrutiny and disallowance.

These changes also reflect the more holistic view of health services that is being taken through changes to the definition of 'health service' in the *Privacy Act 1988*, and go directly toward enabling a more integrated and cooperative healthcare sector.

***Committee response***

The committee thanks the Minister for taking the opportunity to provide this additional information.

## ***Alert Digest No. 11 of 2015 - extract***

### **Trespass on personal rights and liberties—evidential onus Schedule 1, item 36, proposed subsections 26(3) and 26(4)**

Proposed section 26 provides that the use or disclosure by a person of any information obtained under the *Healthcare Identifiers Act 2010*, or a healthcare recipient's or individual healthcare provider's healthcare identifier, is prohibited unless an exception in proposed subsections 26(3) or 26(4) applies. The exceptions in subsection 26(3) relate to the use or disclosure of a healthcare identifier and the exceptions in subsection 26(4) relate to the use or disclosure of other information. A defendant bears an evidential burden in relation to the exceptions in these subsections.

Significant penalties apply for contravention of this provision—a civil penalty of up to 600 penalty units (currently \$108,000 for individuals and \$540,000 for bodies corporate) or a criminal penalty of up to two years' imprisonment and/or 120 penalty units (currently \$21,600 for individuals and \$108,000 for bodies corporate).

**Noting these significant penalties, and as there is no justification in the explanatory memorandum for placing an evidential burden on the defendant, the committee seeks the Minister's advice as to the rationale for the proposed approach, including whether the approach is consistent with the principles in relation to offence-specific defences outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).**

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

## ***Minister's response - extract***

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies.

An evidential burden placed on the defendant is not uncommon. Similar requirements to those used in the Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential

burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant, or could easily be obtained by the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden.

Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that any of the exceptions in those provisions apply to the person.

The evidential burden in each of these circumstances covered by proposed subsections 26(3) and (4) can easily be met. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

***Committee response***

The committee thanks the Minister for this response and **requests that the key information above be included in the explanatory memorandum. While the penalties are significant, the committee notes the explanation provided and in the circumstances leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

***Alert Digest No. 11 of 2015 - extract***

**Delegation of legislative power—incorporation of written instruments as they exist from time to time**

**Schedule 1, item 105, proposed subsection 109(9)**

This subsection allows the Rules (delegated legislation) to incorporate other material which may change from time to time. The explanatory memorandum explains the approach as follows (pp 90–91):

The ability to incorporate in My Health Records Rules material that may change from time to time is important to ensure that the technical standards and security of the My Health Record system are maintained in rapidly changing environments. In particular, it is intended that some Australian standards and written security manuals issued by the System Operator may be incorporated into My Health Records Rules.

It would not be practical for the Rules to refer to such material as it exists at a particular point in time since it is likely to be subject to frequent change or may change at short notice. Without the amendment, participants in the My Health Record system may be forced to comply with outdated requirements. If standards and security manuals change and participants in the My Health Record system no longer comply, it may pose a security or privacy risk for the system. New subsection 109(9) therefore ensures ongoing compliance.

In practice, the System Operator would ensure that any such material that is referenced in the My Health Records Rules is made available to affected parties for free or at a minimal cost. Administrative arrangements would also be put in place to ensure that affected entities are given as much notice as possible of a change so they can ensure they comply with the new requirements when they take effect. There would also be a measure of common sense applied so that if material changed suddenly and affected entities had insufficient time to comply with the new requirements, they would not be penalised immediately.

The committee will have scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards or industry databases, is not publicly available or is available only if a fee is paid).

**The expected administrative arrangements and practices described in the explanatory memorandum are welcomed; nevertheless the committee seeks the Minister's advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill itself.**

*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 materials that will most likely be incorporated in the My Health Records Rules are IT security-related documents, like the *National eHealth Security and Access Framework*, and registered healthcare provider organisations would be required to use software that is compliant with this framework if they wish to connect to the My Health Record system. These requirements are typically technical in nature and complex, detailing IT-related security measures. The requirements may quickly and at relatively short notice change to address emerging IT security threats. It is important to be able to deal with rapidly changing IT security threats in a responsive manner that also allows requirements to be enforced. If this does not occur, the security risks to the My Health Record system will increase given the large number of interconnecting healthcare provider organisations (currently more than 7,000 and expected to increase substantially with the trial of opt-out arrangements). A failure by healthcare provider organisations (or repository or portal operators) to comply with IT security requirements may put individuals' health information at increased risk.

While mentioned in the explanatory memorandum to the Bill as one of the types of document that may be incorporated by reference, at this stage it is considered less likely that Australian standards will be incorporated by reference into the My Health Records Rules.

As the Committee is aware, the power to incorporate material by reference is also constrained by principles relating to the sub-delegation of powers and the requirement that a legislative instrument must be within the clear authority of the enabling legislation. My Health Record Rules that incorporate material by reference must meet the requirements in section 109 of the *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) (as amended by the Bill).

Where materials are incorporated into subordinate legislation by reference, it is important that affected entities and individuals be made aware of any proposed changes to the material incorporated given that it affects the content of the law. For this reason, amendments proposed in the Bill are designed to increase the ability of the System Operator of the My Health Record system to communicate electronically with all participants (registered healthcare provider organisations, contracted service providers, portal operators and repository operators) as well as individuals (that is, registered healthcare recipients) where this is appropriate. There would be no cost for the public associated with accessing IT security materials that are incorporated into the My Health Records Rules. In addition, other channels will also be employed to ensure affected parties are aware of any changes to materials that have been incorporated by reference. For example, publishing details on the System Operator's website and making hard-copies of the material available free of charge.

My Department will make every effort to ensure that incorporating material by reference in My Health Records Rules is only done where necessary and appropriate.

### *Committee response*

The committee thanks the Minister for this response **and 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.**

**The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

### **Delegation of legislative power—important matters in delegated legislation Schedule 1, item 106**

Currently the My Health Record system operates on an opt-in basis. Part 1 of new Schedule 1 of the My Health Records Act provides for rule-making powers which would allow the Minister to make rules (delegated legislation) that will facilitate trials of an opt-out system for healthcare recipients.

The explanatory material provides a rationale for proposing trials of an opt-out approach. In short, it is intended to be undertaken to inform the government on future changes to the system to improve participation and usage. There is a rule-making power to determine where and in relation to what class or classes of healthcare recipients the trials will be conducted.

Clause 2 of Part 1 of Schedule 1 includes a rule-making power which would allow the Minister to make rules to apply the opt-out model nationally. Before doing so the Minister must consider the evidence obtained through the trials and any other matter relevant to the decision (subclause 2(2)). The Minister must also consult the Ministerial Council (subclause 2(3)).

Although the explanatory materials make a strong case for undertaking *trials* of an opt-out system, the difference between an opt-out system and the existing (opt-in) system is substantial. The two different approaches balance individual interests in privacy of their health information and systemic benefits of the My Health record system in different ways.

Although the proposed opt-out system continues to include significant protections of the privacy interests of individuals and facilitates opt-out choices and therefore preserves individual choice to cancel participation in the system, the committee considers that a general change to an opt-out system is central to the regulatory design of the system and thus is a choice which is appropriately made by the Parliament rather than delegated to a Minister. **While it may be appropriate for delegated legislation to provide for the conduct of trials of the opt-out model, the committee seeks the Minister's justification as to why the ability to implement this significant policy change nationally is one that**

**is appropriately made by the Minister making a legislative instrument (rather than the matter being considered by Parliament and the change being made through an amendment to the primary 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***

As highlighted by the Committee, the Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements, and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

These protections include the ability to do the following for all people registered with the My Health Record system:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

As part of the trials, arrangements for opting-out will be tested to ensure that individuals who do not wish to have a record are able to communicate that wish as simply and easily as possible. Opt-out trials will be accompanied by extensive information covering a range of channels, and targeted at all relevant individuals in the trial areas including healthcare recipients, parents, guardians and carers. If a Government decision is made to implement opt-out nationally, a similar strategy would precede the opt-out period ensuring that individuals are able to make an informed choice about whether or not to opt-out.



The Bill proposes that, before I make a decision to implement opt-out nationally, I must consult with the Ministerial Council – that is, the COAG Health Council. The states and territories are central to the success of the My Health Record system, regardless of whether the system is opt-in or opt-out, given that their public health systems will be one of the major healthcare provider participants in the system. If a decision is made to implement opt-out nationally, that decision will be of great interest to states and territories as it will also affect their citizens. In practice, national implementation of opt-out will not occur unless states and territories support the implementation.

Finally, any Rule made implementing opt-out nationally would be subject to Parliamentary scrutiny and disallowance.

Given that the privacy and security arrangements for registration apply equally to opt-in and opt-out arrangements, and the authorisations for collection, use and disclosure of information necessary to implement opt-in and opt-out are clearly set out in the PCEHR Act (opt-in) and in the Bill (opt-out), the parameters of the proposed opt-out arrangements are clear. This is true whether opt-out is implemented as part of a trial in limited geographic areas, or as part of implementing opt-out nationally. As noted above, there are significant privacy protections built into the design of the system, and there will be a comprehensive communications strategy as part of any move to opt-out.

Given these circumstances, it is my view that Parliament has sufficient information in the Bill to assess the opt-out arrangements now, including whether the proposed opt-out arrangements appropriately balances the systemic and population-wide benefits of the My Health Record system with the important interest individuals have in managing the privacy of their health information. As a result, I consider that it is an appropriate delegation of power for the Bill to allow me to make a Rule implementing opt-out nationally, provided that I first follow the procedural and consultation requirements in the Bill.

