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LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Wednesday, 10 June 2009

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Feeney, Fisher, Ludlam and Marshall

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

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: To be advised...

Terms of reference for the inquiry:

To inquire into and report on: AusCheck Amendment Bill 2009

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Committee met at 10.05 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate's Legislation Standing Committee on Legal and Constitutional Affairs and our inquiry into the AusCheck Amendment Bill 2009. This inquiry was referred to the committee by the Senate on 14 May for report by 16 June 2009. The bill will amend the AusCheck Act 2007, adding a capacity to conduct background checks for national security purposes when such checks are authorised under some other legislative instrument. The bill would also make provision for such regulations to be made by the Attorney-General, authorise the collection and use of biometric information about individuals and extend the existing online verification scheme for establishing identity.

We have received seven submissions for 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. We do prefer all evidence to be given in public, but of course, under our resolutions, you may request 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 upon which it is claimed. We will start with representatives from CrimTrac.

[10.06 am]

CROSS, Mr Stewart, Executive Officer, CrimTrac

McDEVITT, Mr Ben, Chief Executive Officer, CrimTrac

CHAIR—Good morning and welcome. We have your submission, which has been lodged with us. Do you need to make any amendments to that before you begin?

Mr McDevitt—The submission can stand on its own. There are a couple of opening comments that I would like to make, if possible.

CHAIR—We will invite you to make that opening statement and then we will go to questions.

Mr McDevitt—Just to reacquaint the committee with where CrimTrac fits in terms of the criminal history checking/background process, CrimTrac was established back in 2000 to take a leadership role in generating national approaches to information sharing solutions for law enforcement agencies. We are not an operational agency ourselves, but we assist law enforcement agencies to achieve their objectives through delivery of rapid access to high quality national policing information services.

We also perform national criminal history record checking services for police jurisdictions and for accredited agencies. I need to stipulate, or make clear, that it is a distinct and different role from the role that AusCheck perform in that they perform a broader background checking service. The CrimTrac role is very specific and relates to criminal history information.

AusCheck is an accredited agency with CrimTrac and receives information about an applicant's criminal record in order to assist with that agency's background checking process. CrimTrac currently conducts point-in-time name based criminal history checks. In limited circumstances, fingerprint based criminal record checks are also conducted.

The key point that I wanted to make to the committee today is an issue around the criminal history checking process itself. The draft legislation refers to AusCheck using fingerprints as a biometric check where it may be required to verify identity where an issue of identity arises. We believe that this approach is not the most desirable approach and that, in fact, when somebody is seeking clearance to work in an area as sensitive as the national security environment that in fact the default position should be a check based around a fingerprint. We believe that establishing a person's identity unequivocally and uniquely requires a check of that sort of calibre to be able to actually give a level of certainty. We do not promote replacing entirely name based checks with fingerprint based checks, but we do believe that for something as important as working in an area such as national security our best advice would be that a fingerprint based check would be far more appropriate. \

We also note that this is a recommendation made by Mr Wheeler in his review of airport policing some years ago and, in fact, is also a trend that occurs overseas where checks relate to areas such as within the national security environment.

CHAIR—Mr Cross, would you like to add anything?

Mr Cross—Nothing further, thank you.

CHAIR—As I understand it, the main provisions of this bill expand the realm of the AusCheck capacity. At the moment it is just used for two areas. Now, subject to regulation, it will be much broader. Do you see a problem with that?

Mr McDevitt—No, I do not. At the moment our arrangements with AusCheck relate to them as an accredited agency which places a whole range of requirements on AusCheck in terms of security of the information, disclosure of the information and so on. That channel is one which is open and would remain open. Whether or not they were processing information relating to ASICs or MSICs, as they currently do, or whether there was a broader suite of information or request for information really for our arrangements would not have any great impact.

CHAIR—Your problem is around the practical impediments in respect of the fingerprint sharing or monitoring. Is that the issue?

Mr McDevitt—Yes. It is a broader issue than what is the main subject of focus here today. But it is an issue that the committee needs to be aware of. There is a great credence placed in this country on criminal background checks as being something on which the decision maker can place a lot of credibility in making a decision about somebody's suitability to be granted a specific licence or to be granted employment. I would

simply make the point that with the extent of identity theft, fraud and manipulation that occurs it is relatively easy to subvert systems and to be able to carry false or multiple identities. Our view is that a fingerprint based check would give a much higher level of certainty. There would be other sectors that this might also apply to, such as working with vulnerable people in the community and so on, but we think, particularly in the national security environment, the committee may like to consider the vulnerabilities associated with name based checking.

CHAIR—You are saying the use of fingerprinting is not only okay but should be the main means of identification? Is there not a problem then with the creation of separate fingerprint registrations in each state and territory? How do you overcome the need to have one consolidated database?

Mr McDevitt—There is only one national fingerprint database, which is the database hosted by CrimTrac.

CHAIR—That already exists, does it?

Mr McDevitt—In fact, for certain occupations there is already a requirement for a fingerprint based check. For example, if you want to work in one of Australia's police forces you are required to give a set of fingerprints and that is checked against the national fingerprint database. In fact, it is also a requirement in most jurisdictions in this country that if I want to work at a casino I need to give a set of fingerprints to have a background check done. Or indeed if I want to work at a racecourse or be employed in the gambling industry I would have to have a fingerprint based background check. It just seems to me that there is an imbalance if that is a requirement that applies only to working in a casino or a racetrack. Perhaps we should be considering that for people who are working in secure areas within airports and being given clearances at these sorts of high levels. Perhaps consideration ought to be given to fingerprint based checks with those environments as well.

Senator FISHER—May I ask a question?

CHAIR—I have not finished yet.

Senator FISHER—I have a question on something that Mr McDevitt said in respect of the racecourse and casino industries. Are those legislative impositions? What makes those requirements?

Mr McDevitt—My understanding is that it is legislation.

Senator FISHER—State, federal, industry based?

Mr McDevitt—My understanding is that it is state based legislation.

Senator FISHER—Is it uniform across all states?

Mr McDevitt—I would have to take that on notice.

Senator FISHER—Thank you.

CHAIR—It might go to the handling of money perhaps. That is peripheral to but not integral to what we are dealing with today. You are saying that when we see 'biometric' we should see 'fingerprint'? What are you suggesting we should do to this bill to make sure it is clear that your concerns are addressed?

Mr McDevitt—The bill introduces an ability for a biometric, and the biometric of choice here is a fingerprint to be utilised where identity needs to be confirmed or there is some doubt about either the veracity of the information that somebody is giving as to their identity. That essentially is the way it would work currently where somebody requires a check and there is a dispute or some lack of clarity because of similar name, date of birth or whatever. Confirmation is done via the person going to a police station and giving a set of fingerprints, which is then used to confirm the identity of the individual.

We are advocating that, rather than the fingerprint being used in that case as an exception, in fact the fingerprint be used as a default. In the first instance there should be a requirement for a person wanting this sort of security clearance to work in the national security environment to actually give a set of fingerprints.

CHAIR—Senator Fisher, did you have any questions?

Senator FISHER—Is 'default' the right description of what you are seeking? I am not sure it is.

Mr McDevitt—'Default' might not be the right word. The bar is set at a name based check. We believe that is a very low setting in terms of confirming, with certainty, that the person in front of you applying for this particular clearance is actually who that person is claiming they are.

CHAIR—The best way to do that is with fingerprints?

Senator FISHER—I understand that point. That is why I was just exploring the use of the word 'default'. 'Default', to me, implies that if you try the name based system and that does not work or for some reason it is

not sufficient for a particular person then you might default to fingerprinting. Whereas I think you are saying that, in all of these instances, the better, preferred and obligatory mechanism should be fingerprinting.

Mr McDevitt—That is correct.

Senator FISHER—Was your organisation consulted in the drafting of this bill?

Mr McDevitt—Only very late in the piece.

Senator FISHER—What was the process?

Mr McDevitt—The process, as far as I am aware, was myself contacting the Attorney-General's Department about the committee and the inquiry into the draft amendments and our concerns in relation to the issue of fingerprint based checks. We also had concerns about how biometrics would be stored and where that information would be disseminated and so on if that were the case. Through my discussions with the Attorney-General's Department my concerns have been allayed in terms of any intention to collect and store fingerprints other than for the purpose of matching them against the national fingerprint database.

Senator FISHER—You are saying your concerns in respect of the biometrics collection and storage were met through that process?

Mr McDevitt—That is correct.

Senator FISHER—If I understand you correctly, you contacted the Attorney-General's Department of your own volition once you became aware that the bill was in the ether?

Mr McDevitt—That is correct.

Senator FISHER—How did you become aware?

Mr McDevitt—Personally I was overseas for the last four weeks. I got notification via email that this process was occurring. We were requested/invited to make a submission. That process of making a submission was then the catalyst for my making contact with the department in relation to some of the draft wording of the bill.

Senator FISHER—I do not want to labour the point, but you become aware of the existence of the bill through this inquiry, did you?

Mr McDevitt—That is correct.

Senator FISHER—Was there an amendment to the draft bill prior to it coming to this inquiry?

Mr McDevitt—No.

Senator FISHER—How were your concerns in respect of biometrics, as you say, met by the department? Were there verbal reassurances?

Mr McDevitt—Yes, that is exactly right. I was seeking clarity from the department in terms of their intentions around biometrics, noting that the draft amendments introduced an opportunity for biometrics to be taken to give certainty to identifying an applicant. My concern was around whether or not the department intended to actually itself collect and store biometric information. The reason that I had those concerns was that Australia is the envy of the world in that we only have one national fingerprint database. We do not have multiple databases. Where there are multiple databases is where you start to get vulnerabilities around matches and so on, which is why we are going down the path of storing, for example, fingerprint information from departments such as Fisheries, Immigration and so on, rather than separate databases being established.

In seeing the draft legislative amendments here I was concerned about whether or not there was an intention for AusCheck to actually collect and store biometric data themselves. In having discussions with the Attorney-General's Department those fears were allayed and, in fact, the department has no intention at all of actually themselves collecting and storing biometric data.

CHAIR—Has your concern on page 2 of your submission about the collection of biometric data now been addressed?

Mr McDevitt—That is correct.

Senator FISHER—Could the Attorney-General's Department point to anything in the bill that confirmed your reassurance that those concerns had been met? Could they point to any provisions in the bill that reassured you that the biometric data would be stored in the national database as opposed to AusCheck retaining it?

Mr McDevitt—No, they could not, and hence the reason for my concern. I could not find anything within the draft amendment that actually allayed my concerns. It was only after having discussions with Mr Alderson that I became satisfied that their intention was, in fact, to utilise the existing national fingerprint database hosted by CrimTrac.

