ATTORNEY-GENERAL'S DEPARTMENT

Criminal Justice Division

01/9853 CRJ RG

5 April 2002

Mr Noel Gregory
Senate Legal and Constitutional
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Gregory

MIGRATION LEGISLATION AMENDMENT BILL (NO.1) 2002

I refer to the query raised by the Senate Legal and Constitutional Legislation Committee ('the Committee') on 27 March 2002 when it was briefed by officers of the Department of Immigration and Indigenous Affairs on the Migration Legislation Amendment Bill (No.1) 2002 ('the Bill'). Schedule 5 of the Bill contains amendments that are designed to ensure that offence provisions in the *Migration Act 1958* ('the Act') operate in the same way as they did before the application of Chapter 2 of the *Criminal Code 1995* ('the Code') on 15 December 2001. The Committee sought a further explanation on items 8 – 11 of Schedule 5.

2. Items 8-11 of Schedule 5 of the Bill are minor technical amendments that first, omit 'an authorised officer' from the offences in subsections 268BJ(1) and 269CN(1) of the Act. Secondly, the Bill makes minor changes to the wording of the those offences to more closely accord with the wording of requirements in other sections. In relation to the Committee's query (ie, the first part of the amendments) those amendments were in response to the concern of the DPP that the prosecution may be required to establish that the defendant knew that the person to whom they had to give or show a document was an 'authorised officer'. That is, the defendant had to know that the officer had been authorised in writing by the Minister or Secretary for the purposes of section 268BJ or 268CN. Such 'knowledge of law' issues had been addressed in previous Code harmonisation Bills.

3. Section 9.3 of the Code codifies the common law maxim that ignorance of the law is no excuse to a criminal offence. That is, it provides that a person can be criminally responsible for an offence even if he or she is mistaken about, or ignorant of, the existence or content of an Act that creates the offence or affects its scope.

4. In accordance with section 9.3, it is most likely that a court would have found that a person was criminally responsible for the offences in existing subsections 268BJ(1) and 269CN(1) of the Act even if, at the time of the conduct constituting the offence, he or she is mistaken about, or

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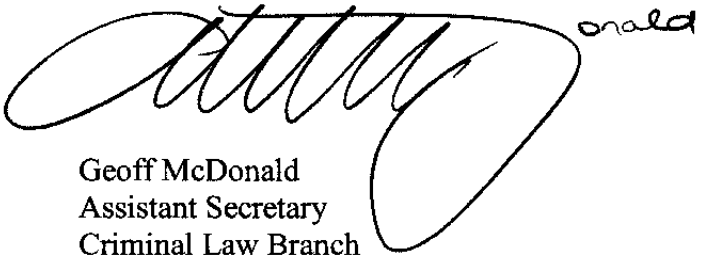
ignorant of, the definition of 'authorised officer' in the Act.

5. Initially, DIMIA agree to include amendments based on advice given by the DPP, and although this Department considers that to be unnecessary, it did not oppose that course of action. Ultimately the matter was settled by simply deleting the defined term without changing the meaning of the provision.

6. I note from the transcript of the private briefing given to the Committee that Senator Bartlett (at page 15) queried the situation where a person thought someone was not an authorised officer. In such a case, that person would have a defence of mistake of fact under section 9.2 of the Code. That is, it is a defence if the person was under a mistaken, but reasonable belief that the person was not an authorised officer, and had that fact existed, the person's conduct would not have constituted an offence.

Yours sincerely



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