#### *Committee response*

The committee thanks the Minister for this response and notes that in practice national implementation of an opt-out system will not occur unless States and Territories support the implementation and that any rule made implementing opt-out nationally would be subject to Parliamentary scrutiny and disallowance. **The committee requests that this key information be included in the explanatory memorandum.**

**While the committee notes the Minister's further information about the proposal, it remains concerned that a general change to an opt-out system is central to the regulatory design of the system and thus is a choice which is appropriately made by Parliamentary enactment, rather than delegated to a Minister.**

*continued*

**The committee draws its concern that this is a matter that is more appropriate for Parliamentary enactment 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.**

**The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

***Alert Digest No. 11 of 2015 - extract***

**Delegation of legislative power—Henry VIII clause  
Schedule 1, subitem 136(3)**

Subitem 136(3) makes express provision for rules (delegated legislation) made for the purpose of subitem 136(2) to modify the operation of the *Healthcare Identifiers Act 2010*, the *Personally Controlled Electronic Health Records Act 2012*, and the *Privacy Act 1988*.

This provision is a ‘Henry VIII clause’, in that it may allow the Minister to modify the operation of the specified Acts by making rules (explanatory memorandum, p. 105). Although it is recognised that such clauses should in general be avoided, the explanatory memorandum (at p. 106) suggests that the clause is needed for transitional purposes and that it is consistent with similar rule-making powers in other amendment bills:

The purpose of this provision is to allow the Minister to deal with any unforeseen or unintended consequences that may arise at a later date, specifically regarding the opt-out trials and the changes in governance of the System Operator to the Australian Commission for eHealth. In particular, as it is intended that the Australian Commission for eHealth will be made under the PGPA Act and PGPA Rules at a later date, this provision is intended to help avoid any unintended consequences from this change. The rule-making power provides legislative authority to address a range of practical situations that might arise with a transfer of functions or when a machinery of government change occurs. Where a rule is made that could potentially modify the application of an Act, which another Minister is responsible for, it is intended for those rules to be made only after that other Minister has been consulted.

Paragraph [136(4)(e)] prohibits the making of rules that directly amend the text of the Act. “Directly amend” means to make an amendment that would need to be incorporated in any reprint of the Act by the Government Printer (see section 2 of the *Acts Publication Act 1905*). Paragraph [136(4)(e)] does not prohibit a rule that modifies the effect of a provision, such as by providing that a provision has effect as if it had been amended in a specified way, but does not make a direct amendment of any Act.

Although it may be accepted that Henry VIII clauses may be appropriate in certain circumstances, the changes resulting from opt-out trials and any general future decision to apply the opt-out system nationally may be significant. **In these circumstances the committee seeks more information from the Minister, and examples of possible circumstances in which the power could be needed, to assist the committee in understanding why the clause is necessary.**

*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***

Subitem 136(3) could be considered a “Henry VIII clause” in that it potentially allows the Minister to make Rules modifying the operation of the *Healthcare Identifiers Act 2010*, the *My Health Records Act 2012* (currently named the *Personally Controlled Electronic Health Records Act 2012*) and the *Privacy Act 1988*. Subitem 136(3) is located in Part 2 (Rulemaking powers, application and transitional provisions) of Schedule 1 of the Bill.

Subitem 136(3) has been included in the Bill to allow the Minister to deal with any unintended or unforeseen circumstances that may arise in the future, in particular as part of transitional arrangements in relation to opt-out and in relation to changes of governance arrangements as governance mechanisms for the My Health Record system are moved out of the *My Health Records Act 2012* and subordinate legislation and into rules proposed to be made under section 87 of the *Public Governance, Performance and Accountability Act 2013*.

As the purpose of the provisions is to assist with unintended or unforeseen circumstances, it is difficult to provide specific examples of when the rule-making power may be used. However, possible circumstances may include where certain *My Health Records Act 2012* governance mechanisms need to be retained for a short period after ‘governance restructure day’ (as defined in the Bill) to ensure appropriate mechanisms remain in place until the Australian Commission for eHealth becomes fully operational.

Henry VIII clauses are not uncommon as part of transitional arrangements. Item 136 in the Bill is modelled on a very similar provision in the *Governance of Australian Government Superannuation Schemes Legislation Amendment Act 2015* – see Item 22 of Schedule 2 of that Act.

As a disallowable instrument, any Rules made under subitem 136(3) would be subject to Parliamentary scrutiny and would be open to disallowance. Subitem 136(4) limits the types of rules that the Minister is able to make under item 136.

### ***Committee response***

The committee thanks the Minister for this response, and in particular notes that:

1. Subitem 136(3) has been included in the bill to allow the Minister to deal with any unintended or unforeseen circumstances that may arise in the future, in particular as part of transitional arrangements in relation to opt-out and in relation to changes of governance arrangements as governance mechanisms for the My Health Record system are moved out of the *My Health Records Act 2012* and subordinate legislation and into rules proposed to be made under section 87 of the *Public Governance, Performance and Accountability Act 2013*; and
2. Possible circumstances in which the provisions may be used include ‘where certain *My Health Records Act 2012* governance mechanisms need to be retained for a short period after ‘governance restructure day’ (as defined in the bill) to ensure appropriate mechanisms remain in place until the Australian Commission for eHealth becomes fully operational.’

The committee also notes the Minister’s advice that the provision is modelled on similar clauses and that any Rules will be disallowable.

However, when delegated legislation can have the effect of overriding primary legislation for the purpose of transitional arrangements the committee prefers that the power is limited to a timeframe appropriate for the particular circumstances. **The committee therefore requests the Minister’s further advice as to whether the provision can be amended to include a sunset provision that reflects the intended transitional use of the provision, rather than leaving the timing unconstrained.**

***Alert Digest No. 11 of 2015 - extract***

**Explanatory memorandum—incorrect item references**

The committee notes that there are incorrect item references in the explanatory memorandum at pages 105–106 (for example, the explanatory memorandum incorrectly refers to subclause 136(3) as 128(3)).

***Minister's response - extract***

I note that the Committee has also identified incorrect item references in the explanatory memorandum and I appreciate you bringing this matter to my attention. I will endeavour to table a replacement explanatory memorandum to correct the errors.

***Committee response***

The committee thanks the Minister for this response and appreciates her undertaking to correct the explanatory memorandum.

# Migration Amendment (Charging for a Migration Outcome) Bill 2015

Introduced into the House of Representatives on 16 September 2015  
Portfolio: Immigration and Border Protection

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 11 of 2015*. The Minister responded to the committee's comments in a letter dated 30 October 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 11 of 2015 - extract*

## **Background**

This bill amends the *Migration Act 1958* to introduce:

- a new criminal offence and a civil penalty provision which will allow sanctions to be imposed on sponsors and other third parties who engage in 'payment for visas' activity;
- a new civil penalty provision which will provide for a fine to be imposed on visa applicants or holders, or other third parties, who offer to provide, or provide, a benefit as part of a 'payment for visas' arrangement; and
- a new discretionary power to consider cancellation of a temporary or permanent visa where the visa holder has engaged in 'payment for visas' activity.

## **Merits review**

### **Item 1, proposed subsection 116(1AC)**

This provision seeks to introduce a discretionary power for the Minister to consider cancellation of a temporary or permanent visa where the visa holder has engaged in 'payment for visas' activity. **The committee seeks the Minister's advice as to whether merits review will be available in relation to decisions made pursuant to subsection 116(1AC).**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

### *Minister's response - extract*

Merits review will be available for cancellation decisions made by a departmental delegate under subsection 116(1AC) of the Act if the visa holder is in the migration zone at the time of cancellation. This is provided for by subsection 338(3) of the Act.

As with all other personal cancellation decisions of the Minister, should the Minister make a personal decision to cancel a visa under subsection 116(1AC) of the Act, that decision will not be merits reviewable, but will be judicially reviewable.

### *Committee response*

The committee thanks the Minister for this response.

Although the committee accepts that other personal cancellation decisions of the Minister are not merits reviewable, it is nonetheless a matter of concern that further broad discretionary powers that impact directly on individuals and are not subject to merits review are being introduced into the legislation. Merits review provides a level of assurance that judicial review cannot, given the restricted grounds on which courts are able to review decisions. For example, in general, judicial review cannot correct for factual errors even when those errors are serious and material. For this reason the committee does not consider that consistency with existing powers in the Migration Act is a compelling justification for the introduction of further, similar powers.

**However, in light of the existing regulatory framework, the committee draws its concerns about the limited capacity of judicial review to ensure administrative justice in the context of broad discretionary powers 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. 11 of 2015 - extract***

### **Trespass on personal rights and liberties—abrogation of privilege against self-incrimination**

#### **Items 5, 14 and 15**

The effect of item 5 is to enable the powers of an inspector under Subdivision F of division 3A of Part 2 of the Migration Act to be exercised for the purpose of investigating whether a person has contravened a criminal or civil penalty provision in relation to a sponsored visa. Expanding the powers of an inspector will allow information to be gathered in relation to whether a person who is or was an approved sponsor has engaged in ‘payment for visas’ activity that constitutes an offence or contravenes a civil penalty provision in relation to sponsored visas. As noted by the explanatory memorandum (at p. 6) current section 140XG relevantly provides that a person is required to produce a record or document to the inspector even if this might tend to incriminate the person or expose the person to a penalty.

Item 14 seeks to amend section 487C(2)(d) in Division 2 of Part 8E of the Act by inserting “or D” after the words “Subdivision C”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other criminal proceedings.