Senator FISHER—Intentions are very well and very honourable, and intentions can of course change subject to circumstances of the time. We can ask the Attorney-General's Department about that later. Chair, I have one more question, but I do not want to take time that others may wish to utilise.

CHAIR—Perhaps one more and then we will go to Senator Ludlam.

Senator FISHER—Consistent with what you have been discussing and talking about the importance particularly internationally and nationally of a national fingerprint database, how do you know that to be the case given that, as you have outlined, potential employees in the racing and casino industries are required to identify themselves by way of fingerprint? If that is not a requirement imposed by national legislation—and you may not be the person to ask this—how can we be reassured that once collected those fingerprints are in fact stored in the national database rather than somewhere else?

Mr McDevitt—I could not guarantee that they would or would not.

Senator FISHER—It may be a question for someone else.

Mr McDevitt—Quite frankly, there would be limited value in their being stored somewhere else. I am not sure for what purpose.

Senator FISHER—I have one further question. Would you have expected to have been consulted about this bill from the outset?

Mr McDevitt—Yes.

Senator FISHER—On what basis would you have had that expectation?

Mr McDevitt—For several reasons, one of which is just in terms of good practice as a portfolio agency of the department. I think a culture of consultation is obviously a useful thing to have. There are two particular reasons. One is that the issue of biometrics is raised and CrimTrac is the host of the two major national biometric databases, being fingerprints and DNA. The second reason, of course, is that CrimTrac does play a central pivotal role in terms of being the single broker of criminal history information for a whole range of accredited agencies, including this one, AusCheck.

Senator FISHER—Did you raise your expectation with the Attorney-General's Department or anyone else, and have you had a response?

Mr McDevitt—Yes, I certainly did, and I have. I have been assured that the culture of consultation that I referred to will be picked up.

Senator FISHER—It will be picked up in the future?

Mr McDevitt—That is correct.

Senator FISHER—Thank you.

CHAIR—Senator Ludlam, do you have any questions?

Senator LUDLAM—I have a couple of questions. I will not be long. Can you tell us how feasible it would be for CrimTrac to assume responsibility for the role that is currently occupied by AusCheck? Would there be any utility in merging the agencies and has that been considered before?

Mr McDevitt—I am sorry, I had a little bit of trouble hearing you. I think that you asked: would it be possible for CrimTrac to perform the full role that AusCheck currently performs?

Senator LUDLAM—Yes, that is right. Has that been considered in the past and would there be any utility for that?

Mr McDevitt—I am not sure whether it has been considered in the past. Given that AusCheck, as I understand it, is an operating division of the department, perhaps that is a question best addressed to the department themselves. Certainly in terms of the process, the role that CrimTrac fulfils in background checking is limited to the provision of criminal history information. Obviously the background checking processes undertaken by AusCheck are a lot more encompassing and broader than the subset of information that is contributed by CrimTrac, which relates specifically to the criminal history component.

Senator LUDLAM—Can I point you to the very bottom of the third page of your submission. It is under the section headed ‘Disclosure of Biometric Data’. Can you talk us through exactly what you mean there?

Mr McDevitt—Which page?

Senator LUDLAM—On the bottom of page 3 of your submission there is a heading ‘Disclosure of Biometric Data’. The paragraph starts, ‘It may be prudent in the light of above information ...’

Mr McDevitt—The point there was to make it explicit that the identity verification information could be disclosed to CrimTrac and Australian police services. At the moment, as I understand it, there is provision for the information to be given to the Australian Federal Police but not necessarily to CrimTrac or to Australian police services.

Senator LUDLAM—You would suggest that that is ambiguous in the bill at the moment? The last question I have relates to the way in which people who are seeking these background checks come to AusCheck. How is their consent obtained and to what degree are they aware of the sorts of background checks that are being performed?

Mr McDevitt—In relation to the elements of the background check that are beyond the criminal history background information, that part of the question is better addressed to the department. In relation to the criminal history information, CrimTrac requires specific informed consent to be given by an individual for a criminal history background check to be initiated by CrimTrac. Those requirements are very clear in our accredited agency documentation with each of our accredited agencies, including AusCheck. It needs to be made very clear to an individual that their criminal history information is being sourced for a particular reason and being made available to decision makers for very specific and limited purposes.

Senator LUDLAM—How much information are people given when they put in an application for this kind of background check? How much detail do you go into about the sorts of searches that are to be performed and the sort of information that will be assessed?

Mr Cross—Each agency that undertakes a background criminal history check has an application form that an individual completes. Within that application form is what is known as an informed consent, which informs that individual who is going to access the information—CrimTrac and the police services—the purposes for which that information will be accessed and then who that information will be released to, which is usually the accredited agency. They are consenting to the information being released back to the accredited agencies for the purposes of that particular check for AusCheck—obviously an ASIC or an MSIC check; but in a range of other agencies it may be child related employment or aged care.

They are also informed about the spent conviction legislation that exists around the country and what can and cannot be released under the various spent conviction regimes that exist not only for the Commonwealth but for various states and territories. That is what is encompassed within that informed consent that the individual is made aware of.

Senator LUDLAM—On the bottom of page 4 you have a section headed ‘National Police Reference System’, the NPRS. You mention that the NPRS is used by most states and territories. Who is it not used by?

Mr McDevitt—The NPRS is utilised by all states and territories and also by the Australian Federal Police.

Senator LUDLAM—It says ‘by most states and territories’ in your submission, so I just wondered whether anything was left out.

Mr McDevitt—We need to correct that. It is utilised by all states and territories. Whoever authored this report was probably referring to the provision element to the National Police Reference System and a consumption element to it. All state and territory police forces provision information to the National Police Reference System, and as part of the national rollout, which I think will be completed by the end of July, they will also consume from the application.

Senator LUDLAM—Thank you for your answers. That is all I have for CrimTrac.

CHAIR—Senator Ludlam, is that all for you?

Senator LUDLAM—Yes.

CHAIR—Senator Barnett.

Senator BARNETT—Thank you for your submission. Are you familiar with the Legal and Constitutional Affairs Committee report of 2007 that was done by this Senate committee in regard to the AusCheck 2007 legislation?

Mr McDevitt—No, not in any detail.

Senator BARNETT—I mention it because it raised a number of concerns, particularly about privacy matters, civil libertarian issues, and the breadth and extent of checking empowered under the initial bill. We made a whole range of recommendations and expressed a whole range of concerns at the time regarding the initial bill. In light of that—and noting you have not seen it—do you have a view with respect to the breadth of the background checks empowered under this bill, and in particular the last two in section 8, where it states:

The regulations could provide for the establishment of background checking schemes for the purposes related to—
and the last two—

... the Executive power of the Commonwealth or matters incidental to the execution of any of the legislative powers of the parliament or the Executive power of the Commonwealth.

Frankly, that is incredibly broad and it could mean just about anything. Have you given any consideration to the merit of including such broad powers which would then be promulgated via regulation?

Mr McDevitt—No. I have had no involvement in the drafting. I think that is a question best put to those who actually drafted the legislation.

Senator BARNETT—In your role you have to try to do your job, but it is subject to protecting the rights and civil liberties of individuals, companies and so on in the execution of your role; is that correct?

Mr McDevitt—That is correct.

Senator BARNETT—You have to balance those things.

Mr McDevitt—That is correct.

Senator BARNETT—Those issues have been raised by a number of submitters to this committee, including the law council, so we will pursue it with them and indeed with the department. I wanted to follow up the issue of consent for background checks, which Senator Ludlam touched on. You seem to express a concern that under amendment 9 it provides that the consent is implied, whereas you say in your last paragraph on page 4 that ‘CrimTrac is fully aware of its obligations under federal privacy provisions and as such requires full informed consent’. Do you think the bill before us does not go far enough?

Mr McDevitt—Prior to having discussions with the Attorney-General’s Department we had some concerns in that regard, because we were not sure exactly how this would work in practical terms. The arrangements that we have with accredited agencies are based entirely around express fully informed consent of an individual as to exactly what information was going to be obtained, exactly who it would be disseminated to and exactly what it would be used for. We have since had discussions with the Attorney-General’s Department, and my understanding is that when somebody applies for one of these checks they will be given very specific guidance in terms of a privacy pro forma to ensure that they are fully aware of what it is that they are entering into and what information is going to be passed to whom and for what purpose.

Senator BARNETT—That is not set out in the bill. That is some sort of piece of paper that will be passed to the people concerned; is that what they indicated?

Mr McDevitt—Again, it is probably best to put that to those who are actually operating the scheme.

Senator BARNETT—Just on that matter, I know Senator Fisher has indicated this. You requested a meeting with the department to express your views and put forward your thoughts on these matters?

Mr McDevitt—Yes, that is correct.

Senator BARNETT—I congratulate you on that. Thank you for being proactive. It is certainly gravely disappointing that there has not been adequate consultation with the relevant authorities. On page 2 of your submission, halfway down, you said of the proposed amendment that it is not obvious who would be responsible for collection of the identity verification information. I am not sure whether you touched on it before I walked in, but can you outline to us your concerns in that regard? I noticed that you referred to the different identity systems in the different police systems. This is halfway down, in the third last paragraph on page 2:

It is not obvious from the proposed reforms who is responsible for collecting this information.

It is a good point.

Mr McDevitt—Yes. We were seeking more clarity in terms of exactly what information would be collected, who it would be collected by and where it would actually be stored. My fears were allayed after

discussions with the department. I have been advised that the intention would be that, if biometric information were to be collected, it would be collected via the local police force and then transmitted to the national fingerprint database maintained by us.

CHAIR—You have already explained that to us earlier in your evidence.

Mr McDevitt—That is what we went through.

Senator BARNETT—Your submission was received on 3 June 2009. When was your meeting with the department?

Mr McDevitt—Only yesterday.

Senator BARNETT—That is the eleventh hour.

Mr McDevitt—In fairness, I have been out of the country for a few weeks.

Senator BARNETT—I appreciate that. I have some further questions, but they have been covered by the other senators. Thank you.

CHAIR—Mr McDevitt and Mr Cross, thank you very much for your time this morning. We certainly appreciate your assisting us with the inquiry into this legislation.

[10.43 am]

BUDAVARI, Ms Rosemary, Director, Criminal Law and Human Rights Unit, Law Council of Australia

MOULDS, Ms Sarah, Policy Lawyer, Criminal Law and Human Rights Unit, Law Council of Australia

CHAIR—I welcome representatives from the Law Council of Australia. I remind you that we have Senator Ludlam with us this morning via the telephone. We have received your submission, which we have numbered five for our purposes. Before I ask you to make an opening statement, do you need to make any changes or amendments to that?

Ms Moulds—We just wanted to make two points of short clarification. The first relates to paragraph 79 of our submission on page 16, which concerns the proposed changes to consent. In that paragraph we state that we have not seen the proposed regulations that would be made under the 2009 bill. We have now had a chance to see the exposure draft of those regulations, but we note that they do not deal with that particular issue of the advice relating to consent to a background check upon application.

