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AFFAIRS

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Thursday, 1 March 2007

Members: Senator Payne (*Chair*), Senator Crossin (*Deputy Chair*), Senators Bartlett, Kirk, Ludwig, Sandy Macdonald, Parry and Trood

Substitute members: (As per most recent Senate Notice Paper)

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Kemp, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Patterson, Robert Ray, Scullion, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Kirk, Ludwig, Parry, Payne and Trood

Terms of reference for the inquiry:

To inquire into and report on:

AusCheck Bill 2006

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Committee met at 4.38 pm

CHAIR (Senator Payne)—Good afternoon, ladies and gentlemen. I am sorry about the slight delay in commencing. The committee was referred another bill today so we were just trying to sort that out. It is never easy.

This is the hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the AusCheck Bill 2006. The inquiry was referred to the committee by the Senate on 8 February 2007 for report by 14 March 2007. The bill proposes a regulatory framework for coordinating and conducting centralised background criminal and security checking by the Attorney-General's Department of applicants for the aviation security identity card and the maritime security identity card and any subsequent schemes. The committee has received 19 submissions to this inquiry. All of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer the witness may request that that answer be given in camera. Such a request may also be made at any other time.

[4.39 pm]

DONOVAN, Ms Helen, Policy Lawyer, Law Council of Australia

CHAIR—I welcome our first witness, Ms Helen Donovan of the Law Council of Australia. The Law Council has lodged a submission with the committee, which we have numbered 6. Do you need to make any amendments or alterations to that submission?

Ms Donovan—No.

CHAIR—We invite you to make an opening statement and we will go to questions from members of the committee after that.

Ms Donovan—Thank you for the opportunity to appear before the committee on behalf of the Law Council today. As stated in our submission, the Law Council has no in-principle objection to legislation which enables a centralised background checking agency to be established within the Attorney-General's Department, particularly if it is able to deliver a more efficient, uniform and secure service. However, the Law Council has three primary concerns with the bill, and it is worth noting that these concerns are echoed in a number of submissions received by the committee.

Firstly, the Law Council is concerned that the regulation-making power granted under the bill is too broad. We appreciate that the bill is intended to be enabling legislation which provides a framework only for the operation of AusCheck, but, to the extent that the notion of a framework implies at least the setting of some parameters, the Law Council believes the bill is less of a framework and more of a jumping-off point. We expect that the bill would at least set some limits on the purposes for which a background check may be required and conducted and the type of information which may be gathered as part of such a check. However, in both these respects, the bill sets no substantive limits.

Secondly, the bill fails to properly take advantage of the opportunities that a centralised agency might present. Through the bill, the parliament has the opportunity to set minimum standards for transparency, fairness and accountability in background checking, but the Law Council believes that opportunity has not been seized. If the bill is passed in its current form, parliament would essentially be saying that its only pressing concern with respect to background checking and the only impetus for a piece of subject-specific legislation on the topic of background checking is to ensure that it is coordinated and conducted by a centralised agency. The Law Council believes that the legislature should have more to say about, for example, guaranteed review rights or reporting obligations. The submission from the Attorney-General's Department offers the assurance that it is intended that the regulations will provide that, if AusCheck makes an adverse finding about a person, that person will have the right to appeal to the AAT. The Law Council believes this type of assurance should be reflected in the primary legislation.

The Law Council's third concern is that the provisions of the bill that deal with the use and disclosure of personal information stored by AusCheck are vague and broad. For example, the Law Council is concerned that the bill allows for personal information collected and stored by AusCheck to be disclosed for the purposes of:

... the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence.

Neither the term ‘criminal intelligence’ nor the term ‘security intelligence’ is defined in the bill, nor is there any list of the agencies, national or international, to which information may be disclosed for this purpose. This has prompted the Victorian Commissioner of Police to write to the committee to say that she believes it would be desirable for the Victorian police to have access to the database on the basis that the information on it would be very useful for a wide range of investigations, including investigations beyond the aviation and maritime industries.

Meanwhile, the submission from the Attorney-General’s Department states that Australian law enforcement and national security agencies have their own information-gathering powers and could get more up-to-date information from their own databases. I think this is supposed to act as an assurance, but it raises the question of why this broad disclosure provision is even included in the bill if the Attorney-General’s Department thinks it is unnecessary. More to the point, as the Office of the Privacy Commissioner has appropriately pointed out, doesn’t this broad authorisation to store and use personal information for criminal and security intelligence purposes go significantly beyond the stated object of the bill?

The more general assurance that has been offered in response to criticisms about the rudimentary nature of the bill, and the correspondingly broad regulation-making power it provides for, is essentially that the relevant details will be contained in other legislation—that is, in the legislation which establishes the background-checking schemes which will simply be administered by AusCheck. However, the bill does not limit AusCheck to administering schemes provided for under other legislation. Clauses 5, 8 and 10 read together clearly envisage that a wide range of background-checking schemes might be devised and implemented by way of AusCheck regulations alone—that is, without the authorisation of any other primary legislation. Given the sensitive nature and function of background checks, which can both be intrusive and adversely impact on people’s livelihoods, the Law Council believes this is highly undesirable. Parliament should retain closer control over determining the purposes for which background checks are necessary.

The members of the committee have access to our submissions so I will not say anything further at this point. The Law Council of Australia and myself in particular do not purport to have any special expertise with respect to the maritime and security identification cards. Representatives of the Office of the Privacy Commissioner, who are scheduled to follow me, are probably much better placed to answer questions about the Privacy Act and the information privacy principles and how they interact with the current bill. Nonetheless, I am happy to attempt to answer the committee’s questions or to take questions on notice if I am unable to answer them today.

CHAIR—Thank you very much, Ms Donovan, and I thank the Law Council for their submission. Senator Parry has a commitment in the chamber at five o’clock so I will ask him to lead off and then I will go to my colleagues.

Senator PARRY—Under paragraph 47 of the Law Council of Australia submission, and you mentioned it also in your opening address, it says:

Neither the terms “criminal intelligence” or “security intelligence” are defined in the Bill.

Does the Law Council have a suggested definition for both of those terms?

Ms Donovan—No, the Law Council does not have a suggested definition for either of those terms. As explained, the Law Council is not entirely clear on why the bill needs to provide for the provision of information for criminal intelligence or security intelligence. But if the bill is to provide for the provision of information for those purposes, then the Law Council believes there should be clear parameters on what those terms mean.

Senator PARRY—That came through with your opening statement, hence my question. You do not have a preference or a model you would like to see as definitions for those two terms used throughout the bill?

Ms Donovan—No, I do not have a definition to offer today.

Senator PARRY—If you feel that is something you would like to provide on notice we would welcome that.

Ms Donovan—It is probably the case that the Attorney-General's Department is better placed to offer a definition of those terms.

CHAIR—They do not often do that, Ms Donovan. When we ask them to define terms in their own legislation they are not usually inclined to run around and do that for us. When we can encourage contributions from those who come before us we tend to, as Senator Parry was just doing.

Senator LUDWIG—One of the central issues is the extent to which that background information will be held. It also appears to be not limited in the sense that, by regulation, you can add to it. Would you agree that it seems to be the central part as to how much information can be collected, what type of information can be collected, how it is then stored, how securely it is stored and then when it should be then destroyed and the ability of this legislation is to add to it by regulation? I take it that is one of your central concerns?

Ms Donovan—That is essentially our central concern.

Senator LUDWIG—Would you address that by ensuring that it could not be extended by regulation or by trying to more narrowly define what background checks or what background information can be collected? I have seen a lot of this type of legislation over the time I have been on this committee. They tend to more narrowly define it by indicating a driver's licence or a passport, or some type of information of that nature, or a search of a particular database. In this instance it is much broader. Do you have a view about whether it should be limited in the—

Ms Donovan—In the legislation itself?

Senator LUDWIG—Yes.

Ms Donovan—If I understand your question correctly, you are asking should the bill itself set the definitions or set the parameters within the bill, or should it set more parameters for the regulations. Is that correct?

Senator LUDWIG—There are two parts. The argument from the Attorney-General's, as I understand it, is that it is framework legislation. Therefore, by definition, you end up with this idea of an empty shell and it is not fleshed out till you see the regulation. We could wait to see

the regulation, but I will not hold my breath. Or you can put more in the framework to at least more narrowly prescribe what should be in the legislation, and then use regulations to fill that out a bit further. I take it we are not all going to wait to see everything loaded into the legislation and we are not going to hold our breath to see the regulation. So I take it the Law Council would prefer that middle option, where everything is a little bit more precise—the definitions, what is required under the legislation.