Similarly, item 15 seeks to amend paragraph 487C(2)(e) in Division 2 of Part 8E of the Act by inserting the words “sponsorship-related provision or a” before the words “work-related provision”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in civil proceedings against the person in relation to an alleged contravention of a sponsorship-related provision under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other civil proceedings

The statement of compatibility addresses this abrogation of the privilege against self-incrimination in the following terms (pp 33–34):

The purpose of the investigations powers in the proposed Bill is to enable the Department to identify and gather evidence in relation to ‘payment for visas’ conduct. The only persons who possess critical information and documents relevant to “payment for visas” conduct are the individual who offers/provides a benefit, or who receives/requests a benefit, or a third party (where involved). Allowing information obtained from such persons, to be admissible in evidence in “payment for visas” civil penalty proceedings will enable the Department to effectively enforce this sanction.



This approach is a departure from standard practice in relation to handling of self-incrimination, however is similar to provisions already in place for work-related civil penalty proceedings. The privilege against self-incrimination is only being removed in relation to proceedings for the criminal and civil penalties for an alleged contravention of a ‘payment for visas’ matter and the protection will still remain in relation to all other civil penalty and criminal proceedings. To the extent that the relevant provisions in the proposed Bill do not permit documents or information collected under sections 487C to be used in other civil penalty and criminal proceedings (ie those that do not involve a sponsorship-related offence or sponsorship-related provision), this is consistent with Australia’s obligations under Article 14(3)(g) of the ICCPR.

The committee is of the view that even where use and derivative use immunities are included, provisions abrogating the privilege should be limited to serious offences and to situations in which a comprehensive justification for the approach is provided. In light of this general approach it appears that the above justification is insufficiently compelling. In general, the need for effective enforcement is insufficiently focused to justify the abrogation of the privilege. Although it may be accepted that evidence obtained from persons directly involved in ‘payment for visas’ conduct will be relevant, it is not clear that the relevant information may not also be obtained by other lawful means. It appears that this argument could usefully be further explained. In addition, the fact that the privilege against self-incrimination is only being removed in relation to proceedings for the criminal and civil penalties for an alleged contravention of a ‘payment for visas’ matter and the protection will still remain in relation to all other civil penalty and criminal proceedings does not seem sufficiently persuasive. Given the focus of the investigation, it may be expected that any realistic threat of prosecution will relate to precisely those matters in relation to which the immunities do not apply. **The committee therefore seeks the Minister’s further advice as to the perceived need to take the significant step of abrogating the privilege against self-incrimination in these circumstances and whether it can effectively be obtained by other lawful means.**

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

### ***Minister’s response - extract***

As noted by the Committee and the explanatory memorandum to the Bill, the effect of item 5 is to enable the powers of an inspector under Subdivision F of Division 3A of Part 2 of the Act to be exercised for the purpose of investigating whether a person who is or was an approved sponsor has engaged in ‘payment for visas’ activity that constitutes an offence or contravenes a civil penalty provision.

Current section 140XG provides that a person is required to produce a record or document to an inspector even if this might tend to incriminate the person or expose the person to a penalty. However, such a record or document is not admissible against the individual in criminal proceedings (except in relation to certain offences relating to the provision of false or misleading information or documents).

The effect of items 14 and 15 is to amend section 487C of the Act to similarly provide that a person is required to produce a record or document even if this might tend to incriminate the person or expose the person to a penalty. However, such a record or document is not admissible against the individual in criminal proceedings (except in relation to certain offences in the *Criminal Code* relating to the provision of false or misleading information or documents) or in civil proceedings (other than proceedings for a civil penalty for an alleged contravention of a sponsorship-related provision or a work-related provision).

Therefore, the abrogation of the privilege against self-incrimination is limited in its effect to the context of proceedings for a civil penalty order, and to criminal proceedings for certain offences under the *Criminal Code* concerning the provision of false or misleading documents, that relate to Subdivision C or D of Division 12 of Part 2 of the Act.

As mentioned in the statement of compatibility for this Bill, there would be occasions where the only persons who possess critical information and documents relevant to 'payment for visas' conduct are the individuals who ask for, receive, offer or provide the benefit.

On other occasions, it is anticipated that my department may receive evidence from other sources, such as third parties involved in 'payment for visas' arrangements that break down. It may also be the case that employers inform the department of 'payment for visas' conduct where they are approached by people offering them money if they will sponsor a visa holder.

Allowing records or documents that are required to be produced under section 487B or Subdivision F of Division 3A of Part 2 of the Act to be admissible as evidence in 'payment for visas' civil penalty proceedings will enable my department to effectively enforce this sanction. This approach is a departure from standard practice in relation to handling self-incrimination, but is the same as provisions already in place for work-related civil penalty proceedings under the Act. As noted above, the privilege against self-incrimination is only being removed in relation to civil penalty proceedings, and criminal proceedings in relation to certain offences in the *Criminal Code* relating to the provision of false or misleading information or documents.

The protection will remain in relation to all other criminal proceedings, including criminal proceedings for an alleged contravention of a 'payment for visas' matter.

As a final matter, I note that the explanation for item 14 in the explanatory memorandum to this Bill is incorrect in this respect, as it states that information or a document required to be given by a person under section 487B may be used in criminal proceedings against

the person in relation to a sponsorship-related offence. This is incorrect, as the only criminal proceedings for which the information or document may be used is in criminal proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to Subdivision C or D of Division 12 of Part 2 of the Act. Currently, parliamentary procedures are being pursued to amend the explanatory memorandum to reflect this.

### ***Committee response***

The committee thanks the Minister for this response. **The committee welcomes the Minister's advice that an amendment to the explanatory memorandum is being pursued to ensure that the explanation for item 14 is accurate.**

The committee notes the Minister's advice that the privilege will remain in relation to criminal proceedings for an alleged contravention of a 'payment for visas' matter and that the same provisions are already in place for work-related civil penalty proceedings under the Act.

The committee also notes the Minister's advice that there would be occasions where the only persons who possess critical information and documents relevant to 'payment for visas' conduct are the individuals who ask for, receive, offer or provide the benefit. However, of itself, the committee does not consider that this is a strong argument for the abrogation of the privilege (this would be the case in numerous situations in which it remains appropriate to prioritise the presumption of innocence over the abrogation of the privilege against self-incrimination). In addition, given the high civil penalties for a 'payment for visas' conduct, the committee therefore remains concerned about the proposed approach.

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

### ***Alert Digest No. 11 of 2015 - extract***

#### **Trespass on personal rights and liberties—evidential onus**

##### **Item 6, proposed subsection 245AW(5)**

Proposed section 245AW seeks to provide extended geographical jurisdiction to specified new offences (the sponsorship-related civil penalty provisions). Defences to these are made available in subsections 245AW(3) and (4), and subsection (5) specifies that a defendant bears an evidential onus in relation to these defences.

The elements of the proposed defences broadly relate to the conduct (1) occurring in a foreign country, (2) by a person who is not an Australian citizen (or a body corporate) and

(3) there is no similar offence in the foreign country (i.e. the person could not be prosecuted for that conduct under the domestic law of the other country). The explanatory memorandum (at p 19) states that:

It is considered appropriate for the defendant to bear the evidential burden if the defendant seeks to rely on a defence in subsections 245AW(3) or 245AW(4) because the citizenship of the person and the place of incorporation of a body are matters peculiarly within the knowledge of the defendant.

It is not clear to the committee how this information could be peculiarly within the knowledge of the defendant, and the explanation also does not address why it is appropriate to require a defendant to establish the legal position in the other country. **The committee therefore seeks the Minister's further advice as to why it is appropriate for a defendant to bear an evidential burden in relation to these matters.**

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

### ***Minister's response - extract***

It is considered appropriate for the defendant to bear the evidential burden in subsections 245AW(3) and (4) because the question of whether the conduct constituting the alleged primary contravention, or the conduct constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly in a foreign country is a matter best within the knowledge of the defendant.

In relation to whether it is appropriate for the defendant to establish whether there is a law in force in the foreign country that provides for a pecuniary or criminal penalty for conduct constituting the alleged primary contravention, this is already provided for in current subsections 245AM(3) and (4) of the Act in relation to work-related civil penalty provisions. Further, these provisions are modelled on section 15.2 of the *Criminal Code* which contains the same provision requiring the defendant to establish the legal position in the foreign country where the conduct constituting the alleged offence occurs.

### *Committee response*

The committee thanks the Minister for this response, however, it remains unclear why each of the elements of the defences can be said to be peculiarly within the knowledge of the defendant. The committee also notes that it is unclear what is intended by the assertion that a matter is ‘best within’ the knowledge of the defendant.

**The committee therefore draws its concerns about placing the evidential burden onto the defendant in these circumstances to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

### *Alert Digest No. 11 of 2015 - extract*

#### **Trespass on personal rights and liberties—strict liability Item 6, proposed subsections 245AR(5) and 245AS(1)**

These subsections create civil penalties which will be strict liability penalties due to the operation of section 486ZF of the Migration Act. The justification for this approach is provided in the statement of compatibility (see pp 31–32):

The imposition of these strict liability penalties does limit the presumption of innocence, however these penalties are reasonable, necessary and proportionate to the legitimate objective of preventing and deterring the practice of “payment for visas” which has a number of detrimental outcomes including undermining the integrity and distorting the function and operation of Australia’s migration programme, and the exploitation vulnerable people. It is necessary to introduce these penalties as there is currently no clear or direct avenue for addressing “payment for visas” through the legal system and these provisions create in the direct legal consequences for engaging in this behaviour. Given the serious, detrimental effects that can occur from the practice of “payment for visas”, including:

- making vulnerable non-citizens liable to exploitation;
- reducing employment opportunities in Australia for permanent residents;
- negative repercussions for Australian wages and conditions;
- the potential for persons who receive payment in return for sponsorship to inappropriately make significant financial gains; and
- adversely affecting the integrity of Australia’s migration programme,

a strong response is required to ensure that this practice does not continue. Additionally, the Department’s investigations into this practice often reveal elaborate fraud which would more appropriately merit criminal prosecution. As such to the extent that the proposed Bill creates strict liability penalties, these can be considered consistent with the protection set out in Article 14(2) of the ICCPR.