CHAIR—What paragraph was that?

Ms Moulds—Paragraph 79. The second point of clarification is that, since writing our submission, we have had a chance to look at the March 2009 Privacy Impact Assessment in respect of the bill and that has some recommendations that were relevant to our submission that we will highlight today.

CHAIR—That would be useful. I will ask you to make an opening statement.

Ms Moulds—Thank you for the opportunity to appear before the committee on behalf of the Law Council. The Law Council is the peak body for Australian lawyers and we represent over 50,000 members through their local law societies and bar associations. As the committee may be aware, the Law Council has a history of advocacy in relation to the AusCheck scheme. We appeared before this committee in 2007 when it inquired into the 2006 AusCheck Bill and raised concerns that that bill failed to establish clear parameters on the purposes for which background checking could be undertaken and enabled new purposes to be added by regulation without the details of these schemes being specified in primary legislation. The Senate committee shared these concerns and recommended that the 2006 bill be limited to providing background checking regimes in relation to two pieces of primary legislation and their related regulations concerning aviation and maritime security.

The Law Council now appears before the committee to again raise its concerns at the government's efforts to expand the AusCheck background checking scheme into new areas via regulation, and we also have a number of concerns with the proposed identity verification scheme that relies on the use of biometric data.

The 2009 bill would allow for AusCheck regulations to be promulgated which create new screening regimes independent of other legislation. Item 7 of the bill would amend section 8 of the AusCheck Act to broaden the range of background checking schemes that can be established by regulation to include purposes related to Australia's national security, the defence of Australia, a national emergency, the prevention of certain terrorist related offences, the executive power of the Commonwealth or matters incidental to the execution of any of the legislative powers of the parliament or the executive power of the Commonwealth.

The Law Council notes that the second reading speech to the 2009 bill suggests that the proposed amendments to subsection 8C would be read down to be limited to national security purposes by virtue of other amended provisions such as proposed subsection 4(1). However, despite these assurances, the proposed amendments to section 8 are broadly worded and potentially allow a background scheme to be established by regulation for any matter incidental to the executive or legislative power of the Commonwealth. As a result, we are concerned that the proposed subsection 8C provides few meaningful limits on the range of background checking schemes that can be established by regulation.

Given the broad language of proposed subsection 8C, the 2009 amendments continue to raise concerns about the ability of the executive to expand the AusCheck scheme into new areas via regulation. We are concerned that the 2009 bill authorises the executive to conduct background checks for a number of broadly framed purposes whenever and however it decides it is necessary without requiring robust scrutiny of parliament. We believe that the 2009 bill should only enable AusCheck to administer background checking schemes that are already authorised by parliament in the context of another legislative scheme. Without seeing primary legislation and associated regulations it is impossible to determine whether a requirement for an

individual to undergo a national security background check is justified in the circumstances and whether the personal information that will be collected for that check is necessary.

The Law Council is also concerned that little justification has been provided as to why such a significant expansion of the AusCheck scheme is warranted. For example, inadequate explanation is provided in the explanatory memorandum as to why it is necessary to include an open-ended power to expand the AusCheck regime by way of regulation in the area of national security, let alone the need to add for purposes relating to any matter incidental to the execution of any legislative or executive powers of the Commonwealth. For these reasons, we recommend that proposed clause 8(1)(c) of the 2009 bill be deleted or at least amended to confine the AusCheck regime to conducting and coordinating background checking for the purposes of Commonwealth acts that directly authorise the screening of persons for a particular reason.

We are also concerned by the provisions of the 2009 bill that seek to introduce the use of biometric data to verify personal information in the AusCheck regime. The introduction of this system of identity verification is a significant addition to the scheme and one that we think requires careful consideration by parliament. The development of biometric technology has been described as in its infancy and its accuracy as a tool for identification and verification of identity remains subject to scientific debate.

Further, the use of biometric data has a range of serious privacy implications. It concerns the collection and use of bodily features and may reveal sensitive information, such as information about illness or physical disabilities. The serious privacy implications of the use of biometric data for verifying identity have been acknowledged by the Australian Law Reform Commission in their recent review of privacy laws in Australia and has received considerable attention from governments and privacy organisations around the world.

We recognise that the 2009 bill attempts to provide a measure of protection for biometric identity verification information. However, we query whether these protections provide enough protection, given the highly personal nature of biometric material and the grave consequences that could flow from its misuse or mishandling.

The Law Council also queries, in the absence of compelling evidence demonstrating the ineffectiveness of the current system, whether it is necessary to introduce such an identity verification system into the AusCheck regime. We note that the March 2009 privacy impact assessment recommends that the bill be amended to remove the ability for AusCheck to collect fingerprints or other biometrics. We recommend that, before a system of identity verification based on the use of biometric data is introduced, parliament should be satisfied that this system is necessary and effective to overcome existing difficulties in identity verification, and it must provide adequate protection against the potential for intrusions into personal privacy.

In conclusion, the Law Council maintains the position it advanced when the AusCheck scheme was first established, and that is that the AusCheck scheme should be limited to conducting and coordinating background checking for the purposes of Commonwealth acts that directly authorise the screening of a person for a specified reason. It should not be exponentially expanded by the introduction of provisions enabling new schemes to be added by regulation. We also urge parliament to carefully consider the privacy implications of the introduction of an identity verification system based on biometric data.

CHAIR—If the bill was amended and the committee and the government took up your suggestion to delete clause 8(1)(c), as you suggested, what Commonwealth acts are you specifically referring to that this bill would need to relate to?

Ms Budavari—One of the acts is referred to in our submission. It is called the National Health Security Act, which has some relevance to security sensitive biological agents. What we are saying, effectively, is that we want to see that primary legislation and regulations before we can make a proper assessment of how far this particular AusCheck amendment bill goes. It is a bit like putting the cart before the horse. Some of the material about the bill says that it is just there to establish a framework and, of course, there will be other legislation that links to that framework.

CHAIR—Or regulations?

Ms Budavari—Or regulations that link to that framework. It is a different situation from the situation that the committee found itself in back in 2007 because, at that stage, the aviation security legislation and regulations and the maritime security legislation and regulations were already in effect for everyone to see what parameters of the checking would be required. But instead under this amendment we have some vague notions of national security and national emergency. As has been pointed out, there are quite broad provisions

about matters incidental to the legislative and executive power of the Commonwealth. It is impossible in that situation to assess it.

CHAIR—You are saying it is hard to judge the merits of this legislation if you do not have regulations in front of you by which you can test that standard. Is that what you are putting to us?

Ms Budavari—Yes.

CHAIR—If clause 8(1)(c) were deleted, why would you not accept the argument that CrimTrac has just put to us that, if you are very clear about what you are testing this legislation against, the pre-eminent test for a person's identity should really be a biometric threshold rather than just name checking or person identification; that the way you really tell who that person is would be by fingerprinting? My question to you is: if we did delete 8(1)(c) then surely your second recommendation would be erroneous?

Ms Budavari—We would have serious concerns if 8(1)(c) were deleted and replaced with reliance on biometric information for identity checking. That is for all the reasons that are outlined in our submission about the difficulty with respect to the privacy implications of relying on biometric information alone. Certainly fingerprinting has been around for a long time and you could not apply this argument to fingerprinting, but there is no definition of 'biometric identification' in the legislation itself.

CHAIR—Does there need to be?

Ms Budavari—Yes, there should be. We have found, in the course of our research on what is encapsulated in biometric information, that a very broad range of information and technologies are still not completely tested as to their accuracy.

CHAIR—If you were quite certain about which Commonwealth acts or which regulations this bill would apply to, surely you would accept CrimTrac's argument that fingerprinting is reliable and should be the main basis upon which you identify people?

Ms Moulds—The proposal in this bill is to use biometrics for identity verification, so they would still be establishing identity, as we understand it, through the use of personal information documents. They would then be identifying those identities through biometric data. Our concern is that before you establish a system where you are going to store, transfer, disclose biometrics and collect them, you really need to look at whether that is necessary for the verification purpose or whether there is not some other way you could verify identity. If you are going to implement the system, you definitely need to look at the sorts of considerations that have been identified by the Biometrics Institute Code and the Council of Europe that look at things like how this material is collected, whether it is collected with the informed consent of the individual, the type of system that it would be stored on, whether the system would be audited subject to different reporting requirements and how that data would be transferred between agencies, if necessary.

CHAIR—Do we already have that or protocols around that when it comes to the national fingerprint database?

Ms Moulds—CrimTrac probably has information about how they go about storing and transferring information about fingerprinting. We cannot tell from this bill the types of features of the system of collection and storage of biometric data that would apply to the schemes that were created under this bill.

CHAIR—Ms Budavari, would you put it to us that you have the same concerns with this legislation as you did in 2006-07?

Ms Budavari—They are very similar concerns. They are not completely the same. Clause 8 has been drafted differently. Some of the long list that was originally in the 2006 bill has been deleted, but particularly the two matters that Senator Barnett referred to with CrimTrac are still of serious concern to the Law Council.

CHAIR—Do you think giving the minister or a government the powers to just create regulations with respect to different areas some time in the future about matters undefined is too broad?

Ms Budavari—Yes. That is it in a nutshell.

CHAIR—Senator Barnett.

Senator BARNETT—Thank you for your submission. It is very thoughtful and very persuasive. Just going back to the Senate committee of 2007 and its review of the 2006 bill, you supported that unanimous report and the recommendations in it?

Ms Budavari—Yes. I think that is set out in our submission.

Senator BARNETT—Yes. I wanted to get that on the record, because it made a whole list of recommendations. I have them in front of me. There were 10 of them. That report actually recommended paragraph 8(1)(c) of the bill be removed, and that is obviously a view that you still hold. I want to get clarity around this. You hold that view, but you also have a backup view which is that if that is not the case then you support, page 15, item 73:

That 8(1)(c) be deleted or at least amended to confine AusCheck to conducting and coordinating background checking for the purposes of other Commonwealth acts which directly authorise the screening of persons for a specified reason.

I am keen to flesh that out with you and ask if you can drill down a little further. Firstly, what is your preferred position? Secondly, regarding the backup position, can you flesh that out and give us some examples of different Commonwealth acts that may be relevant to directly authorising the screening of specified persons for specified reasons?

Ms Budavari—To answer the first question, it would be the preferred position that 8(1)(c) completely come out, but recognising that there are some compelling arguments, including the arguments that are put in the explanatory memorandum for expanding this scheme to some areas that do touch on national security, the only one that we have specifically looked at is the National Health Security Act so far. Perhaps we could take that question on notice and get back to the committee.

Senator BARNETT—Did you want to say anything, Ms Moulds, to answer that question?