Ms Donovan—The Law Council would definitely like to see more definition within the bill itself. But in terms of the details of the schemes which are actually administered, the Law Council believes that unless those schemes can be more clearly set out in this bill then AusCheck should be confined to administering schemes which are set out in other legislation which deal with particular subject matter—not dissimilar to the aviation and maritime security card schemes. In terms of the more general issues which would relate across schemes such as, for example, reporting obligations on AusCheck or just a general statement of principle that in the case of an adverse background check—not just an adverse background check, but when anybody is subject to a background check—they are entitled to certain information about the outcome of that check and where the information is going to be held and how they might be able to access their record, correct their record or challenge an adverse finding. The Law Council believes that that sort of generic detail could be included in the bill.

Senator LUDWIG—I was going to ask you specifically about that additional matter where a person might wish to challenge, because they have been refused. They have been refused on a security check by ASIO. My recollection is that it quite difficult to get a hard reason from ASIO as to why that has been refused, and then it becomes difficult to challenge it, especially merits review, and then it becomes expensive. If it is a prospective applicant looking for a job in a secure area as a contractor, the likelihood that they are going to have sufficient ability to be able to challenge that adverse ruling would be, I suspect, constrained not only on cost but time and effort as well.

Ms Donovan—Yes; and, on the information available, to understand the reasons for the adverse finding. With respect to security assessments, that is already provided for in the ASIO Act and in the Administrative Appeals Tribunal Act, as I am sure the Senator knows, so there are provisions there recognising that an adverse security assessment might tie the hands of another decision maker and that it might make it pointless for an affected person to challenge an administrative decision without challenging the adverse security assessment. The ASIO Act provides for direct challenge of the security assessment, but there are significant limitations on that with respect to the information that is provided to that applicant and the usual provisions of the Administrative Appeals Tribunal Act do not apply. That I think again relates to this bill, in that if we are talking about an adverse background check that is not a result of an adverse security assessment but perhaps the result of some other adverse assessment, whether that be a criminal history check, although we would oppose this, it is clearly envisaged that it might allow for an adverse criminal intelligence check—

Senator LUDWIG—Whatever that might be.

Ms Donovan—Whatever that might be. In somehow looking at the database maintained by the Australian Crime Commission, whatever is allowed. If you have an adverse background check as a result of that, again it would be very difficult to challenge any subsequent decision.

This bill should provide, as the ASIO Act has provided, for specific mechanisms for challenging that finding and for the provision of information and subsequent review.

Senator LUDWIG—Because that opens up the issue of what we do not know of those background checks where it is adverse. If it is an ASIO security assessment we at least know that ASIO has a mechanism. We are unaware, because we don't know all the detail, whether that mechanism exists in all the other areas, so that the ability to challenge could be constrained completely.

Ms Donovan—Indeed. The assurance is that that will be dealt with under the regulations or it will be dealt with scheme by scheme. Indeed, there is a right to challenge certain decisions under the aviation and maritime security schemes, but the Law Council believes that it should not be left to each scheme to determine those provisions, or indeed, why have an act like this? Why establish a centralised agency and not take the opportunity to address these important matters of natural justice?

Senator LUDWIG—If you ended up with three adverse security assessments from three separate agencies, although it might be looking a little bleak at this point, you would still have to challenge each one separately, it appears.

Ms Donovan—It appears that way.

Senator LUDWIG—We are unaware of that, but I am sure the Attorney-General's Department can put it to rest and say only one appeal would be necessary. We will see.

Ms Donovan—The Law Council are not naive about this matter. It is not easy to deal with these issues in generic legislation. It would not be easy to set out the principles which should apply in all cases to facilitate and allow for a review. We have attempted to acknowledge that in our submissions by acknowledging that in each case there might be a different type of decision which the affected person wants to challenge and the background check might play a different role in that. The background check might be definitive. The background check might give rise to a recommendation that is non-binding to another agency. It might give rise to a direction which another agency has no option but to follow. In each case, the appeal which the affected person will seek will be different. We acknowledge that, but nonetheless we think that there is room, if appropriate attention is given to the matter, to at least state some basic principles about the nature of the information that an affected person is entitled to about the background check, about the exercise of any discretion on the basis of the background check and how they might appeal that decision.

Senator LUDWIG—So, in providing the ability to have an agency's database examined for the purpose of a background check, they should, in this legislation, ensure that there is a model of principles enunciated, which they would then, through an MOU or an agreement, sign up to and adhere to so that they have provided for transparency, have provided an appeal mechanism and have ensured that it was at least a similar mechanism for each agency that then said in terms of a background check: 'If you want to check this information then we will at least, if we are going to sign up to AusCheck, ensure that a person doesn't have to face a myriad of different schemes and different principles to determine whether or not they want to challenge the adverse check.' That is not here at the moment, though, is it?

Ms Donovan—There is provision for regulations to be made which deal with review of a decision made under the regulations, but the Law Council believes this is an opportunity to actually think through more carefully what that review scheme might look like and to ensure that it allows for full and effective review and affords an applicant the right to have access to all the necessary information to conduct the review.

Senator TROOD—Is it your position that, where these checks are deemed to be needed for any purpose, there ought to be a specific piece of legislation in relation to them? This particular piece of legislation relates to the AusCheck scheme, so, if the Commonwealth wishes to extend those checks beyond the two schemes reflected here, then that ought to be contained in a specific new and separate piece of legislation. Is that your position?

Ms Donovan—A new and separate piece of legislation beyond this AusCheck?

Senator TROOD—Yes.

Ms Donovan—There are a number of ways that it could be achieved.

Senator TROOD—I appreciate there are. But is it your position that you should not use a piece of legislation like this as the foundation for endless extensions of background checks as a kind of stalking horse or Trojan Horse for the extension of the legislation?

Ms Donovan—That is our position. We understand this bill is to set up an agency that performs a certain function, and we do not think that policies should be achieved through the regulations under this act.

Senator TROOD—But it sets up an agency for a particular function, for a particular purpose. What I am asking you is: if it were deemed necessary to extend the need for checks for another purpose, as is now the case in relation to people dealing with minors, for example, should that be another piece of legislation?

Ms Donovan—Then the background checking scheme would be established under that other piece of legislation and the relevant section of the AusCheck act which says the purposes for which it can carry out a background check could be amended to add that scheme as it already includes the two existing schemes. Alternatively, we have proposed in our submission that paragraph 3 of clause 8, which currently says ‘For such other purposes as prescribed by regulations’, could alternatively read—I will just find the wording we have offered, although I do not pretend to be a legislative drafter—‘For the purposes of other Commonwealth acts which directly authorise the screening of persons for a specified reason.’ That is at paragraph 21 of our submission.

The purpose of making that suggestion was to offer a compromise that, if this flexibility needs to be built in such that AusCheck was able to take on other schemes without a specific amendment to the AusCheck act, it should at least be limited to allowing AusCheck to take on other schemes which are authorised by other legislation as opposed to other schemes which are devised and implemented exclusively under the AusCheck regulations.

Senator TROOD—Does your concern about this reflect a concern about matters of natural justice? Is that the heart of your anxiety as to the nature of the scheme that is here, that there is a danger that individuals who are going to be subject to checks and certainly extended

checks might be denied natural justice by the arrangements as put in place? Or is there another founding philosophical problem that you see here?

Ms Donovan—I would not say that the concern about natural justice is at the heart of our concerns. I will deal with that separately. The heart of our concerns is the idea that a background check is inherently intrusive. It does involve an invasion of privacy, but sometimes it is a necessary evil. How we determine what is necessary depends on the purpose for which it is conducted and confining the information that is gathered to match that purpose. That is a difficult balancing act and we think it is one that should be performed by and closely scrutinised by the parliament. We think deferring that to regulation does not provide for sufficient scrutiny. Looking at this generic bill, we cannot say whether the background checks it introduces are necessary or proportionate to the purpose that is sought to be achieved because there is no detail there. It depends on the regulations.

Senator TROOD—The regulations are subject to the scrutiny of parliament, theoretically anyway.

Ms Donovan—That is acknowledged, but it is the aside you offer—'theoretically anyway'—which raises our concern. They are not subject to the same degree of scrutiny as a bill might be. I would not be here addressing the senators on the regulations, and neither would the Office of the Privacy Commissioner I suspect—we should not treat these matters lightly. Background checking schemes do impact adversely on peoples' lives. They impact on their employment opportunities, their opportunities for advancement.