Although these are civil penalty provisions, the penalty is imposed is significant: 240 penalty units. For an individual this translates to a maximum pecuniary penalty of \$43,200 and \$216,000 for a body corporate. Given the severity of the penalties it is of concern that the right to be presumed innocent until proven guilty according to law is limited by the application of strict liability.

In general, the committee takes the view that strict liability should not be applied to offences where the fine exceeds 60 penalty units. These provisions impose penalties four times that level. The committee is also concerned that the principles on strict liability in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) do not appear to have been considered. Finally, it may be noted that the argument in favour of the application of strict liability to these civil penalty provisions appears to merely point to the adverse consequences of the prohibited behaviour which is not, of itself, a compelling argument for the imposition of strict liability penalties. **The committee therefore seeks the Minister's more detailed justification for the proposed approach.**

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

### ***Minister's response - extract***

Subsections 245AR(5) and 245AS(1) create civil penalties which will be strict liability penalties due to the operation of section 486ZF of the Act.

The effect of section 486ZF is that it is enough to establish that a person contravened subsections 245AR(5) or 245AS(1) by asking for, receiving, offering or providing a benefit in return for the occurrence of a sponsorship-related event, without the need to prove the fault elements that would be required to prove the criminal offence provided for in subsection 245AR(4) of the Act.

The maximum penalty which may be imposed for contravention of the civil penalty provisions is 240 penalty units, which currently equates to \$43,200 or five times higher – \$216,000 – for a body corporate. The high maximum penalty for these civil penalty provisions reflects the high upper limit of amounts paid in 'payment for visas' cases.

It is the Government's position that it is unacceptable for anyone to make a personal gain from their position in a 'payment for visas' arrangement and it is unacceptable for a visa holder to become an Australian permanent resident by engaging in 'payment for visas' behaviour. To protect the integrity of Australia's migration programme, the penalties must be set sufficiently high to cover any potential gain and deter people from this behaviour.

The penalties which may be imposed for contravention of the civil penalty provisions in subsections 245AR(5) and 245AS(1) are lower than those which may be imposed for the criminal offence, which is not a strict liability provision. The *Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers* was considered during the development of the policy and drafting of the Bill.

The decision to introduce non-fault civil penalties is to prevent and deter the practice of 'payment for visas' which has a number of detrimental outcomes including undermining the integrity of Australia's migration programme and the exploitation of vulnerable people. The guide allows for the setting of penalties at a rate greater than the standard ratio in order to address potential gain from the offence.

The regime of offences, civil penalties and discretionary visa cancellation provided for in the Bill will provide my Department with a range of sanctions allowing appropriate action to be taken across a 'spectrum of non-compliance', depending on the seriousness of the 'payment for visas' conduct and the remedial action that is appropriate to the particular circumstances.

***Committee response***

The committee thanks the Minister for this response and notes the explanation given. However, the penalty is significantly greater than the standard ratio recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the committee therefore remains concerned about the use of strict liability for the imposition of such significant penalties.

**The committee draws its concerns about the application of strict liability in these circumstances to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Migration and Maritime Powers Amendment Bill (No. 1) 2015

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 11 of 2015*. The Minister responded to the committee's comments in a letter dated 30 October 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 11 of 2015 - extract*

## **Background**

This bill amends the *Migration Act 1958* and the *Maritime Powers Act 2013*, including to:

- ensure that when an unlawful non-citizen is in the process of being removed to another country under section 198 and the removal is aborted, or the removal is completed but the person does not enter the other country, and as a direct result the person is returned to Australia, then that person has a lawful basis to return to Australia without a visa;
- ensure that when such a person does return to Australia without a visa, the person will be taken to have been continuously in the migration zone for the purposes of sections 48 and 48A of the Migration Act which bar the person from making a valid application for certain visas;
- amends the definition of *character concern* to be consistent with the character test following the amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- provide that the events described in sections 82, 173 and 174 of the Migration Act that cause a visa that is in effect to cease will, as a general rule, cause a visa that is held, but not in effect, to be taken to cease; and
- clarify that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application.

## **Retrospective application Schedule 2, item 22**

This item provides, in a number of subitems, for the retrospective application of various amendments. In each case the justification is brief and does not expressly address the



question of whether it is possible that the approach may create unfairness for affected persons (for example, by defeating a reasonable expectation based on the current provisions). **The committee therefore seeks the Minister's more detailed explanation for the justification of the retrospective application of each provision.**

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

### ***Minister's response - extract***

*Subitem 22(2) and (3): application of item 10 and item 11 – removal power*

The introduction of a new removal power and amendment to the existing removal power of 198(2A) will provide certainty about when a person becomes liable for removal. It is intended that a non-citizen whose visa had been mandatorily cancelled under subsection 501(3A) and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal. Applying the amendments retrospectively to these persons provides clarity on when the person can be removed under section 198.

*Subitem 22(4): application of item 12 – Judicial review of Minister's decisions under section 501CA or section 501BA*

The retrospective application of this amendment means that applicants for judicial review of the Minister's decision under section 501CA or section 501BA will have access to the same Court (the Federal Court) as other applicants seeking judicial review of personal decisions of the Minister under 501, 501A, 501B and 501C. Character decisions generally involve similar legal principles and it is important that they are heard in the Federal Court, which is experienced in this area.

At present, only a small number of adverse Minister's decisions under section 501CA, and none under section 501BA, have been litigated and the Department has requested that they be transferred from the Federal Circuit Court to the Federal Court. Given both the small numbers, and existing practices, it is likely that there will be minimal impact to people as a result of the retrospective nature of this element of the Bill.

*Subitem 22(6): application of item 20 – Inclusion of section 501BA into paragraph 503(1)(b)*

The Minister's power to cancel a visa under section 501BA allows the Minister to set-aside, where the Minister is satisfied it is in the national interest, a non-adverse delegate or Administrative Appeals Tribunal decision. The power under section 501BA is only enlivened after a non-citizen has had the opportunity to put their case for revocation to

either a delegate, or the Administrative Appeals Tribunal. This amendment will ensure that all persons cancelled under one of the character provisions are treated consistently in terms of their ability to return to Australia, and that any person who may be cancelled prior to the Bill passing is subject to the same provisions as a person who is cancelled afterwards.

*Subitem 22(7): application of item 21 – Protected information*

Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers.

This is particularly the case because some character cancellation powers are not enlivened until another power has been used (for example, the Minister's power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised). It is therefore necessary to ensure that confidential information provided to the department prior to the introduction of this amendment, is protected and dealt with by the same administrative procedures used for all of the character cancellation and revocation powers.

The retrospective application of this amendment will ensure the continued protection of confidential information which is relevant, for example, to the revocation consideration of a mandatory cancellation decision, in circumstances where that information was provided to the department previously. It is important to protect confidential information used for the purposes of the character cancellation powers, particularly because the same information may be used for decisions made under different cancellation powers.

***Committee response***

The committee thanks the Minister for this response.

The committee notes the additional information provided by the Minister, but the responses do not clearly address the question of whether the approach may create unfairness for affected persons (for example, by defeating a reasonable expectation based on the current provisions).

**The committee remains concerned about the retrospective application of these amendments and draws these items to the attention of Senators. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

## *Alert Digest No. 11 of 2015 - extract*

### **Retrospective commencement Schedule 3, Part 1**

Table item 3 of clause 2 provides that Part 1 of Schedule 3 of the bill retrospectively commences on 25 September 2014.

The substantive amendment in Part 1 of Schedule 3 (see item 1) is to insert a reference to subsection 48A(1AA) into subsection 48A(1C). The effect of this insertion is to clarify that subsection 48A(1AA) applies, regardless of any of the factors listed in subsection 48A(1C). Those factors were inserted into the Migration Act to restore the intended operation of the statutory bar in section 48A of the Migration Act to making a further protection visa application by persons who had a previous application refused or a protection visa cancelled. The effect of these factors is to indicate that the bar on an application in section 48A applies regardless of the grounds on which the previous application was refused or on which a protection visa had been cancelled.

Subsection 48A(1AA) commenced on 25 September 2014 and the bill seeks to apply these amendments retrospectively from the same date. The purpose of subsection 48A(1AA) was to clarify that the application bar in section 48A applies to all people regardless of whether they made the application for a protection visa or had the application made on their behalf (because they were a minor at the time of the application or had a mental impairment). The explanatory memorandum states that at that time the need to add a reference to subsection 48A(1AA) in subsection 48A(1C) was overlooked, but that the 'policy intention was always that subsection 48A(1C) would apply, in addition to persons covered by subsections 48A(1) and (1B), to persons covered by subsection 48A(1AA)' (at p. 25).

The overall effect of this provision is that the coverage of the bar on making an application for a further protection visa (on what are, in effect, new grounds) is given a broader coverage. Affected persons will thus have very significant interests and rights removed. (It is also noted that the application provision for the substantive amendment described above (item 2 of Part 1 of Schedule 3) appears to exacerbate the problem as the amendment applies even in relation to cases where a previous application was refused or a protection visa cancelled prior to the commencement date.)

The justification for giving these changes retrospective effect is as follows (at p. 5 of the explanatory memorandum):

This item has been given retrospective effect to avoid any suggestion that in the period between 25 September 2014 (when subsection 48(1AA) was inserted) and the commencement of this item, a person who was previously refused a protection visa that was made on their behalf and covered by subsection 48A(1AA) was not barred

from making a valid protection visa application relying on a different ground or satisfaction of a different criterion, because subsection 48A(1C) did not apply to them.