Ms Moulds—Just that the example given in the explanatory memorandum for the type of check that they are seeking to establish by this bill is connected to the COAG review of hazardous materials. I would reiterate what Ms Budavari said, that there is an act that touches upon this at the moment, the Commonwealth National Health Security Act, and that if this is the type of area that AusCheck needs to be expanded into or the government can establish a case for its expansion then we would want to see the legislation and the regulations establishing that regime before AusCheck was expanded.

Senator BARNETT—For sure. We do not have that before us, of course?

Ms Budavari—No.

Senator BARNETT—I would like to have a look at 8(1)(c). I am interested in your view. There are a number of dot points, obviously—national security, defence, national emergency, terrorism. As to the last two dot points, how extensive and how broad are they? It seems to me that they could include just about anything that the government wishes to do at any time for any purpose. Secondly, what are your fears surrounding those two dot points?

Ms Budavari—We would agree, and we have made the point in the submission, that those last two subparagraphs are very broad and could potentially open up the scheme to any purpose. It has been argued in the second-reading speech that in looking at the bill as a whole, and also at the draft exposure regulations, there would be some kind of reading down of those subparagraphs to relate to the national security purpose. A simple reading of it, just looking at it on its face, does not indicate that. If that is the intention, we would like to see some kind of direct nexus in the legislation itself.

Senator BARNETT—Ms Moulds, did you want to add anything to that?

Ms Moulds—No.

Senator BARNETT—With this issue about the privacy impact assessment on the 2006 bill, have you considered the contents of the 2009 assessment?

Ms Budavari—Yes.

Senator BARNETT—I understand that was tabled with the amendment bill. What is your view on it?

Ms Budavari—As Ms Moulds said while she was gathering her notes on the 2009 assessment, we became aware of that assessment only fairly recently so we have not looked at it in great detail, but we are heartened by some of the recommendations in that more recent assessment, particularly in relation to removing the fingerprint verification scheme, or at least substantially amending the parameters of the fingerprint verification scheme.

Ms Moulds—There is also an observation about the privacy risks of the 2009 bill, where the privacy impact assessment expresses a view similar to the earlier privacy impact assessment, which is that the devil will be in the detail of the particular scheme. Again, it is very difficult to establish in any particular

background checking regime established under the regulations whether the background check is justified and the collection of the particular personal information is reasonably necessary for the check.

It also points to the problem of function creep. The number of people subject to national security background checks under the regime could significantly increase relatively easily because of the ability to add new purposes by regulation. We note that there are some other recommendations that indicate an attempt to clarify or limit the scope of the potential national security background checks, such as recommendation 11. We would say that it highlights the problem that if you cannot see the detail of the particular background checking scheme then it is difficult to completely assess the privacy risks for the individual under that scheme.

Senator BARNETT—That makes sense. Do you support the recommendations of the privacy impact assessment?

Ms Budavari—I do not think we have actually gone into it in enough detail to answer yes or no to that question, but certainly the thrust of the 2009 privacy impact assessment seems to reflect a number of the concerns that we had already identified and would, in fact, seem to support some of those concerns.

Senator BARNETT—You certainly support the thrust of where we are headed?

Ms Budavari—Yes.

Senator BARNETT—Do you have a view with respect to the Australian Law Reform Commission and its work in this area? Do you have any response to that and do you want to share that view with the committee?

Ms Budavari—The Law Council did make a submission to the Australian Law Reform Commission inquiry into privacy. That submission did touch on some of the difficulties with biometric information. The Law Council would continue to agree with some of the concerns that have been raised by the Law Reform Commission about the widespread use of biometric systems and the need for particular privacy protections around the use of those systems.

Senator BARNETT—I will move on. The issue of consent came up earlier. I asked CrimTrac some questions about it. I just wanted to get on the record your views regarding this implied consent or deeming of consent under the proposed subsection 9(iv) and your views as to how it can be fixed or improved.

Ms Budavari—Our preliminary comment is that our submission does identify proposed subsection 9(iv) as problematic in terms of implied consent related to the fact of a person simply making an application. Again, in relation to the material that has been produced by the Australian Law Reform Commission around consent, the Law Council is in agreement that the consent needs to be full and informed. Therefore, having a provision which implies consent by virtue of someone making an application we consider to be problematic. It is worth noting that that provision also incorporates the requirement to issue someone with a privacy notice and that that is available on the AusCheck website, as is a large amount of material which can assist people who are in this situation, so it has to be conceded that AusCheck does provide a significant amount of material: service charters, privacy policies, privacy notices, and a frequently asked questions guide on the website. If you look at the privacy notice itself, it is quite sparse in terms of the information that people are given and it would need to be redrafted, obviously, if biometric information was going to be collected as well.

It does not deal with things like whether there is going to be any transporter storage of data or data flow. We would be suggesting that there needs to be much more information given to both the individual and the issuing body in relation to allowing for a full and informed consent. The Law Reform Commission, in its report, deals with these types of issues of what they call bundled consent, which is a little bit similar to implying consent from someone making an application. There is quite extensive discussion of the need for full and informed consent in relation to each piece of information that is collected.

Ms Moulds—From the information that we have been able to gather, at the moment every AusCheck background check occurs via an issuing body, so it is a third-party application by the issuing body. Each of those applications would potentially fall within this situation of consent. We think that it is necessary to make sure that, through that process, the individual is completely aware of what a background check would involve and fully consent to that process when they make the application for their security card or licence.

Senator BARNETT—Thank you.

CHAIR—Senator Ludlam, do you have any questions?

Senator LUDLAM—Senator Barnett has asked most of the things that I wanted to check in on. We have got the Attorney-General's Department coming up next and I presume they are going to tell us that our concerns are unfounded because this bill is essentially a hollow shell and it cannot be filled up, apart by

legislative instrument. Unless there is specific direction in regulation, the bill is not going to have the sort of impacts that we are describing or that we are fleshing out here. I am just wondering if you could, somewhat pre-emptively, just give us your thoughts on that?

Ms Moulds—Our position that we advanced in respect of the 2006 bill would apply here. We think that proposing a new scheme by regulation does not lend itself to the type of robust parliamentary scrutiny that comes from a primary piece of legislation that sets up parameters about a background checking regime. It might be possible to argue that regulations still go through a parliamentary process, but it is not the kind of process where you would be able to robustly evaluate the necessity of implementing a background checking regime, the parameters for that regime, the type of information that would be collected and the purpose for which the regime would be constructed. We do not feel that establishing new regimes, by regulation, would satisfy that kind of concern.

Senator LUDLAM—This would go back to what you mentioned in your opening statement in that, unless there is specific legislation pointing to this bill or this amendment, then you think that the regulations could just fly under the radar of parliamentary scrutiny?

Ms Moulds—Yes. With the example at the moment of the aviation and maritime security regimes, the framework was already there. Parliament had a good sense of what this regime would involve and it was possible to see the detail of that regime. Under this bill the potential detail of any background checking regime that could be established is uncertain.

Senator LUDLAM—Apart from the very broad framing in 8(1)(c). Is this just somebody trying it on again? How different is this from what was attempted in 2006 and 2007?

Ms Budavari—If you look at the 2006 bill there was a much longer list of possible powers that could be relied on for establishing different types of background checking schemes. There has obviously been some attempt to reduce the number of different types of areas that background checking could be undertaken in, but the essential point remains the same. To us, there is little justification in any of the materials that we have looked at for particularly those two subparagraphs about the executive power of the Commonwealth and the power incidental to the legislative and executive powers. We would like to see that. We would be quite happy to listen to arguments about that, but we just do not see those arguments being there at the moment.

Senator LUDLAM—One of the key differences is that in 2006 we had a very long and detailed list and then in 2009 we have a very wide blanket covering the field, as it were?

Ms Budavari—Yes.

Senator LUDLAM—I have no other questions. Thank you very much for your evidence today.

CHAIR—Ms Moulds, did you want to add anything there?

Ms Moulds—I wanted to add another potential difference between this bill and the 2006 bill, which is that there is a proposed amendment to subsection 4(i) that would introduce this definition of national security background check, which then refers to checks that are conducted under the 8C paragraph. When you look at the second-reading speech the argument presented there is that features such as this national security background check definition would enable proposed paragraph 8C to be read down to only apply to national security matters. As we have pointed out, on a plain reading of proposed 8C, that is not explicit.

Senator LUDLAM—It is highly ambiguous drafting. Thank you. I have no other questions.

CHAIR—Senator Fisher, do you have any questions?

Senator FISHER—I do. Was the Law Council consulted in the process leading to the drafting of the bill?

Ms Budavari—No.

Senator FISHER—Would you have expected to have been consulted?

Ms Budavari—We are consulted from time to time on Commonwealth legislation.

Senator FISHER—By whom?

Ms Budavari—By the Attorney-General's Department. It is probably fair to say that it is ad hoc. I suppose, given that we have made a submission to the Senate committee in 2006, there may have been some expectation that we would be consulted, but we certainly do not expect to be consulted on every bill.

Senator FISHER—But some basic auditing of past history would indicate a clear interest from the Law Council, would it not?

Ms Budavari—Yes.

Senator FISHER—What was your first involvement with the draft bill?

Ms Moulds—When it was introduced we realised that there was going to be these amendments coming so we put some effort into examining the amendments.

Ms Budavari—Probably after it had been referred to this committee was the point at which we became aware of it.

Senator FISHER—We are very pleased that you are here today, as others have said. Have you had any discussions or correspondence with the Attorney-General's Department in respect of the draft bill?

Ms Budavari—No.

Senator FISHER—In respect of your concerns about the bill's reference to biometric information and, in particular, your not inappropriate concern that there is no definition of that term, you suggest that the bill does provide some clarification of the purpose for which biometric testing must be done. You then seem to qualify that in paragraph 95 by suggesting:

However, there is no after-the-event mechanism to ensure that the purpose for which biometric data is supposedly being collected is indeed the purpose for which it is being used.

Firstly, is my understanding of what you are saying correct? Secondly, can you expand on what you mean and how would you fix it?

Ms Moulds—Your observation of our point is correct. We recognise that the bill attempts to distinguish between personal information and identity verification information, and provides certain limits on the use and disclosure of identity verification information, but there is not much in the bill to tell us about how this system will operate or how it will be audited or reviewed and reported on. So it is difficult to get a sense of how one would ensure that the limits on use and disclosure of the information were being complied with.

Senator FISHER—You were in the room for CrimTrac's submission, so in a general sense, at least, would you share CrimTrac's concerns about the collection and storage of centralised data?

Ms Budavari—I think we came in at the end of CrimTrac's evidence. We probably cannot comment directly on that, other than to say that there are concerns and there is literature about this, including European literature, that we have referred to in the submission about particular concerns with the storage of biometric information.