In doing some background research I found some Administrative Appeals Tribunal cases which dealt with people who had been refused aviation security cards. While they are not directly necessarily relevant to the review of this bill, they are very interesting because they tell ordinary peoples' stories. You see that a man who has been working at the airport for five years in Brisbane, when that area is reclassified, he loses his job because of his criminal history. His appeal was unsuccessful. I do not take issue with the facts of that case, but it demonstrates that this is a serious matter which impacts directly on peoples' lives.

Senator TROOD—The Johnson and Cowdrey cases that are referred to in your submission, did you discover any other examples? You probably did not do a comprehensive, detailed check, but are you aware of many instances where this could be a problem?

Ms Donovan—I did not find any other cases from the Administrative Appeals Tribunal, but that does not mean that they do not exist. In terms of adverse security assessments, it is difficult of course to find information about those reviews because no doubt they are conducted in camera. I did find a very interesting case which I think again illustrates why this is a matter that the parliament should take up with more vigour and with more rigour. It was the case of a woman working in an airport in the United Kingdom who had an adverse counter-terrorism check—I think that is what it is called. Of course she was not allowed to be advised of the reason. She had been working there, she lost her job and she was not advised of what the reason was for the adverse check because for national security reasons she was not allowed to be told. She sought judicial review, but that was difficult without knowing why she was refused.

The provisions in the UK allowed for somebody to be appointed not as her lawyer but to act for her to have access to that information and eventually her appeal was successful. It seems that perhaps somebody who had a grudge had said something. We are not privy to those details. Again that demonstrates how important appeal rights are and how important it is that the legislation guarantees access to at least enough information about why a certain decision might be made so that you can challenge it. That goes again to the natural justice issue. I am not saying that that is central to our concerns; that is essentially the second issue which we seek to address—that is, this bill is an opportunity and that opportunity has not been seized because it is too difficult. It is too difficult to actually engage in the details and set out what are some basic principles that we think all schemes should comply with.

Senator TROOD—In your submission at paragraph 34 you cite the bill and section 9.1 of the bill, which has a series of propositions in relation to the scheme. Are you saying that you would like those to be expanded?

Ms Donovan—Yes, in particular some of those about how an application might be made and what information is given to an applicant—I think the bill says, ‘The form of advice to be given to an applicant for a background check.’ I think that type of matter could be further expanded, notwithstanding that this is a bill which might apply to many different schemes. I do not pretend that it is an easy task; but I do not think it is an easy task to set it out in regulation either.

Senator KIRK—Thank you for your submission. I would like you to elaborate a bit on what you say from paragraph 27 onwards. You say:

... the Bill should clearly state that the AusCheck scheme must comply with existing rights based legislation and international human rights treaties ratified by Australia.

Then you go on to recommend amending clause 18 to include some subclauses. Could you elaborate some more upon that? In paragraph 29 you say:

While such a sub-clause is, *in some respects*, redundant, it would nonetheless provide an important statement of principle and place appropriate limits on when and why background checks may be conducted and how information obtained may be used.

I wonder if you could elaborate on that for us.

Ms Donovan—This submission is based on clause 5, which does not limit the definition of a background check and therefore allows for other matters in addition to the first three listed to be inquired into as part of a background check. The Law Council is concerned that the type of information that would allow to be gathered is too broad. The Law Council believes that the more information that is gathered about a person the more likely the risk that that information will be improperly used for a discriminatory purpose or a purpose which does not legitimately relate to the scheme itself.

If paragraph (d) of subclause 5 is to remain in the legislation, which the Law Council believes it shouldn't, the Law Council has offered this proposed amendment, which admittedly is a little bit woolly, as a way of providing some restraints on the type of information that can be gathered or on the way that that information can be used. The reason the Law Council suggests it might be in some respects redundant is that regulations would have to comply with other legislative schemes anyway, and we acknowledge that. But

nonetheless, we believe it would still be an important statement of principle—an important guiding principle which might provide some constraints on what is otherwise a blank check to gather any type of information.

Senator KIRK—You do not say it in your written submission, but I understand from what you have just said that you would be happy to see subclause (d) deleted entirely.

Ms Donovan—That is an oversight then, because I do not think there is a need for subclause (d), given that clause 5 already allows for an individual's criminal history check, matters relevant to a security assessment and also matters relevant to citizenship status and right to work et cetera. The Attorney-General's Department was given some questions on notice and was asked to explain what sort of matters this might include. The answer given was essentially that it might involve, for example, this sort of criminal intelligence check which was suggested as part of the Wheeler report. It was suggested that such a check might strengthen the existing aviation security card regime. The Law Council believes that is a very sensitive and controversial proposal, one that has been on the table for over a year, given that it was one that was suggested in the Wheeler report. This again shows why this rudimentary legislation is inadequate. It is a sensitive, controversial suggestion. It has been on the table for more than a year. A piece of legislation is introduced that, amongst other things, provides a framework for administering the aviation and maritime security cards. This one sensitive suggestion is not dealt with in the legislation, but a regulation making power is reserved to the executive to come back to that later. That is something that should be dealt with directly here, particularly because, as the Wheeler report acknowledged, if a background check is to include a criminal intelligence check as well, then that particularly gives rise to issues of natural justice, what sort of information somebody should be given about the reasons for their adverse check and how they might appeal that.

Senator KIRK—Absolutely. Thank you.

CHAIR—Thank you very much for the Law Council's submission, which was very helpful to the committee. If we have any issues we need to pursue with you we will do so on notice, as you so generously indicated we could do. We appreciate your attendance here this afternoon. Thank you.

Ms Donovan—Thank you.

[5.14 pm]

HARRIS, Ms Greer, Acting Policy Adviser, Office of the Privacy Commissioner

SOLOMON, Mr Andrew Gordon, Director, Policy, Office of the Privacy Commissioner

CHAIR—Welcome. The Office of the Privacy Commissioner has lodged a submission with the committee, which we have numbered 12. Do you need to make any amendments or alterations to that submission?

Mr Solomon—No.

CHAIR—Mr Solomon, I assume you will make an opening statement and then we will go to questions.

Mr Solomon—The Office of the Privacy Commissioner welcomes the opportunity to discuss its submission with the committee. The office supports the development and introduction of the AusCheck bill. We believe that providing a regulatory framework around this new centralised background checking service within the Attorney-General's Department promotes transparency and accountability in government processes. We are particularly encouraged to see that a range of information management and protection measures have been included in the bill.

We are also encouraged that the department is undertaking a privacy impact assessment. Our office issued a guide in August last year to assist Commonwealth Government agencies who wished to undertake such assessments. We believe that undertaking this privacy impact assessment will assist the department to identify specific privacy impacts of personal information flows that will occur within the proposed AusCheck process and will enable the department to look at ways of reinforcing the positive privacy impacts of the process and managing or minimising any negative impacts. From an optimum privacy perspective, our office holds the view that the bill could be further enhanced with a few adjustments.

In our submission, we have acknowledged that the current bill seeks to regulate the purpose for which it will undertake background checks by requiring those purposes to either be enacted in primary legislation or through regulations under the bill. We welcome this approach while suggesting that an ideal privacy outcome would be to have each purpose enacted in primary legislation.

In our submission, the office has also commented on issues around collection, information to be assessed, retention of information and use and disclosure provisions. In relation to collection, we believe that section 13 could be aligned more appropriately with the information privacy principles in the Privacy Act if the collection of information was directly related to AusCheck's purposes. If there is a specific reason for the current wording which requires the information to be only related rather than directly related perhaps the section could be modified to specify that reason.

In relation to information to be assessed for particular checking schemes, we believe that proposed section 5 could be modified to indicate that the information must be relevant to the risk associated with the particular background check that is being undertaken. In relation to retention of information we have suggested an additional section in the bill to require

AusCheck to delete information that is not relevant to the background check for which it is being collected, used or disclosed.

Finally, in relation to use and disclosure of any information collected by AusCheck, our office has suggested that some additional information in section 14 about the agencies or organisations, or perhaps the types of agencies or organisations that information could be disclosed to would assist. I now welcome any questions from the committee.

CHAIR—Thank you, Mr Solomon. Ms Harris, you don't wish to add anything at this point?

Ms Harris—No, thank you.

Senator LUDWIG—When you look at this bill, particularly the objects which go to provide a regulatory framework for coordinating and conducting certain criminal security and then it adds 'and other background checking'. You look at the definition of background check and it says in proposed section 5(d) 'Such other matters as are prescribed by the regulations', you then look at part 2, proposed section 8, which establishes AusCheck scheme, and 8(1)(c) 'for such other purposes as are prescribed by the regulations'. You then look at how the information might be safeguarded and you cannot find that either. They may as well have said 'as such other regulations may prescribe'. Does that concern you as the Privacy Commissioner in terms of how that information might be gathered, stored and then destroyed if it is no longer necessary and whether it meets the privacy principles in terms of this bill? We do not have the regulations to see whether it does in terms of the operation.