If the amendment were made prospective in effect, there would be an implication that the amendment does not clarify section 48A, but instead alters the effect of section 48A. By making the amendment retrospective to the time when subsection 48A(1AA) was inserted, that implication is avoided and it is clear that a person who is otherwise covered by subsection 48A(1AA) could not have validly made a protection visa application relying on a different ground or criterion in between the commencement of subsection 48A(1AA) and the commencement of this amendment.

It appears that the rationale for retrospective commencement amounts to a claim about the intended operation of the amendments introduced on 25 September 2014. While a particular outcome was being sought through the 2014 amendments, the actual content of those provisions as enacted did not (properly interpreted) reflect the intended operation of the amendments. Nonetheless, even in this circumstance retrospectively aligning the law with those intentions significantly undermines the rule of law, particularly when the consequences for affected individuals are significant. In general, individuals should be entitled to rely on the current law to determine their rights, including rights to apply for important benefits such as a protection visa. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law. **The committee therefore seeks the Minister's further justification for the proposed approach, including addressing the fairness of the proposed approach to affected persons and the importance of limiting retrospective commencement to cases where this can be seen to further rather than diminish the rule of law.**

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

### ***Minister's response - extract***

The Committee has identified that retrospective commencement of provisions can undermine the rule of law particularly when the consequences for affected individuals are significant. My Department knows of no cases on hand where a person who was previously refused a protection visa that was applied for on their behalf has attempted to make a further application for the grant of a protection visa relying on a ground that is different from the ground on which the refused protection visa application was based. That is, my Department is not aware of any person who would be negatively affected by the retrospective commencement of this provision.

The Committee has also expressed concerns that the retrospective commencement of the provision is aggravated by the retroactive application of the provision.

Section 48A is, and has always been, intended to prohibit further protection visa applications by a person (whether or not they are a minor or have a mental impairment) who, while in the migration zone, has made an application for a protection visa that was refused (or held a protection visa that was cancelled, which is not relevant for present purposes).

It would be contrary to the Government's intention regarding the plain text of section 48A if the amendment did not apply to persons who are minors or have a mental impairment and who had a protection visa application (that was made on their behalf) refused before commencement of subsection 48A(1AA) as inserted by the *Migration Legislation Amendment Act (No. 1) 2014*. The timing of the visa refusal is irrelevant - the Government's intention is that section 48A should apply if a person has had a protection visa application refused 'whilst (the person is) in the migration zone'.

The amendment is a technical amendment that clarifies how the law as it currently stands should be interpreted; it is not a change in the law. It would not make sense if, as an amendment that merely clarifies the status quo, it did not apply to persons who have had protection visa applications refused before commencement and who are already barred under section 48A from making a further protection visa application because of the previous refusal.

The government's longstanding position is that a person who has had a protection visa application refused whilst the person is in the migration zone, and who does not otherwise have a lawful basis for remaining in Australia, should not be permitted to prolong their stay in Australia by making repeat protection visa applications. If the person disagrees with the visa refusal decision, they can seek merits review of the decision and/or judicial review.

Where the person has exhausted their merits and judicial review rights and there is some reason why the person should have their protection claims re-assessed, for example due to change in personal circumstances or country information, there is always the possibility of Ministerial intervention. Whilst acknowledging that the Minister's power under section 48B is non-compellable, where the change of the person's circumstances is such that a re-assessment of their claims is prima facie warranted, the department's usual practice is to recommend the matter to the Minister for considering exercising his power under section 48B.

*Committee response*

The committee thanks the Minister for this response and, in particular, notes the advice that his department is 'not aware of any person who would be negatively affected by the retrospective commencement of this provision.'

**However, the committee does not agree that the amendment is merely technical. Under Australia's constitutional arrangements, the courts are charged with interpreting legislation as it currently stands. For this reason amendments which have retrospective effect are not aptly characterised as merely clarifying the status quo.**

**The committee draws its concerns 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.**

# Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

Introduced into the House of Representatives on 10 September 2015

Portfolio: Employment

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 10 of 2015*. The Minister responded to the committee's comments in a letter dated 20 October 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 10 of 2015 - extract*

## **Background**

This bill amends the *Social Security (Administration) Act 1999* to:

- amend penalties for failing to enter into an Employment Pathway Plan;
- suspend payments and apply penalties for failing to behave in an appropriate manner at an appointment;
- enable more immediate application of penalties for failing to participate in activities or job interviews;
- suspend payments for inadequate job search;
- remove waivers for serious penalties incurred for refusing or failing to accept a suitable job; and
- repeal redundant provisions and simplify the compliance framework by renaming all failures resulting in short-term penalties as 'no show no pay' failures, and by repealing connection and reconnection failure provisions.

## **Broad discretionary power**

### **Inappropriate delegation of legislative power**

#### **Schedule 1, item 34, proposed subsections 42SA(5)–(7)**

New subsections 42SA(5), (6) and (7) would allow the Secretary, by legislative instrument, to determine matters that the Secretary must consider when deciding whether a job seeker has acted in an inappropriate manner at an appointment (the consequences of which will be suspension of payments).

The explanatory memorandum does not explain why these matters cannot be included in the primary legislation. Further, subsection 42SA(5) empowers the Secretary to make a legislative instrument to determine what matters must be taken into account, *but does not require that such an instrument be made*.

In addition, subsection 42SA(7) makes it clear that matters additional to any prescribed by such a legislative instrument can also be taken into account by the Secretary.

**The committee therefore seeks the Minister's advice as to:**

- **whether consideration has been given to providing for these matters (or some limitations on this power) in the primary legislation; or**
- **whether the provision can be amended to *require* the Secretary to determine the mandatory relevant considerations for determining whether a job seeker has acted in an inappropriate manner. The committee notes that without such a legislative instrument the Secretary has a broadly framed power to determine what constitutes inappropriate behaviour at an appointment.**

*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 or to delegate legislative powers inappropriately, in breach of principles 1(a)(ii) and 1(a)(iv) of the committee's terms of reference.*

### ***Minister's response - extract***

It is intended that a legislative instrument would be made to prescribe the mandatory relevant considerations that the Secretary must take into account when deciding whether a job seeker has acted in an appropriate manner during a relevant appointment.

Providing for the detail of this matter in the Bill would add excessive complexity to the *Social Security Administration Act 1999*. However, I confirm that the Government will give careful consideration to amending the relevant provisions to *require* the Secretary to make the legislative instrument.

### ***Committee response***

The committee thanks the Minister for this response.

The committee notes the Minister's advice that including the matters that the Secretary must take into account when deciding whether a job seeker has acted in an appropriate manner during an appointment 'would add excessively complexity to the *Social Security Administration Act 1999*'. While a desire to reduce the complexity of the primary legislation is commendable, the committee does not consider that this is, of itself, sufficient justification for significantly reducing Parliamentary scrutiny by providing for important matters to be included in delegated legislation.

*continued*



The committee also notes the Minister's advice that 'it is intended that a legislative instrument would be made to prescribe the mandatory relevant considerations that the Secretary must take into account' and that 'the Government will give careful consideration to amending the relevant provisions to *require* the Secretary to make the legislative instrument'. **The committee would welcome an amendment which *requires* the Secretary to make a legislative instrument prescribing the mandatory relevant considerations because without such an instrument the Secretary has a very broadly framed power to determine what constitutes inappropriate behaviour at an appointment.** The committee notes that this would also ensure that the bill reflects the intention outlined in the Department of Employment's submission to the Senate Education and Employment Legislation Committee's inquiry into the bill. (In that submission [at p. 3] the department states that the 'details of what constitutes inappropriate behaviour will be set out in a legislative instrument, which will be subject to parliamentary scrutiny').

While reiterating that such an amendment would be welcome as it would ensure that there is a level of parliamentary scrutiny and guidance in relation to the exercise of this discretionary power, the committee notes that proposed subsection 42SA(7) makes it clear that matters additional to any prescribed by such a legislative instrument can also be taken into account by the Secretary.

In addition, providing for matters in delegated legislation means that the level of Parliamentary oversight of this discretionary power will be more limited than if the matters were provided for in primary legislation.

**The committee draws this broad discretionary power and its comments (including in relation to the potential amendment) 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 matter to the attention of the Education and Employment Legislation Committee and the Regulations and Ordinances Committee for information.**

Senator Helen Polley  
Chair





**THE HON PETER DUTTON MP  
MINISTER FOR IMMIGRATION  
AND BORDER PROTECTION**

Ref No: MS15-026181

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 15 October 2015 in relation to comments made in the Committee's *Alert Digest No. 11 of 2015* concerning the following bills in my portfolio:

- Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015
- Migration Amendment (Charging for a Migration Outcome) Bill 2015
- Migration and Maritime Powers Amendment Bill (No. 1) 2015.

Please find my advice in relation to Committee's comments on these bills at Attachment A, Attachment B and Attachment C respectively.

Thank you for considering this advice. The contact officer in the Department of Immigration and Border Protection is Greg Phillipson, Assistant Secretary, Legislation and Framework Branch, who can be contacted on (02) 6264 2594 and greg.phillipson@border.gov.au.

Yours sincerely

PETER DUTTON

30/10/15

**Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015**

Delegation of legislative power—incorporation by reference: Schedule 1, item 1, proposed subsection 153ZOB(6)

*The committee therefore seeks the Minister's advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill.*

Subsection 153ZOB(6) is proposed to be inserted into the *Customs Act 1901* by the Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015. This provision contains the head of power to create regulations that may apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. The Committee has asked for my advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill.