Another related issue is the one example that seems to be given in the explanatory memorandum—I cannot recollect if it is in the second-reading speech—is a criminal history check which brings up two people with the same name and the same date of birth. The justification is then given for the need for a fingerprint check. What we are also questioning is whether there is no other method of distinguishing those two people that does not involve a biometric check. Under anti-money laundering legislation there is a range of electronic identity verification tools that perhaps are an alternative to going down the biometric route, or is it possible in that circumstance for the person to be asked one more question, such as what is their mother's maiden name, to distinguish them? It just seems to be quite an assumption that, in that situation, you then need to go to a biometric identity verification system. It is interesting that the privacy impact assessment of March 2009 says that in that situation it should be up to the police agencies involved to sort out and make that distinction, and that they should be capable of doing that without going to the biometric solution.

Senator FISHER—Is it your understanding that biometric—whatever it is supposed to mean—includes fingerprinting and DNA testing?

Ms Budavari—Yes. The literature would clearly include those things.

Senator FISHER—If the reference in the bill to collection of biometric stuff were deleted and replaced instead with the collection of fingerprint and DNA data to confirm identity, would your concerns with biometric collection and associated concerns fall away?

Ms Moulds—I do not think they would fall away. Some of them would change slightly, in that other forms of biometric, such as iris scanning, can be collected without any knowledge, let alone consent, of a person. Fingerprinting and DNA potentially have methods that involve knowledge and consent.

Senator FISHER—Unless you watch *CSI* when you see other ways, but we do not do that, do we?

Ms Moulds—The general concerns about whether this is necessary and an effective means of solving the identity verification problems, and also the concerns about the storage transfer disclosure of this information, would still remain.

Senator FISHER—Yes. Chair, I have one more question to finish this issue?

CHAIR—Yes.

Senator FISHER—Can I take you to paragraph 8A of your submission where clearly your primary position is the deletion of Clause 8(1)(c), but then you essentially say in 8A on page 3:

Failing that, confine AusCheck to background checking for purposes of other Commonwealth acts which directly authorise the screening of persons for a specified reason.

Consistent with what you have said to us today and in your submission, would you also, as the Law Council, add to that ‘for a specified reason and in a specified way’, which would potentially allow for different sorts of testings for different purposes, that is different specified reasons, and it would also enable the limitation of the mechanisms used if that were your primary position? I am asking you to flesh it out a little more. Clearly, you are saying get rid of 8(1)(c). The government presumably wants it in there; that is why it is there. You are then saying that, if that fails, authorise the screening for a specified reason. Would you also want to say ‘in a specified way’, consistent with your submission?

Ms Budavari—Yes. I think that it should be done in a specified way. In the AusCheck regulations and in the aviation and maritime security regulations there are already some specifications of the way in which these checks are done, but that does not negate, if it is going to be new Commonwealth acts and accompanying regulations, there needing to have some specification around both purpose and means.

Ms Moulds—There could be a situation where the AusCheck Act itself could set up certain principles about the collection of information and verification of information that could help satisfy some of our concerns and provide that kind of framework which we understood the 2006 bill to be trying to create. The AusCheck Act itself might be able to alleviate these concerns by setting out some of these privacy protections and methods.

I would agree with your suggestion that the detail of the specific method of collection and the type of information could also be found in the enabling legislation, which would allow robust assessment of the privacy implications of that scheme for the individual.

Senator FISHER—That approach would more directly and transparently address many of your concerns?

Ms Budavari—Yes.

Senator FISHER—One further question. I know I am indulging.

CHAIR—Last one.

Senator FISHER—CrimTrac spoke to us earlier. I hope I am not misstating Mr McDevitt’s position, but as I understand it, CrimTrac’s position is that whatever this data is, centralisation of it is good. In criticising, as you do in your submission, the lack of the bill’s specific provisions relating to the destruction and storage of this information and the individual’s right to challenge accuracy, I presume that you are not saying the information should not be centralised; I presume that you are supporting centralisation of whatever this database and information is. You are criticising the lack of compulsory and transparent mechanisms to deal with it thereafter; is that right?

Ms Budavari—That is a fair assessment, yes. As we have stated in the submission, we do not have any particular objection to the AusCheck scheme as a whole. Our objections relate to the proposed breadth under the amendment bill and the concerns about the incorporation of biometrics without the necessary protections that we are arguing for in the submission.

Senator FISHER—I presume you would not support your concerns about the treatment of the stored data being addressed by mini AusChecks springing up in each state and regulated by different rules?

Ms Budavari—I am not quite sure of your question.

Senator FISHER—I am talking about a state based system as opposed to a centralised one, as an example of a move away from a centralised system that may, in the minutia, deal with your concerns about treating the data thereafter, but does not necessarily do it in a consistent way because it is no longer centralised. I want to test, to the final degree, that you are saying that centralisation is good, but you have just got to do the right thing with it.

Ms Budavari—Yes.

Ms Moulds—It is not the centralisation per se that is the problem, it is protections that would be incorporated for that.

Senator FISHER—Thank you.

CHAIR—Ms Moulds and Ms Budavari, thank you once again for your submission, ever reliable and efficient. We appreciate your contribution to our work on this committee. We are going to break for 15 minutes to have morning tea.

Proceedings suspended from 11.35 am to 10.56 am

ALDERSON, Dr Karl John Richard, Assistant Secretary, AusCheck, Attorney-General's Department

HORSFALL, Mrs Karen, Director, Policy, Legal and Communications, AusCheck, Attorney-General's Department

TIGHE, Ms Sarah, Legal Officer, Attorney-General's Department

CHAIR—Welcome. We have your submission, which we have numbered one for our purposes. Do you wish to make any alterations or changes to that?

Dr Alderson—No.

CHAIR—I want to remind committee members of the Senate's resolve that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking 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. I remind the officers also that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of that claim. Dr Alderson, would you like to make a short opening statement?

Dr Alderson—I will not make an opening statement, but I will make two quick remarks, if I may.

CHAIR—Thank you.

Dr Alderson—Firstly, there is one clear-cut point: the department and I made an unjustifiable error in failing to consult CrimTrac in the framing of the bill. It is as simple as that. Since then, we have been looking closely at our procedures to make sure that does not happen again and that, for example, in briefing the government on the recommendations of this committee and how to go forward, we involve CrimTrac and the other agencies. So I acknowledge that point and apologise for it, as I have done to Mr McDevitt. Secondly, in terms of the issues that have been raised in the submissions to the committee and in the testimony this morning on things like definition of national security, use of biometrics and the meaning of consent, hopefully we have some information that we can give in response to the committee's questions that will help its thinking about those issues.

CHAIR—Thank you.

Senator BARNETT—Thank you for being here. Obviously you have heard some of the testimony this morning and the submissions that have been made. Thank you for the response regarding consultation or lack of it regarding CrimTrac. Do you want to expand on that in terms of other parties, like the Law Council of Australia, that I assume you would ordinarily consult?

Dr Alderson—The distinction I would draw there is that it is a basic responsibility of a department to ensure that all entities within government that may have an interest or input are consulted. That is a departmental responsibility that misfired on this occasion in relation to CrimTrac. In terms of bodies outside government, like the Law Council, that is always a decision for the government to make on a case-by-case basis. In that case, in my role, rather than being able to give any undertaking about what would happen in future, that is simply a case-by-case judgement. It is our responsibility to make sure that the Attorney-General is aware of the interests and input of any entity such as the Law Council.

Senator FISHER—Senator Barnett, before you move away from that, may I ask a question?

Senator BARNETT—Absolutely.

Senator FISHER—If it is a decision for the government, did you indicate to the government parties that might be interested from the outside, if you like?

Dr Alderson—No. In the case of this particular bill, a decision was made—as has been the case commonly, I think, with criminal justice and security legislation—not to do consultation outside government in the framing of the bill. That is probably all I can add there; although obviously, having been privy to the discussion here and the submissions, we would highlight the particular interest and comments of the Law Council when we brief the government on this committee's report and recommendations.

Senator FISHER—Are you able to suggest the basis on which that decision was made? Was it communicated to you from the Attorney-General's office?

Dr Alderson—I am worried that we are getting into the territory of talking about advice that the department gave to the minister and so forth.

Senator FISHER—It is simply a matter of process. You are suggesting that there was a decision not to consult at the outset. Was that a government decision; and, if so, how was it communicated to you or how did you become aware of it?

Dr Alderson—I think I can reasonably say that, broadly, the process we proposed for finalising this bill for introduction to parliament was not one that included consulting with the Law Council.

Senator FISHER—Are you saying that it was the department's decision to not consult at the outset?

Dr Alderson—I am not sure that I can go further on this, because I do not want to separate out the question of the advice that the decision gives to the attorney and the decisions that the attorney made.

Senator FISHER—I am suggesting that you can because it is advice as to process; it is not advice as to substance. It is advice as to such a thing as basic as consultation. On what public interest basis would you not want to disclose that? Did the department recommend to the government that there would be no consultation at the outset on the inputting end, or was the recommendation or decision the other way: from the government to the department?

Dr Alderson—I am sorry; it is not so much because of the handling of this issue in this particular case, but there are other occasions when this is quite a sensitive issue.

Senator FISHER—Indeed, which is why the issue is all the more important.

Dr Alderson—I certainly can say one thing: there was no directive in this case from the Attorney-General to exclude the Law Council or anything like that.

Senator FISHER—Was there a directive from the Attorney-General to exclude everybody other than departmental agencies?

Dr Alderson—No. The briefing that we put for finalising the bill just did not encompass consulting with the Law Council.

Senator FISHER—So I go back to my earlier question. Leaving aside the Law Council in specifics, you have referred to a decision to not consult on the input end. At what point was that decision made and by whom? How did you become aware of it, if it was not a decision from and of the department itself?

Dr Alderson—It was part of the decision about the bill being ready for introduction into parliament.

Senator FISHER—Yes?

Dr Alderson—There was a process that, in my experience of the department, happens more often than not. That is that you have a process of consultation within the government for finalising a bill of this kind; then it is presented to a minister and, subject to it being approved within the government, it goes into parliament. There are cases with a bill of this kind where, as well as that happening, a phase of consulting occurs, say, with the Law Council; but that was not part of this process.

Senator FISHER—Chair, I do not want to take any more of the committee's time on this issue, but perhaps I can place on notice: at what point in time was the decision taken not to consult with parties and groups outside government; by whom was it taken; and, if it was not a decision taken by the Attorney-General's Department, how and when did the Attorney-General's Department become aware of it? Thank you.

Dr Alderson—Certainly. We will take that on notice.

Senator BARNETT—There are two areas of significant concern: the first relates to the definition and the broad scope, as set out in this bill; and the second is the inclusion of biometric data. First things first: why has the government chosen to include in clause 8(1)(c) of the bill such a broad list of purposes and, in particular, the inclusion of the executive power of the Commonwealth and matters incidental to the execution of any legislative powers of the parliament or the executive power of the Commonwealth?