Mr Solomon—It is not apparent that the AusCheck bill purports to make AusCheck exempt from the obligations under the information privacy principles and it is apparent from the Attorney-General's second reading speech that AusCheck will operate in accordance with the provisions of the Privacy Act. Specifically as discussed in our submission, information privacy principle one relates to the manner and purpose of collection of personal information and requires agencies to limit the collection of personal information to where it is necessary for or directly related to a purpose that is directly related to the function of the collector. As mentioned in my opening statement, the office believes that section 13, which authorises the collection of information, could be aligned more appropriately with the IPPs if that collection of information was directly related to AusCheck's purposes.

To further expand on your question in a wider view, our understanding of the bill is that it sets up a process within the Attorney-General's Department that at the moment is in relation to ASICs and MSICs. It allows for that background checking to be pursued for other background check purposes at a later time, but they would have regulation around each of those processes, which would be in either primary legislation or regulations under this bill. So, apart from the issues that we have raised in our submission, I do not think at this stage the office feels there are any other outstanding major concerns.

Senator LUDWIG—Do you think people should be able to access that to find out what information is being held on the database, from a privacy perspective?

Mr Solomon—As I said, I believe that AusCheck is going to follow the obligations under the information privacy principles. We have nothing to say that that is not the case, so provisions that already exist under privacy legislation will apply.

Senator LUDWIG—Are you aware of who the consultants are that have undertaken the privacy impact assessment work?

Mr Solomon—We have been approached by the consultant for some initial discussions.

Senator LUDWIG—Are you able to say who the consultant is?

Mr Solomon—I do not think that I am at liberty to say. I think that would be the Attorney-General's Department.

Senator LUDWIG—When you start at the objects then move through the definition and the way the purpose can be prescribed by regulation, it sets up, in my mind, a very wide scheme. It does not seem to be limited. It is now about ASIC and MSIC card, but it does not seem to rule out a whole framework of data collection from organisations ranging from criminal history checking through to criminal intelligence, through to security assessments—and what we do not know after that. Does the breadth concern you from a privacy perspective? In other words, once the government decides to put this in place, then this is the last time you will be asked to comment on this bill because the next way it will operate is by regulation. So, unless you are involved in the regulation, you will not see it again and it can be extended and extended into a whole range of areas. What I am asking you is: is the framework, in your view, too broad, just right or too narrow?

Mr Solomon—In my opening remarks I said that the ideal privacy outcome would be for each of the schemes that AusCheck undertakes to be initiated through primary legislation, but we are also mindful that this scheme is an advance. It puts in place some legislative oversight of each of the schemes that AusCheck will undertake so that there at least will be regulations for each of those schemes.

Senator KIRK—Following on from questions I was asking of the Law Council, I believe it is clause 5(d) which has the effect of potentially expanding the type of information that can be assessed in a background check. Your suggestion on page four of your submission is that that could benefit from being reference to the risk associated with particular appointment situations or other reasons the background check is being undertaken. I wonder if you could expand a bit upon that for us and how you would draft that. I am not suggesting that you have to draft the provision for me, but how would you formulate that in the legislation; what would be the nature of the amendment? Would it refer to, as it does here, the risk associated with the employment? Is that what you see is the best way to narrow the operation of the clause?

Mr Solomon—We have not looked at a form of words for amending or modifying the section, but we do propose that the regulation-making power be fettered by it being relevant to the particular background-checking scheme that that information will be collected for. I have not got a form of words, but I think that section could be fettered using some words to that effect.

Senator KIRK—I wonder if you might be able to take that on notice and come back to the committee with a form of words as to how you suggest that might be formulated? That will be helpful.

Mr Solomon—I will take it on notice and let you know what we can do.

Senator TROOD—Do I understand your position to be that the Privacy Act applies to the legislation and that, insofar as people have a right to access information about themselves through the Privacy Act, you are persuaded that that is sufficient protection in relation to this scheme?

Mr Solomon—Yes, the office's position is that this scheme is within the Attorney-General's Department. The Attorney-General's Department is subject to the Information Privacy Principles and those principles allow for certain rights and responsibilities in relation to people's personal information, so our position is that this scheme is subject to those principles and that is sufficient.

Senator TROOD—Could you explain to me the means by which those entitlements apply to this legislation? You say the privacy rules apply to the Attorney-General's office but this is a general proposition you are putting. I am not quite clear how a person whose information might be on the database would necessarily get access to it by way of the provisions here, but you are saying they get access by virtue of the generic provisions that apply to any data held by the Attorney. Is that correct?

Mr Solomon—The privacy principles apply to most government agencies. They do apply to the Attorney-General's Department.

Senator TROOD—I see.

Mr Solomon—The Office of the Privacy Commissioner does not want to create more inconsistency between or overlapping of principles, so it is important that the existing principles are allowed to apply; we understand that they do.

Senator TROOD—The Law Council makes the point that there is the need for a more specific provision about this, but you are not troubled by that. You do not think that is necessary?

Mr Solomon—I do not know if I can say it in any more words.

Senator TROOD—Okay. The point you make about deleting information—it seems to me to be rather difficult to delete information that is not relevant to the background check. How might one establish a set of principles that might be used to actually remove information? One gathers a body of information. Are you saying that a view will be formed on that body of information and then it would be appropriate to remove that information which was not relied upon for the position that was reached in relation to an individual? I am struggling to see how you easily separate or set up a legislative or regulatory scheme which would allow you to disaggregate the information in the way you propose in your submission.

Mr Solomon—I am not suggesting that operationally that would be an easy process. Our understanding is that some of the criminal history checks that are now undertaken do provide information across—they are unfettered—and that not all of that information may be relevant to the particular background check that is being undertaken. So our general position would be that that which is not relevant could be deleted; it would not need to be kept. I am not suggesting that operationally that is going to be an easy process.

Senator TROOD—I am sympathetic to the proposition you are putting, but I am interested in trying to determine how you would actually operationalise it, and that seems to me to be a

challenge. Are there any legislative schemes of which you are aware that might provide some guidance to try to achieve that task?

Mr Solomon—I think that all government agencies struggle with trying to keep their databases accurate, relevant, up to date and those sorts of things under the privacy principles, and this would not be an easy challenge. I could take it on notice and let the committee know if we can suggest any similar schemes that would be appropriate.

Senator TROOD—If you could turn your mind to that, that would be helpful I think. Thank you.

CHAIR—Mr Solomon, was the Office of the Privacy Commissioner involved in any consultation process with the Attorney-General's Department in the development of the legislation?

Mr Solomon—Yes, the office had some meetings in that development process.

CHAIR—Were they meetings—to the extent that you can tell the committee—of a formal consultation process on this particular piece of legislation or just in the general course of events?

Mr Solomon—We received some briefings during the development process.

CHAIR—So you were able to make some input as the bill was being drafted?

Mr Solomon—We feel we made some input as the bill was being drafted.

CHAIR—As there are no further questions, we thank you both very much for appearing this afternoon and thank you very much for the submission of the Office of the Privacy Commissioner.

[5.33 pm]

BOURCHIER, Ms Annette, Executive Manager, AusCheck Division, Attorney-General's Department

BROWN, Mrs Frances, Director, Policy and Legal, AusCheck Division, Attorney-General's Department

KELLY, Ms Elizabeth, Executive Director, AusCheck Division, Attorney-General's Department

HANNA, Mr Graham Wayne, Section Head, Aviation Security Identity Section, Office of Transport Security, Department of Transport and Regional Services

JOHNSON, Ms Cheryl, General Manager, Supply Chain and Identity Security, Regional Aviation and Air Cargo Security Branch, Office of Transport Security, Department of Transport and Regional Services

KILNER, Mr John, General Manager, Maritime Security Branch, Office of Transport Security, Department of Transport and Regional Services

TONGUE, Mr Andrew Keith, Deputy Secretary, Department of Transport and Regional Services

CHAIR—Welcome. DOTARS has lodged a submission with the committee, which we have numbered 13, and the Attorney-General's Department has lodged two submissions, which we have numbered 15 and 15A. Do you need to make any amendments or alterations to those submissions?

Ms Kelly—No.

Ms Johnson—No.

CHAIR—I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions which ask for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Officers of the departments are also reminded that any claim that it would be contrary to the public interest to answer a question is one which must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

I invite you to make brief opening statements, if that is your inclination. At the conclusion of those, we will go to questions from members of the committee.