I do not consider that it is necessary to include such a requirement in the Bill. However, I undertake that, should any such document or writing be included in the regulations, its inclusion will be especially highlighted in the explanatory material for the regulations. The incorporated material would also be made publicly available on the Department of Immigration and Border Protection website and a Department Of Immigration And Border Protection Notice would be issued indicating where the document can be obtained.

These commitments are in addition to section 26 of the *Legislative Instruments Act 2003*, which requires that an explanatory statement for an instrument that incorporates a document by reference must contain a description of such documents and indicate how they may be obtained. Any explanatory material will, therefore, also include these requirements.

I trust that this commitment will address the Committee's concerns about the easy availability and accessibility of such documents or writing.

## **Migration Amendment (Charging for a Migration Outcome) Bill 2015**

### *The objective of the Bill*

The Migration Amendment (Charging for a Migration Outcome) Bill 2015 responds to recommendation 10.7 of the Independent Review into Integrity in the Subclass 457 Programme (the 457 Integrity Review), in its report released on 10 September 2014, which recommended that it be made unlawful for a sponsor to be paid by a visa applicant for a migration outcome and that this be reinforced by a robust conviction and penalty framework.

The Department is aware of allegations about persons offering or receiving a benefit in return for a range of sponsorship-related events that can influence a person's eligibility for a sponsored visa ('payment for visas' activity). 'Payment for visas' activity is not currently unlawful, but it is considered to be unacceptable because it undermines the integrity of Australia's migration programme with detrimental effects including:

- making vulnerable non-citizens liable to exploitation;
- reducing employment opportunities in Australia for Australian citizens and Australian permanent residents;
- negative repercussions for Australian wages and conditions; and
- the potential for persons who receive payment in return for sponsorship to inappropriately make significant financial gains.

As well as implementing recommendation 10.7 of the 457 Integrity Review, the Bill also expands the application of the new provisions beyond the 457 visa programme to other temporary and permanent work visas where 'payment for visas' activity may also occur.

The Bill amends the *Migration Act 1958* (the "Act") to:

- make it a criminal offence for a person to ask for or receive a benefit in return for sponsorship, punishable on conviction by a maximum of 2 years imprisonment or 360 penalty points (which currently equates to \$64,800 for an individual person or five times higher - \$324,000 – for a body corporate), or both;
- introduce civil penalties for persons who ask for or receive a benefit in return for sponsorship, with a maximum pecuniary penalty of 240 penalty units (which currently equates to \$43,200 for an individual person or five times higher - \$216,000 – for a body corporate);
- introduce civil penalties for persons who offer or provide a benefit to another person in return for sponsorship, with a maximum pecuniary penalty of 240 penalty units (which currently equates to \$43,200 for an individual person or five times higher - \$216,000 – for a body corporate);
- provide that executive officers of bodies corporate, individual partners in a partnership and members of committees of management of unincorporated associations may be individually liable for the offence and civil penalties in certain circumstances;

- provide for the offence and civil penalty provisions to have extraterritorial operation in certain circumstances;
- provide for powers to investigate alleged 'payment for visas' offences and contraventions of civil penalty provisions; and
- provide for discretionary cancellation of visas held by persons who have engaged in 'payment for visas' activity by giving or receiving payments or other benefits.

Merits review: Item 1, proposed subsection 116(1AC)

*The committee seeks the Minister's advice as to whether merits review will be available in relation to decisions made pursuant to subsection 116(1AC).*

Merits review will be available for cancellation decisions made by a departmental delegate under subsection 116(1AC) of the Act if the visa holder is in the migration zone at the time of cancellation. This is provided for by subsection 338(3) of the Act.

As with all other personal cancellation decisions of the Minister, should the Minister make a personal decision to cancel a visa under subsection 116(1AC) of the Act, that decision will not be merits reviewable, but will be judicially reviewable.

Trespass on personal rights and liberties—abrogation of privilege against self-incrimination: Items 5, 14 and 15

*The committee therefore seeks the Minister's further advice as to the perceived need to take the significant step of abrogating the privilege against self-incrimination in these circumstances and whether it can effectively be obtained by other lawful means.*

As noted by the Committee and the explanatory memorandum to the Bill, the effect of item 5 is to enable the powers of an inspector under Subdivision F of Division 3A of Part 2 of the Act to be exercised for the purpose of investigating whether a person who is or was an approved sponsor has engaged in 'payment for visas' activity that constitutes an offence or contravenes a civil penalty provision.

Current section 140XG provides that a person is required to produce a record or document to an inspector even if this might tend to incriminate the person or expose the person to a penalty. However, such a record or document is not admissible against the individual in criminal proceedings (except in relation to certain offences relating to the provision of false or misleading information or documents).

The effect of items 14 and 15 is to amend section 487C of the Act to similarly provide that a person is required to produce a record or document even if this might tend to incriminate the person or expose the person to a penalty. However, such a record or document is not admissible against the individual in criminal proceedings (except in relation to certain offences in the *Criminal Code* relating to the provision of false or misleading information or documents) or in civil proceedings (other than proceedings for a civil penalty for an alleged contravention of a sponsorship-related provision or a work-related provision).

Therefore, the abrogation of the privilege against self-incrimination is limited in its effect to the context of proceedings for a civil penalty order, and to criminal

proceedings for certain offences under the *Criminal Code* concerning the provision of false or misleading documents, that relate to Subdivision C or D of Division 12 of Part 2 of the Act.

As mentioned in the statement of compatibility for this Bill, there would be occasions where the only persons who possess critical information and documents relevant to 'payment for visas' conduct are the individuals who ask for, receive, offer or provide the benefit.

On other occasions, it is anticipated that my department may receive evidence from other sources, such as third parties involved in 'payment for visas' arrangements that break down. It may also be the case that employers inform the department of 'payment for visas' conduct where they are approached by people offering them money if they will sponsor a visa holder.

Allowing records or documents that are required to be produced under section 487B or Subdivision F of Division 3A of Part 2 of the Act to be admissible as evidence in 'payment for visas' civil penalty proceedings will enable my department to effectively enforce this sanction. This approach is a departure from standard practice in relation to handling self-incrimination, but is the same as provisions already in place for work-related civil penalty proceedings under the Act. As noted above, the privilege against self-incrimination is only being removed in relation to civil penalty proceedings, and criminal proceedings in relation to certain offences in the *Criminal Code* relating to the provision of false or misleading information or documents.

The protection will remain in relation to all other criminal proceedings, including criminal proceedings for an alleged contravention of a 'payment for visas' matter.

As a final matter, I note that the explanation for item 14 in the explanatory memorandum to this Bill is incorrect in this respect, as it states that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence. This is incorrect, as the only criminal proceedings for which the information or document may be used is in criminal proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to Subdivision C or D of Division 12 of Part 2 of the Act. Currently, parliamentary procedures are being pursued to amend the explanatory memorandum to reflect this.

Trespass on personal rights and liberties—evidential onus: Item 6, proposed subsection 245AW(5)

*The committee therefore seeks the Minister's further advice as to why it is appropriate for a defendant to bear an evidential burden in relation to these matters.*

It is considered appropriate for the defendant to bear the evidential burden in subsections 245AW(3) and (4) because the question of whether the conduct constituting the alleged primary contravention, or the conduct constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly in a foreign country is a matter best within the knowledge of the defendant.



In relation to whether it is appropriate for the defendant to establish whether there is a law in force in the foreign country that provides for a pecuniary or criminal penalty for conduct constituting the alleged primary contravention, this is already provided for in current subsections 245AM(3) and (4) of the Act in relation to work-related civil penalty provisions. Further, these provisions are modelled on section 15.2 of the *Criminal Code* which contains the same provision requiring the defendant to establish the legal position in the foreign country where the conduct constituting the alleged offence occurs.

Trespass on personal rights and liberties—strict liability: Item 6, proposed subsections 245AR(5) and 245AS(1)

*The committee therefore seeks the Minister's more detailed justification for the proposed approach.*

Subsections 245AR(5) and 245AS(1) create civil penalties which will be strict liability penalties due to the operation of section 486ZF of the Act.

The effect of section 486ZF is that it is enough to establish that a person contravened subsections 245AR(5) or 245AS(1) by asking for, receiving, offering or providing a benefit in return for the occurrence of a sponsorship-related event, without the need to prove the fault elements that would be required to prove the criminal offence provided for in subsection 245AR(4) of the Act.

The maximum penalty which may be imposed for contravention of the civil penalty provisions is 240 penalty units, which currently equates to \$43,200 or five times higher - \$216,000 – for a body corporate. The high maximum penalty for these civil penalty provisions reflects the high upper limit of amounts paid in 'payment for visas' cases.

It is the Government's position that it is unacceptable for anyone to make a personal gain from their position in a 'payment for visas' arrangement and it is unacceptable for a visa holder to become an Australian permanent resident by engaging in 'payment for visas' behaviour. To protect the integrity of Australia's migration programme, the penalties must be set sufficiently high to cover any potential gain and deter people from this behaviour.

The penalties which may be imposed for contravention of the civil penalty provisions in subsections 245AR(5) and 245AS(1) are lower than those which may be imposed for the criminal offence, which is not a strict liability provision. The *Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers* was considered during the development of the policy and drafting of the Bill.

The decision to introduce non-fault civil penalties is to prevent and deter the practice of 'payment for visas' which has a number of detrimental outcomes including undermining the integrity of Australia's migration programme and the exploitation of vulnerable people. The guide allows for the setting of penalties at a rate greater than the standard ratio in order to address potential gain from the offence.



The regime of offences, civil penalties and discretionary visa cancellation provided for in the Bill will provide my Department with a range of sanctions allowing appropriate action to be taken across a 'spectrum of non-compliance', depending on the seriousness of the 'payment for visas' conduct and the remedial action that is appropriate to the particular circumstances.