Dr Alderson—You are asking about the rationale for framing the definition in the broad way in which it has been framed. First of all, 'national security' does not have any fixed or precise meaning, either constitutionally or legally. In fact, the events of the last few years has meant that it has really been an evolving concept and, in future years, as the concept evolved, may come to encompass things that we do not necessarily think of as national security now. So the rationale for the breadth of the definition included is to ensure that the legal basis and the constitutional basis are there to allow national security background checking on a

case-by-case basis in future. Because of the breadth of the legal definition in the act, essentially it then is limited in two ways: firstly, because it sits inside a terminology of 'national security' and takes that flavour, which leads to the reading down point and brings that connection back to 'national security' as understood at the time; secondly, in terms of the introduction of any supporting regulations for new checks or what have you, it then would become a matter for policy discussion and political debate as to whether the content of those regulations fit properly within the concept of 'national security'. So the rationale for the way it is framed is to say: 'Don't limit the legal and constitutional basis for this; leave that discussion about whether it properly encompasses national security for the case-by-case assessment.'

Senator BARNETT—I will just pick up on some of those points. In particular, it seems that one of the key purposes for including 8(1)(c) in this national security reference is at least to cover the field in terms of a constitutional power argument. This bill then can cover the field and the powers of the Commonwealth are authorised and therefore, from a constitutional perspective, the actions flowing from this legislation are authorised. Is that the main or primary reason for including the words 'national security'?

Dr Alderson—The main rationale for the breadth of the definition is to provide that broad constitutional—

Senator BARNETT—The definition of 'national security' or all the definitions put out in (1)(c)?

Dr Alderson—All the definitions, but particularly subparagraphs 5 and 6 to which you refer. So you are right: the principal rationale is the broad constitutional and legal coverage.

Senator BARNETT—Knowing the purpose behind the inclusion of clause 8(1)(c), I think, helps us enormously. Let us go back a step. Obviously, you are familiar with the arguments for and against the initial 2006 bill.

Dr Alderson—Yes, I am.

Senator BARNETT—Are you aware of the report by the Senate Legal and Constitutional Committee—

Dr Alderson—Yes.

Senator BARNETT—and its recommendation to delete clause 8(1)(c)?

Dr Alderson—Yes.

Senator BARNETT—But obviously, notwithstanding the reservations in the recommendations, you have proceeded not to include it.

Dr Alderson—There certainly is an overlapping issue there with the one that the committee was concerned about in 2006-07. There are at least a couple of major differences with that 2006 bill, as originally introduced. No. 1 is that the 2006 bill, in itself, was conceptualised as allowing the introduction of background checks. So there was a concept that you could create new background checks under that 2006 bill; whereas the concept behind this one is that it only allows us to plug in to some other piece of legislation that allows for the background checks. So that is one kind of important conceptual difference in the way that it has been framed. The second is that there were other features of that 2006 bill. For example, that 2006 bill left open-ended what could be included in a background check and that could be added to by regulation; whereas this retains the model in the current act where what is within a background check is limited. So there are some differences as well as some similarities with the issues.

Senator BARNETT—Surely you can get around this issue of constitutionality. Obviously, one option is to remove or delete section 8(1)(c) altogether; but the other option is referred to by the Law Council in their submission. Have you seen their submission and read it?

Dr Alderson—Yes, I have.

Senator BARNETT—You will see there that their backup recommendation is to identify the relevant Commonwealth legislative powers to which this bill would refer. Would that not cover you in a constitutional sense?

Dr Alderson—I understand that the effect of the Law Council's backup proposal is 'or a background check under an existing piece of Commonwealth legislation'. So they are tying it to the existence of a piece of legislation. That also could be potentially broad because it would not limit the kinds of legislation under which a background check could be created. I am conscious that the committee will have a strong interest in the breadth of the definition; however, as for the alternate Law Council proposal, I ask whether it would be administratively viable to do it in that way? Quite possibly it would because, on my understanding of it, that would also be a broad approach that allowed you to connect this to any applicable piece of legislation.

Senator BARNETT—But the initial bill related to aviation and maritime; it was specific and identified those two areas. This thing is simply all and sundry: ‘any and all of the above’. It is just broad ranging to the extreme.

Dr Alderson—I have talked about the reason why the definition is as broad as it is. The rationale for going beyond aviation and maritime and not listing precise acts in this definition is to say that a desirable policy goal is to have consistency and centralisation of background checking for the Commonwealth. So, because you have the same entity doing it, it is more efficient, and you have the same privacy standards and information available and so forth. The idea is that this act, under the proposed amendments in this bill, should therefore create a more general framework for national security background checking that is capable of being applied to any future piece of legislation. So, in a sense, you set all of that infrastructure up for national security background checking and then, under a separate piece of legislation, you plug into it. I know it is a very different topic, but that would be in the same way that—

Senator BARNETT—Not separate legislation; separate regulations.

Dr Alderson—It would vary. As to where it would come from, it needs to be in either an act or a piece of delegated legislation, for which there is power under an act.

Senator BARNETT—This bill authorises the promulgation of regulations to do exactly that.

Dr Alderson—That is right. But I would make the distinction that, under the way this is formulated, the AusCheck regulations cannot create a background checking scheme. It has to be a combination of the AusCheck regulations and some other separate piece of legislation. For example, the most likely next candidate for a background check is security sensitive biological agents—and I am happy to talk more about that a bit later, if you would like. Taking that as an example, there would need to be a piece of legislation, primary or delegated, authorising the background checking scheme for security sensitive biological agents; it could not be just in the AusCheck regulations.

CHAIR—If that is your premise, will we then see legislation that will refer to this AusCheck bill? Are you saying that in future there will be legislation or regulations out there about X and somewhere in that legislation or those regulations it will say, ‘These checks will be done with reference to the AusCheck bill’?

Dr Alderson—Essentially, yes.

CHAIR—Are there other pieces of legislation then that we will see come before this parliament that will be amended to reflect that change in focus and shift?

Dr Alderson—In future years there might well be. The only one that is a clear candidate at the moment is security sensitive biological agents. In that particular case, the piece of primary legislation allows for delegated legislation under which a background checking scheme could be created; that is the only known case. But our assessment is that, in future years, there might well be background checking schemes in other contexts—other hazardous materials contexts. The premise of this bill is that, if the infrastructure exists for AusCheck to do those background checks under a consistent set of privacy safeguards, then, on a case-by-case basis and with additional checks, you can plug those in. But those checks cannot be created by AusCheck regulations; they have to be created by some other piece of legislation.

Senator FEENEY—Primary legislation.

Dr Alderson—Or delegated legislation for which there is authority in primary legislation.

Senator FISHER—What in this bill says that?

Dr Alderson—There is no overt provision; there is just an absence of any power in here to create a new background check. There are just facilitation provisions about how they would operate. There are no powers in here under which we can require a person to undergo a background check, for example.

CHAIR—That requirement would be in future legislation or regulation, by cross-referencing it to this legislation.

Dr Alderson—That is correct. There would have to be a separate piece of legislation that creates that requirement.

CHAIR—If people ask you what is different with this legislation to what we, as a committee, looked at three years ago, is the answer that this is now a framework upon which other legislation would be referenced?

Dr Alderson—Yes, that is right. There is a lot of overlap, but the two main differences go to this being a framework into which some other piece of legislation has to create the obligation and plug in.

Senator BARNETT—Why don't you say that in the bill? Why isn't it specified in the bill?

Senator FISHER—Rather than by omission; why is it not overt rather than arguably covert?

Senator BARNETT—You have not made a case for that in the bill. It is not legislatively required in the bill, as far as I am aware.

Senator FEENEY—It has certainly been part of the debate, hasn't it?

Senator BARNETT—Why haven't you done that?

Dr Alderson—Why it has not been done that way and whether it could be done are two different things. But it has not been done that way, because this was framed against that premise: it gives certain powers, but it does not give the power to impose an obligation to do a background check; that would be done separately, and that limitation has then been articulated in the explanatory memorandum, the second reading speech and so forth. That is the rationale on which it has been based to date.

Senator BARNETT—You keep referring to these consistent safeguards for privacy. Where are all of those set out in the bill?

Dr Alderson—We will come to questions about biometrics, on which I know that you will have a separate series of questions—

Senator BARNETT—Yes, we will come to that.

Dr Alderson—but an example is, say, sections 13 and 14 of the existing act. They set out rules on what can be done with the information that is provided to AusCheck, both in terms of its use in checking whether somebody has been issued with a card or determining whether they should be issued with a card and then—

Senator BARNETT—Yes, I have section 13 here; I do not have to go through all of that. But are you suggesting to us that this is comprehensive and covers the field in terms of terms and conditions for confidentiality, privacy, security and so on?

Dr Alderson—In terms of the guidelines—

Senator BARNETT—Are you suggesting to the committee that they are comprehensive and they cover the field?

Dr Alderson—If you combine the Privacy Act, these provisions and the guidelines we have—

Senator BARNETT—Which guidelines?

Dr Alderson—We have a privacy policy that is published on our website.

Senator BARNETT—Yes, but it is not in legislation.

Dr Alderson—That is right; however, when you have information like this on a database, a key question is when it can be given to law enforcement or national security agencies. The idea is that this bill then provides a consistent answer to that question and this act would provide a consistent framework for that, instead of having different background checking—

Senator BARNETT—I know. We have been there. Let us just go back to your saying that there are security sensitive biological agents. Let us just deal with that. What is all that about?

Dr Alderson—This is the new background check that is likely to be the next cab off the rank. The most obvious background check to come along next is likely to be for security sensitive biological agents. There is a list of 12 biological agents. They are things like anthrax, which present a danger to the community. The COAG hazardous chemicals series of reports have recommended the establishment of a background checking scheme for those who are involved in handling these tier 1 security sensitive biological agents. It is likely that the next background check, if it got approved and we had the legal authority to do it, would be for those who are involved in handling these security sensitive biological agents, of which the major category is people who work in scientific labs.

Senator BARNETT—You have mentioned anthrax. Can you give us some other examples? What other examples are you talking about?

Mrs Horsfall—I will just mention that the biological agents that are classified as security sensitive biological agents are determined by the Minister for Health and Ageing. We do have a list, I think, in our notes of—

Senator BARNETT—There is a list of 12, you said. Can you give us a couple of examples? I am happy for you to provide us with that list, on notice.

Dr Alderson—Yes. If we do not find that in the next few minutes, we will provide that on notice.

Senator BARNETT—So it is agents like anthrax.

Dr Alderson—Yes.

Senator BARNETT—Will you take that on notice?

Dr Alderson—Yes.

Senator BARNETT—Can you provide further and better particulars regarding this COAG hazardous chemicals list, if that is the list—

Dr Alderson—I am sorry; in terms of the background to how this scheme got recommended?