Ms Kelly—There is no opening statement from the Attorney-General's Department.

CHAIR—DOTARS?

Ms Johnson—Yes, we have an opening statement. The Department of Transport and Regional Services is fully supportive of the AusCheck Bill and the establishment of AusCheck as a central vetting agency within the Attorney-General's Department. The

establishment of AusCheck is a key component of the government's transport security framework and responds to the strong public concern about criminal activity in Australian airports and ports. Further, it is consistent with the recommendations from the report of Sir John Wheeler on airport security and policing arrangements for background checking processes for aviation security identification cards to be further strengthened and centralised in the Attorney-General's Department.

The rapid expansion of the ASIC regime and its distributed administration by some 190 issuing authorities increase the risk of a card being issued to an ineligible person. As an interim measure, a background checking unit was established in the department to process background checks for the maritime identification card and, in March 2006, the responsibility of the BCU was expanded to include background checks for ASICs. Prior to March 2006, the background checks were the responsibility of the various ASIC issuing bodies. AusCheck will facilitate verification of proof of identity documents in the future, provide an opportunity to develop appropriate and consistent technological solutions for data checking to overcome problems with the current system, allow a single national database to be maintained on all applicants and cardholders and improve the ability of government to respond to security alerts involving an individual in the industry. Establishing AusCheck will help to ensure a nationally consistent approach for conducting security checks and assist in maintaining public and industry confidence in background checking.

AusCheck will coordinate and perform criminal history checks, ASIO checks, document verification checks and Department of Immigration and Citizenship work rights and citizenship checks. All interfaces with AusCheck's checking partners, such as the AFP, CrimTrac, ASIO and the Department of Immigration and Citizenship will be electronic. This will lead to a speedier turnaround on the majority of applications and, once operational from 1 July 2007, it is intended that AusCheck will operate on a cost recovery basis.

Comments made during the second reading of the AusCheck bill made reference to lost and stolen ASICs. The Attorney-General advised that:

... the commencement of AusCheck and its centralisation of background checking should improve the ability to monitor cards.

It should be noted that the ASIC has significant security features and has not been successfully counterfeited since its introduction in 1986. The security features would make it extremely difficult for a person other than the holder to use it.

I would like to add that the ASICs do not confer access rights to secure areas of airports. Access to secure areas of airports remains at the discretion of the airport operator, according to the individual airport's transport security program. ASIC holders do not have automatic right of entry to these areas; rather, the ASIC is only evidence that a holder has met certain eligibility criteria. While even one missing ASIC is of concern, it should be noted that the unaccounted for ASICs represent only a small percentage of the total ASIC pool.

It is important to note that DOTARS will continue to be responsible for the regulatory framework governing the management of the ASICs and MSICs. That is, DOTARS will be responsible for aviation and maritime security identity policy, including the management of future changes to the eligibility criteria, security features in the card and proof of identity

requirements and industry performance against regulatory requirements. DOTARS will continue to consult with industry on future changes to the ASIC regime and DOTARS will work closely with AusCheck on policy issues associated with the processing of ASICs and MSICs.

CHAIR—Thank you, Ms Johnson. We will go to questions.

Senator LUDWIG—You have probably been asked this a million times, but I thought I would just check again. What is the total number of ASIC cards and MSIC cards that have been issued to date?

Ms Johnson—The total number of ASIC cards is 92,606 and I will get Mr Kilner to respond to the MSIC card number.

Mr Kilner—There have been 79,000 applications for MSICs and at this time 72,000 cards have been issued.

Senator LUDWIG—How long does it take for an MSIC card to be processed and issued?

Mr Kilner—That depends on whether or not the individual has a criminal history. In most cases where there is no record of a criminal history, the turnaround time can be about a week for the background check. It can take another week or two, depending on the issuing body, to produce and distribute the card. In general, we advise applicants and industry that they should allow about six weeks for the full process to take place.

For those people who have a criminal history, we are then relying on the state and territory jurisdictions to provide the necessary criminal history to the AFP so that the AFP can collate that criminal history. Therefore, those checks can take longer, depending of course on the number of jurisdictions involved and the particular record keeping used by those jurisdictions—whether it is electronic or other.

Senator LUDWIG—Could you take it on notice—unless you have already answered this somewhere else, in which case you can provide it to the committee a lot earlier—to provide the length of time the 7,000-odd that are still in the system have been in the system by month and number, so that the committee has an understanding of how old or how new, as the case may be, some of these applications are. Can you also tell us how many have been refused as well? That would be the same for ASIC. I think the tail has certainly shrunk, if my memory serves me correctly, but if you would not mind providing the same information of those that are currently in the system and awaiting approval or at least sending out by post or however you do it.

Mr Kilner—I can answer your second question straight away, but by month and by number will take some time. With regard to maritime security identity cards, as at 27 February a total of 46 applicants have been considered ineligible to be issued a maritime security identity card on the grounds that they have been convicted of a maritime security related offence. The majority of these have been drug related. Of those 46 applicants, 21 are still ineligible, not having applied to the secretary of DOTARS for review; 22 have been approved following application to the secretary for a review; and three have been approved after initially being refused—these applicants were approved after appealing to the secretary under regulation 608X of the maritime transport and offshore facilities security regulations.

Senator LUDWIG—The ASIC and MSIC cards which are currently or have been appealed to the AAT or other court process, if there are only a few of them, you can perhaps give me the case number or the name; but if there is none then obviously there is a zero return. I am happy for you to take that on notice for both MSIC and ASIC.

Mr Kilner—Zero for MSICs.

Ms Johnson—For ASICs there have been two appeals that were upheld and two that were withdrawn.

Senator LUDWIG—And the names of those?

Ms Johnson—I do not have them.

Senator LUDWIG—I would ask you to take that on notice, if it is available and depending on whether it is on the public record. This scheme will be operational by 1 July; is that the idea?

Ms Kelly—The scheme is currently operational, but AusCheck will be discharging its functions under the scheme from 1 July.

Senator LUDWIG—Does AusCheck develop a new database from that date or do they take over an existing database by DOTARS?

Ms Kelly—The bill provides for us to migrate the existing data onto the AusCheck database. We are still working through the details of how that might occur because the data has never been kept centrally before, so there are some significant data cleansing issues. Also there is some additional data being collected under the process from 1 July that obviously has not been part of the previous system. But the bill expressly authorises us to take historical data, because one of the key values of the central database will be to know at all times who has access to secure areas of air and seaports. So, if we do not have that historical data, the database will be of limited value until we have done a full renewal cycle, which will be five years.

Senator LUDWIG—Is the database up and running, or is it on track to be up and running by 1 July?

Ms Kelly—It is still being constructed, but it is on track to be up and running by 1 July.

Senator LUDWIG—What is the total cost of the database?

Ms Kelly—It is in the vicinity of \$6 million, when you take into account the range of contractors, the hardware and the specific application development.

Senator LUDWIG—What sort of information will be held? It will not be a document verification service from 1 July, will it?

Ms Kelly—The document verification service certainly will not be available from 1 July. It is our understanding that it will be available some time in the next year, but we are obviously in the hands of the document verification service people on that issue. It is probably unlikely that we will have it on 1 July or indeed before the completion of the first year of operation.

Senator LUDWIG—The second reading speech said the government also decided that AusCheck will use the proposed national documentation verification service to assist in

determining the bona fides of applicants. Can you tell me the date from which that will happen?

Ms Kelly—We are in the hands of the document verification service people in relation to that and we understand that it will be some time next year at the earliest.

Senator LUDWIG—2008.

Ms Kelly—And that would not be a full documentation verification service. As I think was established in estimates, the full documentation verification service will not be fully operational until 2010.

Senator LUDWIG—That was my recollection too. In any event, it will not be the sole means by which you will obtain information; that is not the design?

Ms Kelly—No, and the obligation to verify identity remains with the issuing bodies. They sight the identity and go through their own processes of authentication of the identity, and that obligation remains with them. When the document verification service becomes available either partially or completely, that will be an enhancement to that process in the sense that there will be an additional process to check whether the proof of identity material that they sight is validly issued identity documentation. But the issuing body will retain the responsibility to verify identity.

Senator LUDWIG—In terms of how the information will be stored, it seems that a lot of that will be by regulation in terms of the type. This is, as I understand it, a framework legislation. When will the regulations be available?

Ms Kelly—We are in the hands of the office of legislative drafting. We have provided some preliminary drafting instructions. Obviously the form of the bill will determine the outcome of those regulations as well, but as yet we do not have a draft from the office of legislative drafting.

Senator LUDWIG—Is there a timetable to obtain a draft?