**Migration and Maritime Powers Amendment Bill (No. 1) 2015**

Retrospective application: Schedule 2, item 22

*The committee therefore seeks the Minister's more detailed explanation for the justification of the retrospective application of each provision*

*Subitem 22(2) and (3): application of item 10 and item 11 – removal power*

The introduction of a new removal power and amendment to the existing removal power of 198(2A) will provide certainty about when a person becomes liable for removal. It is intended that a non-citizen whose visa had been mandatorily cancelled under subsection 501(3A) and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal. Applying the amendments retrospectively to these persons provides clarity on when the person can be removed under section 198.

*Subitem 22(4): application of item 12 – Judicial review of Minister's decisions under section 501CA or section 501BA*

The retrospective application of this amendment means that applicants for judicial review of the Minister's decision under section 501CA or section 501BA will have access to the same Court (the Federal Court) as other applicants seeking judicial review of personal decisions of the Minister under 501, 501A, 501B and 501C. Character decisions generally involve similar legal principles and it is important that they are heard in the Federal Court, which is experienced in this area.

At present, only a small number of adverse Minister's decisions under section 501CA, and none under section 501BA, have been litigated and the Department has requested that they be transferred from the Federal Circuit Court to the Federal Court. Given both the small numbers, and existing practices, it is likely that there will be minimal impact to people as a result of the retrospective nature of this element of the Bill.

*Subitem 22(6): application of item 20 – Inclusion of section 501BA into paragraph 503(1)(b)*

The Minister's power to cancel a visa under section 501BA allows the Minister to set-aside, where the Minister is satisfied it is in the national interest, a non-adverse delegate or Administrative Appeals Tribunal decision. The power under section 501BA is only enlivened after a non-citizen has had the opportunity to put their case for revocation to either a delegate, or the Administrative Appeals Tribunal.

This amendment will ensure that all persons cancelled under one of the character provisions are treated consistently in terms of their ability to return to Australia, and that any person who may be cancelled prior to the Bill passing is subject to the same provisions as a person who is cancelled afterwards.

*Subitem 22(7): application of item 21 – Protected information*

Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers.

This is particularly the case because some character cancellation powers are not enlivened until another power has been used (for example, the Minister's power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised). It is therefore necessary to ensure that confidential information provided to the department prior to the introduction of this amendment, is protected and dealt with by the same administrative procedures used for all of the character cancellation and revocation powers.

The retrospective application of this amendment will ensure the continued protection of confidential information which is relevant, for example, to the revocation consideration of a mandatory cancellation decision, in circumstances where that information was provided to the department previously. It is important to protect confidential information used for the purposes of the character cancellation powers, particularly because the same information may be used for decisions made under different cancellation powers.

#### Retrospective commencement: Schedule 3, Part 1

*The committee therefore seeks the Minister's further justification for the proposed approach, including addressing the fairness of the proposed approach to affected persons and the importance of limiting retrospective commencement to cases where this can be seen to further rather than diminish the rule of law.*

The Committee has identified that retrospective commencement of provisions can undermine the rule of law particularly when the consequences for affected individuals are significant. My Department knows of no cases on hand where a person who was previously refused a protection visa that was applied for on their behalf has attempted to make a further application for the grant of a protection visa relying on a ground that is different from the ground on which the refused protection visa application was based. That is, my Department is not aware of any person who would be negatively affected by the retrospective commencement of this provision.

The Committee has also expressed concerns that the retrospective commencement of the provision is aggravated by the retroactive application of the provision.

Section 48A is, and has always been, intended to prohibit further protection visa applications by a person (whether or not they are a minor or have a mental impairment) who, while in the migration zone, has made an application for a protection visa that was refused (or held a protection visa that was cancelled, which is not relevant for present purposes).

It would be contrary to the Government's intention regarding the plain text of section 48A if the amendment did not apply to persons who are minors or have a mental impairment and who had a protection visa application (that was made on their behalf) refused before commencement of subsection 48A(1AA) as inserted by the *Migration Legislation Amendment Act (No. 1) 2014*. The timing of the visa refusal is irrelevant – the Government's intention is that section 48A should apply if a person has had a protection visa application refused 'whilst (the person is) in the migration zone'.

The amendment is a technical amendment that clarifies how the law as it currently stands should be interpreted; it is not a change in the law. It would not make sense if, as an amendment that merely clarifies the status quo, it did not apply to persons who have had protection visa applications refused before commencement and who are already barred under section 48A from making a further protection visa application because of the previous refusal.

The government's longstanding position is that a person who has had a protection visa application refused whilst the person is in the migration zone, and who does not otherwise have a lawful basis for remaining in Australia, should not be permitted to prolong their stay in Australia by making repeat protection visa applications. If the person disagrees with the visa refusal decision, they can seek merits review of the decision and/or judicial review.

Where the person has exhausted their merits and judicial review rights and there is some reason why the person should have their protection claims re-assessed, for example due to change in personal circumstances or country information, there is always the possibility of Ministerial intervention. Whilst acknowledging that the Minister's power under section 48B is non-compellable, where the change of the person's circumstances is such that a re-assessment of their claims is prima facie warranted, the department's usual practice is to recommend the matter to the Minister for considering exercising his power under section 48B.



**THE HON SUSSAN LEY MP  
MINISTER FOR HEALTH  
MINISTER FOR AGED CARE  
MINISTER FOR SPORT**

Ref No: MC15-017619

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley

I refer to the request from the Senate Standing Committee for the Scrutiny of Bills, dated 15 October 2015, for advice in relation to issues about the Health Legislation Amendment (eHealth) Bill 2015 raised in the Committee's Alert Digest No. 11 of 2015 (14 October 2015).

A detailed response on each issue is set out below.

Issue 1: Important matters in regulations (proposed sections 20 and 25D)

The Committee has noted that proposed sections 20 and 25D of the *Healthcare Identifiers Act 2010* (HI Act) broadens the power to allow for future regulations to be made allowing prescribed entities to collect, use, disclose and adopt identifying information and healthcare identifiers. In light of the explanation provided by the explanatory memorandum, the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

**Response:**

I would like to take this opportunity to provide more information about the intention for proposed sections 20 and 25D.

In 2014 the HI Act was amended to allow use of healthcare identifiers as part of the Aged Care Gateway, which is a centralised online information resource for individuals seeking access to aged care services. The amendments permitted the verification of aged care clients' identities, and the creation and maintenance of uniquely identifiable aged care client records. Identity verification and the protection of both client privacy and the integrity of Commonwealth systems were enhanced through the use of healthcare identifiers. In the future, it is intended that (with appropriate consent), aged care clients registered in the Aged Care Gateway system (who are also registered in My Health Record system) will be able to make relevant components of their aged care client record (including assessment outcomes and a summary of their services plan) accessible to healthcare professionals (who are participating in the My Health Record system). Establishing the key building blocks such as adoption of the healthcare identifier in the Aged Care Gateway system was an important step to enabling appropriate access to health-related information.



Individuals who are recipients of health-related or health-reliant services, such as aged care, disability, cancer screening, are clients of the health system and are in a category where they would benefit from having a My Health Record. Under an opt-out system, they would have a My Health Record unless they choose to opt-out. The use of healthcare identifiers can enable an individuals' health information to be shared in a manner that enables high identity integrity across the services. In the same way that the Aged Care Gateway can utilise healthcare identifiers to ensure accurate identification of individuals and their aged care records, entities that provide other appropriate health-related services and their clients may be able to benefit from use of healthcare identifiers to accurately identify individuals and their records.

These entities could include, for example, the National Disability Insurance Agency (NDIA) and the national cancer screening registers, or other health related services that are not registered with a Health Provider Identifier for their Organisation. Healthcare identifiers are an accurate identifier of an individual, and such entities and individuals may benefit from the entity being able to associate health-related records with an individual's healthcare identifier. In the future this may allow, for example, the viewing of certain disability or cancer screening information as part of an individual's My Health Record (as is planned in connection with the Aged Care Gateway). Currently, entities such as NDIA are not authorised to handle healthcare identifiers or identifying information as they are not healthcare providers within the meaning of the HI Act.

Proposed new sections 20 and 25D of the HI Act allow for future regulations to be made allowing prescribed entities to collect, use, disclose and adopt identifying information and healthcare identifiers. However, there are strict limits on the ability to make regulations for these purposes. In summary, regulations may only be made authorising the collection, use or disclosure of identifying information and healthcare identifiers for purposes related to the provision of healthcare or to assist people who, because of health issues including illness, disability or injury, require support.

The proposed new regulation-making powers have been designed to allow the appropriate collection, use, disclosure and adoption of healthcare identifiers and identifying information by entities like NDIA and the national cancer screening registers, without having to amend the Act each time a new entity needs to be authorised as was necessary with the Aged Care Gateway. Given that the NDIA and the national cancer screening registers may wish to handle identifying information and healthcare identifiers over the next couple of years to improve healthcare and health-related services supplied to individuals, the ability to authorise this in regulations will allow timely authorisation without the need to amend the HI Act each time.

Any regulations made authorising other entities to collect, use and disclose identifying information and healthcare identifiers will be subject to Parliamentary scrutiny and disallowance.

These changes also reflect the more holistic view of health services that is being taken through changes to the definition of 'health service' in the *Privacy Act 1988*, and go directly toward enabling a more integrated and cooperative healthcare sector.

#### Issue 2: Evidential onus (proposed subsections 26(3) and (4))

The Committee has noted that proposed section 26 provides that the use or disclosure by a person of any information obtained under the HI Act, or a healthcare recipient's or individual healthcare provider's healthcare identifier, is prohibited unless an exception in proposed subsections 26(3) or 26(4) applies.