Senator BARNETT—Yes. Please take that on notice. I am certainly not convinced yet. Before we get on to this biometric verification system, which I know that the other senators are interested in, can you tell me why AusCheck is operating as an independent entity within the department, when we have an entity such as CrimTrac, which I understand has been fully functioning and operating within certain legal parameters for decades? It has been quizzed and checked and it comes to Senate estimates. It is a separate agency of the department, as it were. You mentioned before about the importance of having consistent terms and conditions regarding privacy, security, confidentiality and those sorts of things. Aren't we at risk of having an agency that has all the ticks with it, as in CrimTrac, and then setting up an AusCheck agency within the department? Why are we doing this separately?

Dr Alderson—I will mention quickly as an aside that, of course, as part of the department, we come to Senate estimates and are subject to all of those accountabilities too. But that decision was made by the then government in 2005. The essential rationale is that CrimTrac has a range of functions but, in this sort of area, they collate the criminal history records from the states and territories into one central area and then see whether there have been convictions and send that information out as somebody's criminal history check. We take that information plus a security assessment that ASIO does and apply it to criteria in legislation, particularly the offence part. So the idea is that those are somewhat different functions to those being done by CrimTrac. CrimTrac collates criminal history information, whereas we put that with other information and apply that to legislative criteria. We also deal directly with the issuing bodies—the airports and the airlines—and with the individuals concerned. Essentially, with all of those dealings with individuals and the fact that we do things outside of CrimTrac's remit, the decision was made at that time that—

Senator BARNETT—Yes, I can see what was made at that time and I am not going there. But we are looking at this and I am just looking at the merit. You are talking about operational procedures—aviation and maritime—and now we are broadening this out. CrimTrac is there and it can do all of these things in terms of operational checks. The department normally deals with policy and policy development type matters. It seems as though your remit has broadened somewhat. Is it a fair comment to say that the department's remit has broadened?

Dr Alderson—Yes. In recent years, the Attorney-General's Department has taken on operational roles in a number of areas; a few years ago, it had fewer of those. But, for example, looking at the specifics, the way we work with CrimTrac is a very familiar model for CrimTrac. They deal with their 16 or 20 partners and send them criminal history information in the way that we do, and each of those does different things with it. So I guess the functions we perform are slightly different to CrimTrac's. I guess that questions about which agency should do which function are kept under review by governments.

Senator FEENEY—Does CrimTrac have an interface with ASIO?

Dr Alderson—Not a direct one. We have the direct electronic interface with ASIO.

Senator FEENEY—That is a critical difference then, isn't it, between your two business units?

Dr Alderson—Yes.

Senator FEENEY—You work with national security agencies and they do not.

Dr Alderson—That is a critical difference. In particular, we have established a direct electronic connectivity with ASIO, which is a very efficient electronic process, which means that they can be involved in our process without people having to hand over pieces of paper and so forth. That is a different kind of process to the one that CrimTrac are involved in. So that is true.

Senator BARNETT—I know that other senators want to ask about biometric information but, before we get on to that, there is the issue of consent. You probably heard some of the arguments earlier from the Law Council; indeed, CrimTrac in their submission refer to ‘implied consent’ and having ‘fully informed consent’. How would you respond to those concerns?

Dr Alderson—There are a couple of things to say about this. I am not sure there is a clear alternative to what is in the bill or in maintaining the status quo. The starting point is that the existing AusCheck act says that an individual can apply for a background check for themselves or, if they consent, a third-party can apply on their behalf. We do 50,000 checks a year for the aviation and maritime schemes and, for the foreseeable future, that will be our predominant work. Under those schemes, you have no choice: if you want to work in a secure area in an airport or a maritime zone, it is a precondition of employment there to have a background check and be given the approval that allows you to get an aviation or maritime security identification card. So the reality is that the person does not have a free choice; it is not a question of them carefully arriving at their own judgement about whether they would like a check. In this particular context, a precondition to getting that card and working in those areas is that they have the check. So we say, given the fact that it is a precondition, if it is made clear to the person that it is a precondition and they proceed, then legally we have the authority to process the check.

However, we supplement that with making available, directly to the issuing bodies and to everybody else through our website, a privacy notice so that people will understand what is involved in the process; I have a copy here and it is also on our website, if that would be helpful to the committee. From a previous witness or in a previous question, there might have been some criticism of the notice. But, in terms of being helpful, I do not think it is helpful to people to give them something that is extremely complicated and lengthy. A lot of effort has been gone into in framing this notice to try to make the information clear and simple, to describe what happens when a background check comes to us. So that is the rationale behind the framing of the provisions.

Senator BARNETT—I do have other questions, but I want other senators to have a chance to ask question too. Can you give us an example of why this bill came into being in first place? We know that AusCheck 2006 is limited to aviation and maritime. Give us an example as to why this bill has come about. We know that the objective is to provide background checks for national security purposes, and that is very noble, but can you give us an example? What is the purpose of this bill?

Dr Alderson—The second purpose of this bill is about biometrics, which we will come to shortly; so I will put that aside until then. The first purpose of the bill is to broaden the capacity of AusCheck to do background checking. It is about saying that we should have the infrastructure there, in terms of the legal framework, and internally, within AusCheck, the IT system et cetera that allow us in future to take on additional national security background checking tasks, supported or authorised by another piece of legislation. The whole reason for AusCheck legislation being developed—the whole concept was developed in 2005-06—was the prospect that, in future years, there would be a number of different background checks and it would be undesirable if, in an ad hoc way, they were created in different departments for different purposes and under different rules. There should be one central system. It is far more efficient that way. For example, a lot of work was done to establish direct connectivity to Asia, and it created a certain amount of money. So, in terms of making the best use of the taxpayer’s dollar, we do not want to have different agencies trying to replicate that; it is better to do it once and once only. So the general concept is that there are likely to be background checking schemes in future for which a single framework under this act would be the best result.

Senator BARNETT—But there is not one catalyst or one example that you can give us.

Dr Alderson—The immediate catalyst is security. The broad catalyst is the COAG review of hazardous materials, which recommends stronger controls, including background checking in a number of areas. Under hazardous materials, there are a number of different topics: radioactive materials, ammonium nitrate, security chemicals and biological agents. So there are four different topics under there. Of those four, only one has reached the stage of potentially being close to fruition, and that is security sensitive biological agents. That has particularly evolved a bit, in terms of the department of health’s thinking on it, in the period since this bill was introduced. So that stands as the paramount example of something that is genuinely under development.

Senator BARNETT—Can you be more specific in terms of that example: security sensitive biological agents? You have mentioned that there are 12 and you are going to take that list on notice; but can you alert us to anything that we are facing today whereby this needs to be done swiftly?

Dr Alderson—The answer to that question is that we have made it clear all along in our discussions with the department of health that our capacity to do this is subject to the passage of this bill, and that is in the hands of the parliament. But I think, if the legislative framework were in place and the government then made the decision, the department of health would like to commence that scheme quite soon. I think their ideal objective is potentially July.

Senator BARNETT—Have they advised you of that in writing?

Dr Alderson—Yes, they have. But we have made it clear that our capacity to do that is subject to parliament's timetable regarding the timing of the legislation, and they understand that. That has been factored into their thinking about it.

Senator BARNETT—What reasons did they give?

Dr Alderson—For wanting to start at that time?

Senator BARNETT—In July.

Dr Alderson—Simply that they have developed a broader regulatory scheme for security sensitive biological agents, which they are intending to commence in July.

Senator FEENEY—Do you mean a broader list of issues or agents?

Dr Alderson—No; other arrangements for how labs that deal with these biological agents will be licensed and kept on a register and arrangements whereby health will have people who can go out and inspect these labs. So they are looking at elements other than those to do with background checking.

Senator BARNETT—In light of the time, please take on notice to provide further particulars regarding the reasons why the department of health needs this by July; we are talking three weeks away.

Dr Alderson—Yes.

Senator BARNETT—Thank you.

CHAIR—Senator Ludlum, do you have any questions?

Senator LUDLAM—Yes, I will ask a couple. I want to tease out something that Senator Barnett was asking about before: the triggers, I suppose, for this bill and whether it would be by regulation or by another act. I was a bit unclear about whether you said that, for your purposes, the powers would still be broad enough that you would not object necessarily, or it would still work for your purposes, if these provisions were being triggered by an act rather than by legislative instruments.

Dr Alderson—My response to that is: it is possible that new background checking schemes, which we envisage could come along, could be supported by different definitions of 'national security' to what we have put in the bill, including one that said 'a background checking scheme authorised by or under an act of parliament'. In a sense, the short answer to your question is yes.

Senator LUDLAM—That is not necessarily a deal breaker. However, that was one of the strongest arguments that the Law Council raised: regulation can sometimes fly under the radar and they are a bit of a blunt instrument because all we can do is disallow; we cannot amend.

Dr Alderson—I am sorry; there is a separate question that I need to go to there. Whether you would then say that something has to be in an act rather than in delegated legislation is another question. In fact, most schemes involve a mix of both. In every case where you have a legislative scheme, there has to be a source of authority in the act. If we said, for example, 'The whole background checking scheme or the specific authority to do the background checking has to be in an act,' there might be situations where this government or a future government might say, 'Well, no, we've got this act that says we can regulate this area,' and the background checking scheme then would be in regulations. This government or a future government could make that argument. There is a difference between saying the background checking scheme has to be 'in or authorised by an act' and saying 'an act or authorised under an act'—say, in regulations.

Senator LUDLAM—In terms of the kind of information that is sought and collected during these background checks, one of the criticisms made in the committee's report in 2007 was that it was a bit ambiguous as to what was being collected. Does such a list exist, or would you say that concern has been addressed in the current bill?

Dr Alderson—The 2006 bill said that what is included in a background check could be added to by regulation. But, following the recommendations of this committee, that was narrowed so that the AusCheck act

says that a background check incorporates essentially criminal history information and a security assessment; they are the kinds of elements of it. This bill makes no change to that, except in one respect. The only change this bill makes is to further tighten that. At the moment it says that a background check includes a security assessment, but it does not define what that is. Under this bill, we say 'security assessment' has the meaning that is in the ASIO act; so that is specifically a security assessment done by ASIO. The background checking we do incorporates getting a security assessment from ASIO and getting a criminal history from CrimTrac. Then, as an extra service for some clients, we also get information on a person's work rights, if they have a visa from the immigration department. But that does not actually form part of our decision; we just send that on.

Senator LUDLAM—So in terms of the material that is collected, collated and forwarded to the relevant agency that has been seeking the information, is there anything in this bill or in the act as it stands that governs what happens to that information, once the background check has been performed?