Ms Kelly—They provide an indicative timetable of eight weeks from the time of delivery of instructions. On that timetable, I think we have approximately another month to go.

Senator LUDWIG—When they are available, can you make those available to the committee, or is there a reason that you could not make a draft available to the committee?

Ms Kelly—I am not aware of any reason. We will certainly be consulting fully with our stakeholders on the development of those regulations. The content of these schemes is already fully set out under the DOTARS regulations, under the aviation and maritime acts. Our regulations will merely set out the application information and also how we relate to the individual applicant in our component of the process. So the full details of the scheme will still remain under the maritime and aviation transport security legislation regulations.

Senator LUDWIG—What information—hard documentation—will the Attorney-General's Department keep under this scheme?

Ms Kelly—To whom?

Senator LUDWIG—Of the person who is being checked. You will have a database, but will you keep any hard data, any paper data?

Ms Kelly—No, it will be an entirely electronic system.

Senator LUDWIG—So that primary information will be held by either DOTARS or—

Ms Kelly—What do you mean by ‘primary information’?

Senator LUDWIG—The application form or the verification to check if there is a paper check.

Ms Kelly—There is no paper application form under the AusCheck system. Our applications are received from issuing bodies, who are our applicants. They may receive application forms from the individuals who are the subject of the background check, but all applications to us will be made electronically, so there will be no paper record stored by AusCheck, with the exception of appeals. In the event that a decision is appealed, there may be a file created in relation to an appeal process.

Senator LUDWIG—Where will that be kept?

Ms Kelly—Within the AusCheck offices.

Senator LUDWIG—Will the regulations set out how that file is kept?

Ms Kelly—That file will be managed in accordance with the Archives Act procedures and the records management procedures that govern other records within the office.

Senator LUDWIG—That will also determine who has access to that file?

Ms Kelly—That will determine who has access to that file. It will obviously be subject to the Privacy Act in relation to an individual whose personal information is stored on that file.

Senator LUDWIG—The Privacy Commissioner has indicated a couple of matters. Have you had an opportunity to look at the Privacy Commissioner’s submission?

Ms Kelly—I have.

Senator LUDWIG—They make a couple of suggestions. Are you able to say whether the Attorney-General is minded to narrow—my words—section 8(1)(a) and (b)? In the Privacy Commissioner’s submission, it says:

Section 8(1)(a) and (b) addresses the establishment of a background checking scheme ...

And so on and so forth. It also says:

The Office notes the particularly broad scope of the “other purposes” that the AusCheck scheme may be used for, some of which would not require further primary legislation.

It goes on to say:

... the AusCheck scheme should be able to be undertaken only after primary legislation has been enacted, either through amendments to the AusCheck legislation or through other new or amended primary legislation.

Are you able to say whether or not that is being looked at by the Attorney-General’s Department—whether or not you intend to pick up the suggestion by the Privacy Commissioner?

Ms Kelly—It might be useful to explain in response to that the background in relation to the decision to establish AusCheck. When government directed that AusCheck be established,

it was in the context of a direction that a scheme be established to centralise the aviation and maritime schemes but also that the Commonwealth was conscious that a significant amount of background checking occurred within the Commonwealth and there might be opportunities to minimise duplication and improve efficiencies by creating a framework within AusCheck that could subsequently, after the aviation and maritime schemes had been settled, move on and look at other opportunities for background checking that was occurring within the Commonwealth. So the bill really reflects that direction from government to create a vehicle for centralising background checking and the coordination of background checking for aviation and maritime identification cards but also with the ability to at a later point expand into increasing efficiencies and minimising duplication in other areas of background checking in which the Commonwealth is involved.

Senator LUDWIG—Like what?

Ms Kelly—There are no specific plans in relation to the use of AusCheck, but the Commonwealth is involved in a range of background checking. There are obviously the aviation and maritime schemes that are dealt with specifically here that are established under regulation, and the obligation to obtain the background check is established under the regulations in both of those cases. There is a scheme that was established in January in relation to people working with persons in aged-care facilities. The Commonwealth is also involved in background checking in the exercise of its executive power in relation to security clearances of employees. Also its employees are actually subject to a range of background checking regimes in that they interact with state and territory functions, so its employees are involved in obtaining checks for working with children in the range of background checking schemes that are conducted by various states on that issue.

The Commonwealth was also involved in the establishment of the ammonium nitrate background-checking regime. That was done under state and territory legislation but the Commonwealth was involved in its establishment. So there are a variety of areas in which the Commonwealth is involved, in different ways, and, whilst AusCheck was directed initially to look at the aviation and maritime schemes, it was very much with a view to providing a vehicle to later look at other opportunities when those activities are settled.

Senator LUDWIG—In all you list about 17 purposes in proposed section 8(2), but what could not be added? I will reverse it. You seem to have a broad number that go from national security to defence, money appropriation for the purpose of the Commonwealth, the collection of statistics, trade and commerce, provision of allowance and pensions and child endowment, notwithstanding the other matters in respect of which the parliament has the power to make laws for. Could it arguably cover Medicare and Centrelink?

Ms Kelly—It is a list of Commonwealth powers in relevant areas.

Senator LUDWIG—I know what it is.

Ms Kelly—One of the things that is perhaps important to point out is that, in order to operate in the area of national security, the Commonwealth relies on a package of constitutional powers. There is no one head of power that supports all of its activities on national security. Most of the areas in which the Commonwealth operates require a package of

constitutional powers in order to support that activity. Whilst the list looks long, it is often—particularly in the national security area—a combination of powers that are required.

Senator LUDWIG—That is interesting, but the question was: could it arguably cover Medicare and Centrelink?

Ms Kelly—If the particular activity that you are referring to falls under one of the heads of power that are listed in proposed subsection 2 and it is an activity that could be conducted under those powers, then it could.

Senator LUDWIG—So we can establish that, under proposed section 8(2), it could include purposes which could arguably cover Medicare and Centrelink in that list?

Ms Kelly—To the extent that it is permitted under proposed section 8(2), that is correct.

Senator LUDWIG—What could not be covered in those? Do you have any examples of what you cannot cover? What I am trying to understand is the breadth. There are certainly arguments in the submissions that this is a very broad framework and in any framework there is usually a start and a finish, or at least a limit.

Ms Kelly—The limit is the limit of Commonwealth power. What the bill purports is that, where the Commonwealth is involved in background checking, AusCheck can be involved in background checking. Where the Commonwealth cannot be involved in background checking, then AusCheck cannot be involved in background checking. That is the limit.

Senator LUDWIG—There is no activity of the Commonwealth that cannot be added.

Ms Kelly—If it is within Commonwealth constitutional power and it is listed in subclause 8(2), then it is a purpose for which we could become involved.

Senator LUDWIG—So once this scheme is in place, the government could add a scheme for AusCheck for, say, applying for Centrelink services.

Ms Kelly—The government could do that if it was within its power, with or without the AusCheck bill.

Senator LUDWIG—Under this AusCheck system, could it, by regulation, apply for Centrelink services?

Ms Kelly—That is not a scenario that we have envisaged but, if it was within the power under clause 8(2), it could be done.

Senator LUDWIG—So there would not be anything to prevent the bill's application to the proposed access card from being brought under the AusCheck scheme either?

Ms Kelly—I am not aware of any similarities or linkages between this bill and the access card scheme.

Senator LUDWIG—By regulation you can then require any government service—on national security, money appropriation or collection of statistics—to complete the relative forms and to then do background checks to provide—

Ms Kelly—I am not aware of any proposal for the access card registration procedure to involve any element of background checking. As I understand it, it is an identity verification procedure.

Senator LUDWIG—But the question is that it does not rule it out either. It could permit it by regulation. You have already said as much, I suspect, but I am just using that as an example.

Ms Kelly—If it is within Commonwealth power then certainly clause 8(2) provides the purpose for which regulations can be prescribed.

Senator LUDWIG—As I understand the way the scheme will work, it will be by an application via a website. Has the application been developed yet that will demonstrate what information will be required?

Ms Kelly—Substantially, yes.

Senator LUDWIG—Is that available to the committee?

Ms Kelly—We can certainly tell you the information that we will be requiring on the application form in relation to each individual. It is not in hard copy form; it is a web page.

Senator LUDWIG—You can print the web page out though.

Ms Kelly—Yes.

Senator LUDWIG—Do you have that?

Ms Kelly—Not here. It is the various categories of identification information. The thing that is different from the current system is some additional information on address history. The last 10 years of address history is the additional proof of identity requirement that we will be introducing. Other than that, the information is the same as is currently collected.