The Committee has noted that significant civil and criminal penalties apply for contravention of this provision and that there is no justification in the explanatory memorandum for placing an evidential burden on the defendant. The Committee has therefore sought my advice as to the rationale for the proposed approach, including whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).

**Response:**

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies.

An evidential burden placed on the defendant is not uncommon. Similar requirements to those used in the Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* – where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant, or could easily be obtained by the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden.

Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that any of the exceptions in those provisions apply to the person.

The evidential burden in each of these circumstances covered by proposed subsections 26(3) and (4) can easily be met. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

Issue 3: Incorporation of written instruments (proposed subsection 109(9))

The Committee has noted that this subsection allows the Rules (delegated legislation) to incorporate other material which may change from time to time. The Committee has scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents.

The Committee has sought my advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the Bill itself.



**Response:**

The materials that will most likely be incorporated in the My Health Records Rules are IT security-related documents, like the *National eHealth Security and Access Framework*, and registered healthcare provider organisations would be required to use software that is compliant with this framework if they wish to connect to the My Health Record system. These requirements are typically technical in nature and complex, detailing IT-related security measures. The requirements may quickly and at relatively short notice change to address emerging IT security threats. It is important to be able to deal with rapidly changing IT security threats in a responsive manner that also allows requirements to be enforced. If this does not occur, the security risks to the My Health Record system will increase given the large number of interconnecting healthcare provider organisations (currently more than 7,000 and expected to increase substantially with the trial of opt-out arrangements). A failure by healthcare provider organisations (or repository or portal operators) to comply with IT security requirements may put individuals' health information at increased risk.

While mentioned in the explanatory memorandum to the Bill as one of the types of document that may be incorporated by reference, at this stage it is considered less likely that Australian standards will be incorporated by reference into the My Health Records Rules.

As the Committee is aware, the power to incorporate material by reference is also constrained by principles relating to the sub-delegation of powers and the requirement that a legislative instrument must be within the clear authority of the enabling legislation. My Health Record Rules that incorporate material by reference must meet the requirements in section 109 of the *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) (as amended by the Bill).

Where materials are incorporated into subordinate legislation by reference, it is important that affected entities and individuals be made aware of any proposed changes to the material incorporated given that it affects the content of the law. For this reason, amendments proposed in the Bill are designed to increase the ability of the System Operator of the My Health Record system to communicate electronically with all participants (registered healthcare provider organisations, contracted service providers, portal operators and repository operators) as well as individuals (that is, registered healthcare recipients) where this is appropriate. There would be no cost for the public associated with accessing IT security materials that are incorporated into the My Health Records Rules. In addition, other channels will also be employed to ensure affected parties are aware of any changes to materials that have been incorporated by reference. For example, publishing details on the System Operator's website and making hard-copies of the material available free of charge.

My Department will make every effort to ensure that incorporating material by reference in My Health Records Rules is only done where necessary and appropriate.

Issue 4: Important matters in delegated legislation (proposed Schedule 1)

The Committee has noted that the My Health Record system currently operates on an opt-in basis, and that Part 1 of new Schedule 1 of the My Health Records Act provides for rule-making powers which would allow the Health Minister to make rules that will facilitate trials of an opt-out system for healthcare recipients.



Clause 2 of Part 1 of Schedule 1 includes a rule-making power which would allow the Health Minister to make rules to apply the opt-out participation arrangements nationally. Before doing so the Minister must consider the evidence obtained through the trials and any other matter relevant to the decision (subclause 2(2)) and must also consult the Ministerial Council (subclause 2(3)).

The Committee has noted that the explanatory materials make a strong case for undertaking trials of an opt-out system, however, the Committee has sought my justification as to why it is appropriate to allow a Minister to implement opt-out nationally through a legislative instrument rather than the matter being considered by Parliament and the change being made through an amendment to the primary legislation.

**Response:**

As highlighted by the Committee, the Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements, and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

These protections include the ability to do the following for all people registered with the My Health Record system:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

As part of the trials, arrangements for opting-out will be tested to ensure that individuals who do not wish to have a record are able to communicate that wish as simply and easily as possible. Opt-out trials will be accompanied by extensive information covering a range of channels, and targeted at all relevant individuals in the trial areas including healthcare recipients, parents, guardians and carers. If a Government decision is made to implement opt-out nationally, a similar strategy would precede the opt-out period ensuring that individuals are able to make an informed choice about whether or not to opt-out.

The Bill proposes that, before I make a decision to implement opt-out nationally, I must consult with the Ministerial Council – that is, the COAG Health Council. The states and territories are central to the success of the My Health Record system, regardless of whether the system is opt-in or opt-out, given that their public health systems will be one of the major healthcare provider participants in the system. If a decision is made to implement opt-out nationally, that decision will be of great interest to states and territories as it will also affect their citizens. In practice, national implementation of opt-out will not occur unless states and territories support the implementation.

Finally, any Rule made implementing opt-out nationally would be subject to Parliamentary scrutiny and disallowance.

Given that the privacy and security arrangements for registration apply equally to opt-in and opt-out arrangements, and the authorisations for collection, use and disclosure of information necessary to implement opt-in and opt-out are clearly set out in the PCEHR Act (opt-in) and in the Bill (opt-out), the parameters of the proposed opt-out arrangements are clear. This is true whether opt-out is implemented as part of a trial in limited geographic areas, or as part of implementing opt-out nationally. As noted above, there are significant privacy protections built into the design of the system, and there will be a comprehensive communications strategy as part of any move to opt-out.

Given these circumstances, it is my view that Parliament has sufficient information in the Bill to assess the opt-out arrangements now, including whether the proposed opt-out arrangements appropriately balances the systemic and population-wide benefits of the My Health Record system with the important interest individuals have in managing the privacy of their health information. As a result, I consider that it is an appropriate delegation of power for the Bill to allow me to make a Rule implementing opt-out nationally, provided that I first follow the procedural and consultation requirements in the Bill.

#### Issue 5: Henry VIII clause (subitem 136(3))

The Committee has noted that subitem 136(3) makes express provision for rules (delegated legislation) made for the purpose of subitem 136(2) to modify the operation of the *Healthcare Identifiers Act 2010*, the *Personally Controlled Electronic Health Records Act 2012* and the *Privacy Act 1988*. This provision is a ‘Henry VIII clause’, in that it may allow the Health Minister to modify the operation of the specified Acts by making rules.

The Committee has sought more information, and examples of possible circumstances in which the power could be needed, to assist the Committee in understanding why the clause is necessary.

#### **Response:**

Subitem 136(3) could be considered a “Henry VIII clause” in that it potentially allows the Minister to make Rules modifying the operation of the *Healthcare Identifiers Act 2010*, the *My Health Records Act 2012* (currently named the *Personally Controlled Electronic Health Records Act 2012*) and the *Privacy Act 1988*. Subitem 136(3) is located in Part 2 (Rule-making powers, application and transitional provisions) of Schedule 1 of the Bill.

Subitem 136(3) has been included in the Bill to allow the Minister to deal with any unintended or unforeseen circumstances that may arise in the future, in particular as part of transitional arrangements in relation to opt-out and in relation to changes of governance arrangements as governance mechanisms for the My Health Record system are moved out of the *My Health Records Act 2012* and subordinate legislation and into rules proposed to be made under section 87 of the *Public Governance, Performance and Accountability Act 2013*.

As the purpose of the provisions is to assist with unintended or unforeseen circumstances, it is difficult to provide specific examples of when the rule-making power may be used. However, possible circumstances may include where certain *My Health Records Act 2012* governance mechanisms need to be retained for a short period after 'governance restructure day' (as defined in the Bill) to ensure appropriate mechanisms remain in place until the Australian Commission for eHealth becomes fully operational.

Henry VIII clauses are not uncommon as part of transitional arrangements. Item 136 in the Bill is modelled on a very similar provision in the *Governance of Australian Government Superannuation Schemes Legislation Amendment Act 2015* – see Item 22 of Schedule 2 of that Act.

As a disallowable instrument, any Rules made under subitem 136(3) would be subject to Parliamentary scrutiny and would be open to disallowance. Subitem 136(4) limits the types of rules that the Minister is able to make under item 136.

I note that the Committee has also identified incorrect item references in the explanatory memorandum and I appreciate you bringing this matter to my attention. I will endeavour to table a replacement explanatory memorandum to correct the errors.

Thank you for the opportunity to respond to the issues raised by the Committee.

Yours sincerely

**The Hon Sussan Ley MP**

**02 NOV 2015**







RECEIVED

21 OCT 2015

Senate Standing C'ttee  
for the Scrutiny  
of Bills

**Senator the Hon Michaelia Cash**  
Minister for Employment  
Minister for Women  
Minister Assisting the Prime Minister for the Public Service

Reference: MS15-000897

Committee Secretary  
Senate Standing Committee for the Scrutiny of Bills  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Committee Secretary

**Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance)  
Bill 2015**

I refer to the Alert Digest No. 10 of 16 September 2015 concerning the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the Bill) and acknowledge the Committee's comments in relation to proposed subsections 42SA(5) – (7).

It is intended that a legislative instrument would be made to prescribe the mandatory relevant considerations that the Secretary must take into account when deciding whether a job seeker has acted in an appropriate manner during a relevant appointment.

Providing for the detail of this matter in the Bill would add excessive complexity to the *Social Security Administration Act 1999*. However, I confirm that the Government will give careful consideration to amending the relevant provisions to *require* the Secretary to make the legislative instrument.

Yours sincerely

Senator the Hon Michaelia Cash

20/10/2015