Senator LUDWIG—In terms of the sample ASIC that has been provided—that is the application from CASA—which aspects of the form will be part of the AusCheck system? Are you going to retain all of those?

Ms Kelly—We have not been through the process of comparing the CASA form. I understand that there may be additional information that many issuing bodies obtain from individuals for whom they are making an application, but we will only require the information that is currently required under the DOTARS regulations, with the addition of that address history.

Senator LUDWIG—Will there be any restrictions placed on the information in any of the fields?

Ms Kelly—Could you explain what you mean?

Senator LUDWIG—Who will have access ultimately to the AusCheck database as well?

Ms Kelly—Any issuing body that lodges an application to us will be able to access that application information. So the individual issuing body that provides the information will be able to access that information. All issuing bodies will be able to use our card verification facility whereby they can determine whether a card presented to them is a validly issued card from the AusCheck database. That search will only reveal to them the information on the face of the card. They will not be able to look behind and receive any of the background information or proof of identity or identifying information in relation to the individual; merely that the card is a valid card and the details that are presented on the card that is before them.

Senator LUDWIG—But all issuing authorities will have access to at least the information that is provided on the form.

Ms Kelly—Only for their own applications. So for their own applications they will have access to that information. They will not have access to that information for applications made by other issuing bodies.

Senator LUDWIG—But will they have access to the additional information that you will require?

Ms Kelly—Only the issuing body that has made that application and provided it to us will have access to it.

Senator LUDWIG—But you have indicated that there is also information such as residency periods that will be added. So who will have access to that information?

Ms Kelly—That information will not be available in the card verification facility. That information, to the extent that it is made available to persons other than issuing bodies, is governed by the disclosure provision, clauses 13 and 14.

Senator LUDWIG—Who can it be disclosed to?

Ms Kelly—To persons who bring themselves within 14(2).

Senator LUDWIG—Who could that be? I was looking for a hint.

Ms Kelly—I think the obvious persons that the bill was drafted around, having their needs in mind and the direction from government in mind, would be the AFP and the Australian Crime Commission.

Senator LUDWIG—And ASIO?

Ms Kelly—ASIO would use their own powers under the ASIO Act, so they would not need to rely upon those powers.

Senator LUDWIG—Would the AFP have unfettered access to the AusCheck database?

Ms Kelly—They would have access in accordance with subclause (2) there. They would also have their rights under IPP10 and 11 relating to their functions as a law enforcement agency.

Senator LUDWIG—They would not require a warrant or a subpoena to obtain information?

Ms Kelly—Provided that it was in accordance with subclause (2).

Senator LUDWIG—What limit is there in subclause (2):

(b) may be used or disclosed for the following purposes:

- (i) carrying out a subsequent background check in relation to the individual ...
- (ii) responding to an incident that poses a threat to national security;
- (iii) the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence.

I am not sure that they do anything other than that. They might play sport on a Sunday, but—

Ms Kelly—The AFP probably would not qualify under (i) because they are not carrying out background checks. So I would imagine it would be either (ii) or (iii).

Senator LUDWIG—They might do it for their own employees.

Ms Kelly—I do not quite get the connection between that and information that we might have.

Senator LUDWIG—They might employ people who were pilots.

Ms Kelly—In any event, if they can bring themselves within subclause (ii), and the limits are set out there; namely:

(ii) responding to an incident—

or—

(iii) the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence.

Senator LUDWIG—Are there limits to that or is it as broad as it looks? Can you explain what that means to me in plain English.

Ms Kelly—It relates to the activities of those agencies. I think it is the ordinary English meaning of the words as they appear in subparagraph (iii) that creates the limits.

Senator LUDWIG—What do you say ‘criminal intelligence’ is? This is a question that I have often asked CrimTrac. If you look at their database, they share information—particularly criminal history but also a range of information between states. Each state provides them with information, as I understand it. So what do you say criminal intelligence is?

Ms Kelly—I think the meaning of the term ‘criminal intelligence’ is known in relation to law enforcement and intelligence agencies. AusCheck would have no role in the assessment of criminal intelligence. For a definition of criminal intelligence and what that entails it is probably best to go to a law enforcement or intelligence agency. That information will be provided by agencies in accordance with the clause as it is set out.

Senator LUDWIG—But, if the Australian Federal Police say that they would like to look at it for the purpose of criminal intelligence, don’t you have to determine whether it is for the purpose of criminal intelligence and whether you will allow them access, or do I just use the magic phrase and get access to your database?

Ms Kelly—We are still in the process of establishing the procedures in relation to access to our database. One of the options would be to create guidelines which would have the content of what was required before access could be achieved. That is something that we are still considering, but certainly the sorts of things that we would consider would be the sort of detail that would be required. We will take expert advice on that from those involved in criminal intelligence in order to assist us in that process.

Senator LUDWIG—But I come back to the question: if I am the Australian Federal Police, which I am not, and I ask for information from your database based on this legislation, which says ‘criminal intelligence’, and I claim that it is criminal intelligence, are you in a position to say no, no matter what your guidelines say?

Ms Kelly—It would be a question of being satisfied that the request was in accordance with the clause.

Senator LUDWIG—Where does it say ‘satisfied’ in clause 14?

Ms Kelly—In order to act under the legislation, we would have to be satisfied that—

Senator LUDWIG—Why?

Ms Kelly—The provision—

Senator LUDWIG—Who has to be satisfied? It says:

- (1) The Secretary may establish and maintain a database ...
- (2) AusCheck scheme personal information about an individual:
 - (a) may be included in the AusCheck database; and
 - (b) may be used or disclosed for the following purposes:

Ms Kelly—It would then be a question of an unlawful use or disclosure if it were not disclosed in accordance with those purposes, and that would be an offence under the act.

Senator LUDWIG—But what if the Australian Federal Police say it is for criminal intelligence?

Ms Kelly—As I said, we have not yet fully established the procedures for access.

Senator LUDWIG—I am not suggesting that it would not be for criminal intelligence; I am just saying that they have only to use the phrase.

Ms Kelly—As I said, we have not fully established the procedures for access to our database and they are matters that we will be considering as we proceed along the implementation process.

Senator LUDWIG—I am sorry, Chair, I have been a little longer than I thought I would be. I can pause here if others want to ask questions.

CHAIR—We will go to Senator Trood for a period and then we will come back to you, Senator Ludwig.

Senator TROOD—Is this expected to speed up the process of making these checks or is it likely to be the same?

Ms Kelly—We do expect to speed up the process. We have re-engineered the process of obtaining the background checking information to achieve that. We have told our issuing body clients that, for background checks involving Australian citizens with no actual or potential criminal history, we will do a five-business-day turnaround. We hope to do much better than that, but we feel very confident about a five-business-day turnaround. Seventy per cent to 80 per cent of checks will be done in that time frame. That provides a great advantage to our clients, who get that sort of time frame on some occasions but not on a consistent basis.

Senator TROOD—The bill provides for cost recovery. I presume that is cost recovery from agencies, is it?

Ms Kelly—It is cost recovery from both AusCheck—the Attorney-General’s Department’s costs—and our checking partner costs, so that includes costs from CrimTrac and ASIO and potentially DIAC.

Senator TROOD—I would like to explore some of these matters that Senator Ludwig was raising with you in relation to these regulations, particularly the prospect of the regulations adding purposes. I understood your evidence, Ms Kelly, to be that this was a sort of contingency provision for the possibility that the services of AusCheck might be used for other purposes down the track. Can I take it from that that when these regulations appear they will not, as far as you know, add particular purposes at this stage? You said, ‘We don’t have anything in mind,’ I thought, or words to that effect.

Ms Kelly—They are certainly not on our agenda. It is also important to understand that the background checking that the Commonwealth is currently involved in is also established by way of regulation and through a variety of other means. But this method of establishing background-checking schemes is already the current precedent within the Commonwealth.

Senator TROOD—So there will not be additions at this juncture?

Ms Kelly—We do not have any intention at the present time to do that.

Senator TROOD—Will the regulations have some kind of review scheme incorporated within them?

Ms Kelly—That is correct. The reason why the review provision or any review provision was not included in the bill is that each scheme that AusCheck is involved in will have different points at which review is required. So, in relation to the ASIC and the MSIC schemes, they already have a significant number of points at which a decision may be reviewed by the AFP. All those rights remain. There will be additional points where we think that, in the AusCheck process for those two schemes, AAT review rights need to be provided for. Every time we do a scheme, we will look for the appropriate point. Review rights will be provided in all schemes; that is certainly the intention. It is just that it is not able to be predicted in advance exactly at what points those review rights should appropriately be provided. So the detail of those will be provided in the regulations as each scheme is set out there.

Senator TROOD—Can you give the committee any intimation of the additional review points that might be included in the scheme?

Ms Kelly—There are certainly additional review points when AusCheck makes an assessment of the various components of the background check and then provides a response to the issuing body; that will be a point of review. That decision is also reviewable subsequently by the issuing body of their own motion, and there are also reviews later in the process in relation to the DOTARS involvement in reconsideration.

Senator TROOD—You heard, I think, the evidence about concerns about privacy. The office assured us that the privacy provisions that generally apply would apply to this piece of legislation. Could you just outline how you think they might apply to an individual here.

Ms Kelly—Certainly in terms of access to personal information, a person in relation to whom AusCheck has stored personal information will have all of the rights under the Privacy

Act to access and correct information held in that way. Also, the Privacy Act applies to AusCheck, as I think Mr Solomon confirmed. The act actually seeks to clarify and expand and further explain the way the act applies by specifying the uses for which we propose to collect and disclose information. But certainly we are covered by the Privacy Act and the IPP regime.

Senator TROOD—Your view is that the Law Council's concerns are overstated, perhaps?

Ms Kelly—It certainly was a clear direction that we are to manage information in accordance with the Privacy Act, and the bill actually embodies that.

Senator TROOD—This point, which is also in the Law Council's submission, with regard to the reporting to parliament or some mechanism within the regulations that might provide us with some regular information about the number of checks that are undertaken, the number of rejections, perhaps the reasons for them—can you say anything on that subject? Is that likely to be part of the regulations as well?

Ms Kelly—AusCheck, as part of the Attorney-General's Department, is subject to the annual reporting and portfolio budget statement process in relation to accountability. We had envisaged that information in relation to application numbers, processing times, refusals, AAT appeals would be routinely included in our annual report as part of those obligations.

Senator TROOD—I think that covers the issues that I want to raise.

CHAIR—Do you have any further questions, Senator Ludwig?

Senator LUDWIG—I do, thank you. In the definitions for the AusCheck scheme 'personal information' means personal information but (b) 'relates to the administration of the AusCheck scheme'. What does that mean and what information might be included under that section?

Ms Kelly—I might have to take that on notice to explain that definition. It is not immediately obvious to me.

Senator LUDWIG—Me neither. While you are taking that on notice, my question really relates to how broad or how narrow it might be. So what are the restrictions? Perhaps you could provide some examples of that which relates to the administration of the AusCheck scheme itself and the types of personal information.

Ms Kelly—That is in relation to the (b) part of the definition?

Senator LUDWIG—Yes, the (b). Could it, for example, collect records on the usage of the ASIC card or the MSIC card itself under that provision? Of course, with a lot of these things people might keep a check on how it is used, where it is used and whether or not you can include that in the information that you require or keep.

Ms Kelly—It would depend on whether that related to the administration of the scheme.

Senator LUDWIG—I do not know, you see.

Ms Kelly—I mean, the scheme is about determining whether individuals are a suitable risk to have access to secure areas of airports and that would mean—

Senator LUDWIG—It does not only say that, does it? I did not mean to interrupt you, but I know that part of it. But it is also not limited—'such other matters as prescribed by regulation'.

Ms Kelly—We will take that on notice.

Senator LUDWIG—Of course, if I read 5(d) correctly—'such other matters'—does that mean you can amend the definition by regulation.

Ms Kelly—It would depend. We can amend the definition and that definition of course relates to AusCheck's involvement in a scheme. If AusCheck were to be involved in a background checking scheme, however that was constituted, then we would want the definition to be amended of what a background check included in that subclause there.

Senator LUDWIG—A background check in relation to an individual is an assessment of information relating to one or more of the following:

- (a) the individual's criminal history;
- (b) matters relevant to a security assessment of the individual;

and (c) deals with, in short, citizenship status. You can then use (d) to extend that to a range of others by regulation. Would you call that a Henry VIII clause where you can amend through the regulation the primary legislation and, in fact, an important one such as the definition?

Ms Kelly—I do not think that it is a Henry VIII clause. What it purports to do is provide a menu of components of a background check for which AusCheck can assist in providing a service. If, for example, DOTARS were to add an additional element to their background checking scheme for ASICs and MSICs, we would expect that to be fully reflected in either DOTARS legislation or regulations. But this provision would merely allow AusCheck to be involved in coordination of that scheme.

Senator LUDWIG—'Such other matters as are prescribed by the regulations'—so could the individual's criminal history or the passenger list from Customs be added?

Ms Kelly—I think there would have to be an assessment made in each case and we would have to know more about the particular information before we could answer that question.

Senator LUDWIG—But, if it could, why wouldn't that be a Henry VIII clause if you have just added another database, such as the Immigration database—they are building a super database at the moment. Customs have a range of databases they have access to.

Ms Kelly—As I have said, this is actually intended to be something that would sanction AusCheck's involvement in a scheme established elsewhere. So, to that extent, it is not a Henry VIII clause.

Senator LUDWIG—How am I reading that wrong? 'Such other matters as are prescribed by the regulations.' So you can prescribe such other matters—(a), (b) and (c). Am I reading that badly or is it that I do not get it?

Ms Kelly—Again, it would depend upon the matter and the particular legislative backing that the addition of that matter would require.

Senator LUDWIG—What matter?

Ms Kelly—But I can only say that, if DOTARS, for example, were to change the components of the ASIC and the MSIC background checks, the intention is that AusCheck's involvement in that would be supported by amendment to that definition of 'background check'.

Senator LUDWIG—By regulation?

Ms Kelly—Yes.

Senator LUDWIG—We might differ on what a Henry VIII clause is then. If ASIC, for some strange reason, wanted passenger information from Customs or wanted to access Immigration's supercomputer, you would then, upon their request, add that in by regulation?

Ms Kelly—To the extent that there is a context and a framework established; there are already matters that are clearly there.

Senator LUDWIG—No, I do not know about the context or the framework. If they add that database in and they then request that you then prescribe it by regulation, on what grounds would you say no? Where do I look to see that you cannot or that you should not? If they, being the primary issuer of the card, say they require that information and request it—they might have been able to secure from Immigration a memorandum of understanding to get that information; they might already have it and want to use it legitimately for a background check—where does your gatekeeper role come in?

Ms Kelly—We obviously would have to be satisfied that it was a process that could be conducted under the AusCheck Bill. Certainly, in the way that the Attorney-General's Department scrutinises all processes involving rights, we would obviously look at that process as well. We would also expect that any significant changes to any regulatory scheme in which we were involved or any new AusCheck scheme would be submitted to a privacy impact assessment process where all of those issues would be fully considered. Certainly it is intended that we have a privacy impact assessment to fully canvass all of those issues in any new scheme in which AusCheck is involved.

Senator LUDWIG—And I can find all those things you just talked about in this legislation?

Ms Kelly—No. That is a policy commitment.

Senator LUDWIG—I cannot find it in the framework. Will I find it in the regulations when I see them?

Ms Kelly—No.

Senator LUDWIG—No, I would not have thought so either. It is a commitment from you, Ms Kelly, is it?

Ms Kelly—That is the normal Attorney-General's Department practice and it is what we are observing in relation to this bill and what we intend to observe in relation to any future AusCheck scheme.

Senator LUDWIG—So the type of personal information that can be kept on the database is under clause 4. Going back to (a) for a brief examination for a moment: 'that is obtained

under the AusCheck scheme'. Is that limited? What could you keep—blood type, address, age and medical history?

Ms Kelly—The type of information in relation to ASICs and MSICs is already specified under the DOTARS regs and, as I have said, we are adding additional information that is required for the purposes of conducting the background check.

Senator LUDWIG—We get a bit circuitous here, aren't we? It could be any of those I mentioned depending on the scheme you add by regulation.

Ms Kelly—If it was required for the purpose of conducting the background check.

CHAIR—Senator Ludwig, we are scheduled to complete our hearing at this time.

Senator LUDWIG—I might put the reminder of my questions on notice.

CHAIR—Unless you do not have very many?

Senator LUDWIG—No, I have many. You might wish to also ask a question.

CHAIR—No, I think most of the areas that I would have pursued have been covered. I would note though that our reporting date is 14 March, so if we try to get those questions to the departments tomorrow—

Senator LUDWIG—Yes.

CHAIR—then we will seek your assistance, Ms Kelly and Ms Johnson, in returning any answers to the committee as soon as possible. If there are no further questions, I thank all of the witnesses who have given evidence to the committee this afternoon and declare this meeting adjourned.

Committee adjourned at 6.26 pm