Dr Alderson—There is, and that is the privacy provisions in this act. The privacy provisions in this act, particularly in sections 13 and 14, define what we can do with that information. Then there are some further, more detailed rules in our regulations and there are also some guidelines. Between all those things, there are quite detailed rules about what we can do. For example, if we have information about offences that a person has committed, we can convey that to that person to check that we have got it right—because, under our process, they get a chance to say whether we have got it right or they think we have made an error. We can also, in certain limited circumstances, provide that to the issuing body, which is normally their employer—say, Qantas in the case of a Qantas employee. Additionally, there is a particular process for allowing Commonwealth law enforcement agencies to access the information on our database.

Senator LUDLAM—So it is not forwarded as a separate set of information to those agencies, which they would then retain?

Dr Alderson—No.

Senator LUDLAM—You are giving them access or a window into your database.

Dr Alderson—No. The way it works with the law enforcement agencies is that, in practice, we provide information to them on a CD.

Senator LUDLAM—The direction of my question was: what governs what happens to the CD, once you have passed it on?

Dr Alderson—I would make a distinction between the actual criminal history certificate and the information about convictions, which is important. We have an obligation in our relationship with CrimTrac that we do not pass on the actual criminal history certificate that we get. So that does not go on to anyone; it does not go on to law enforcement agencies. As for the provisions about information going on to law enforcement agencies, the restrictions essentially are that those agencies have to be approved under our guidelines—the approved entities at the moment are the Federal Police, the Crime Commission and Customs—and then they have to use that information for purposes relating to law enforcement or national security. But we do not vet the specific use they make of that information.

Senator LUDLAM—So, once you have handed that material over, that could potentially sit in an archive or on a file for any number of years.

Dr Alderson—That is right. They are confined to using it for law enforcement or national security and they, themselves, are also subject to general privacy rules. So we require them to comply with all relevant privacy laws, which include that you cannot keep things other than for the purpose for which they were given originally.

Senator LUDLAM—That will be a bit of a patchwork between the states and territories. I come back to a point that you mentioned before, which is that the person having the check done on them has the right to evaluate some of the specific material there.

Dr Alderson—Yes.

Senator LUDLAM—Do they have a right to look at all of the data that has been provided as part of the background check, or does that vary according to the agency that is seeking it?

Dr Alderson—No. There are two parts: the security part and the criminal history part. On the security assessment side, it is very rare for a person to get an adverse security assessment. But, if that happens, there is a separate process under the ASIO act, under which a person can appeal against their adverse security

assessment. So they do not get any details; they just get notified of the decision and then there is a separate appeal process. In terms of criminal history, we send them a sheet of paper saying, 'We consider that you have these convictions on your criminal record, which fall within the criteria that mean you are not eligible for an aviation security card,' or, 'maritime security card.' Then the person has 28 days to dispute the accuracy of the criminal history information that we have given or our interpretation of whether they fall within the guidelines. After those 28 days, taking into account any response they have provided, I then make a final decision on that.

Senator LUDLAM—So there is a possibility for there to be 'back and forth' on the security side of things. You are not given specific details of what has been raised, but you are told that a red flag has gone up. How do you then contest that?

Dr Alderson—I am not sure that it has ever happened, so it is not something on which we have such tried and true procedures as we have on the criminal history side. But, essentially, we would notify that person of the adverse security assessment and of their rights to appeal it.

Senator LUDLAM—How would they appeal it, if they are not able to see the assessment itself?

Dr Alderson—I might have to take that on notice.

Senator LUDLAM—It would be helpful to know, first of all, whether those provisions have ever been triggered—so whether this has actually been tested or whether we are talking about a theory. But, if so, please give us your understanding of exactly what your rights would be. You said before that you do roughly 50,000 of these checks a year as things stand. Is that correct?

Dr Alderson—Yes.

Senator LUDLAM—That is just for maritime and aviation. Presumably, as we are trying to broaden the mandate quite substantially here, that number could go up. I am seeking what protocols you have in place, where they are set down and, in the event that a red flag does go up one day, what that implies for the person.

Dr Alderson—We can take on notice the precise procedures that apply in that situation.

Senator LUDLAM—Yes, Also please separate out for us, as you have tried to do here, the difference between the criminal record side and the security side. I am particularly interested, I suppose, in the security side.

Dr Alderson—Okay. So you would also like the process on the criminal history side?

Senator LUDLAM—It sounds as though that is a bit better tested; but, yes, I would appreciate that too.

Dr Alderson—Okay.

CHAIR—Senator Ludlum, have you finished?

Senator LUDLAM—That will do for the time being; thank you, Chair.

CHAIR—Dr Alderson, I just need to remind you that we are due to report on this legislation next week. That means that we would need answers back by midday Friday, if that is possible.

Dr Alderson—Yes.

CHAIR—A little bit later would be stretching it; but by midday Friday would assist us, if that is all right.

Dr Alderson—We understand that.

Senator FEENEY—There was something in one of your answers to a question from Senator Ludlum that makes me think I might have misunderstood an element of this—and that is access. You spoke about how agencies are authorised to look at your information. I understand, perhaps wrongly, that you authorise individuals rather than agencies to look at your information and that those individuals obviously are recognisable to you and have to authenticate and verify themselves before they can access the data. If I have misunderstood that, can you illuminate me?

Dr Alderson—Certainly.

Senator FEENEY—Obviously, I would anticipate there being some concern if agencies as a whole were authorised to look at your database. Can you tell me a little about this?

Dr Alderson—Both those things are true. I am sorry; I omitted to mention earlier that, under our guidelines, ASIO is also a prescribed agency that is authorised to access this information—although, in the last two years, in practice, there have been no occasions where they have sought that access. Both those things are true. The agency has to be approved as an agency that is authorised, under our guidelines, to access this information.

Then, once that agency has been approved, it has to nominate a specific requesting officer with whom we deal in providing that information. So both are true: it is the agency and a specified officer within it.

Senator FEENEY—So, in the event that something untoward occurred—something that realised less than your aspirations about how the system could work—is it not true that you would be able to trace the flow of information from your agency to a certain individual in an authorised agency?

Dr Alderson—That is right. In addition, that individual has to be at Senior Executive Service level; so, yes, that is right.

Senator FEENEY—That is a protection, is it not?

Dr Alderson—It is a protection that there is a clear chain to the individual.

Senator FISHER—Dr Alderson, the beginning of your submission refers to the department's view that the bill does not authorise AusCheck to undertake new background checking in the absence of a specific authorising legislative instrument; you have indicated that 'legislative' could be regulatory or some other thing. Does it have to be a federal legislative instrument?

Dr Alderson—It would not have to be; it could also be state or territory.

Senator FISHER—Why is that? If you are talking about this department overseeing AusCheck and there being a centralised mechanism and a centralised dint, why would this bill not provide for that scenario to be by federal mechanisms and federal mechanisms only?

Dr Alderson—The distinction I would make is that we are not aware of any background check for a state or territory in the pipeline, so it is purely hypothetical at this stage. But, at the hypothetical level—

Senator FISHER—But that is the point, is it not? That is part of the concerns.

Dr Alderson—That is right. I am going on to give the hypothetical answer: when AusCheck was established, the idea was that, for there to be a coherent framework for background checking in Australia, with consistent rules and efficient processes so that you were not replicating these arrangements with ASIO, CrimTrac and so forth, AusCheck should have the capacity, if called on in the future, to do background checking for states or territories.

Senator FISHER—All that may be very well and good, but it is about that 'if called on in the future' that I think the committee has heard significant concerns. If called on in the future, 'by whom, for what and how it would be called on' is a pretty clear pointer for concerns in terms of the evidence that we have heard today and in the submissions before us. I am following through on the same point. In attempting to explain this point, I am looking at page 3 of your submission, under part 2, where it states that 'the bill will allow AusCheck to conduct background checks in support of other regulatory regimes'—we have discussed that—'as agreed on a case-by-case basis by government'. What do you mean by that? That is hardly the same as 'by legislative instrument', is it?

Dr Alderson—To the extent that sentence implies that a government decision without a legislative instrument would be enough, that sentence is not correct.

Senator FISHER—How could it be correct and consistent with what you were saying earlier? Governments can agree to do any range of things that may be totally outside 'legislative instrument'.

Dr Alderson—Yes. The words you have read out, I think, are misstated, because a legislative instrument of some kind would be required separately from the AusCheck scheme.

Senator FISHER—Nonetheless, your unintentional oversight in your submission, I think, illustrates the earlier point that we got to in your response to Senator Barnett. That is the fact that the legislation is drafted on a permissive basis; so, in a sense, it is by omission, if you like, that teeth can be given to the legislation. You said earlier on that the bill allows 'plugging in to existing testing'. They are the key words that I want to focus on. But that is not necessarily the case either, is it, because stuff that may not exist today may exist tomorrow by regulatory dint or as agreed on a case-by-case basis by government, underpinned by some legislative instrument. In this bill, you are also talking about plugging into existing or future testing—

Dr Alderson—That is right, although—

Senator FISHER—which is not defined as of today.

Dr Alderson—Except that we are leaving intact the strict definition in section 5 of the act about what a background check is.

Senator FISHER—With respect, so what?

Dr Alderson—Maybe it is simply that I misunderstood your question. One thing open in the 2006 bill is confined here, which is what a background check is. You are right that, in fact, the intended effect of this bill or, on a conceptual level, the idea behind it is that you create the infrastructure for a background checking process and what the privacy safeguards will be and so forth that can apply generally. Then, as proposals for new background checks come along, the merits of having those background checks can be debated. But, if a decision is made by whatever process to introduce such a background check and there is a legislative instrument that authorises that background check, then, according to the phrase I used, that can ‘plug in’ to this AusCheck system for doing that background check.

Senator FISHER—So it is not just today; it can be future. You have said ‘by whatever process’. It is indeed by whatever process—

Senator FEENEY—By legislation.

Dr Alderson—Yes.

Senator FISHER—because it may be by legislative instrument that is no more than a regulation by a state instrumentality, for example, and not necessarily federal; depending on the balance of power of the parliament at the time, there may not even be the capacity to disallow that regulatory instrument. So what we are talking about is not very clearly defined, is it?

Dr Alderson—But, again, I suppose the premise on which this is based is that there is one set of issues where you debate whether you should have a background check that might happen at the Commonwealth level or the state level; and then there is another issue that, in a sense, if a state, through its delegated legislation process, is going to introduce background checking, the argument is that it is better to have the capacity for managing that through this central repository than to—

Senator FISHER—That is a separate point for debate and, personally, I can see a lot of wisdom in that. But the point I am trying to flesh out is: what information and testing are we contemplating being encompassed by the bill? I have a further question about the same issue. Earlier on in response to Senator Barnett, I think you indicated that there were two separate issues: firstly, why wasn’t the bill drafted explicitly to set out the testing that is to be done and done by AusCheck. You drew a difference to why it was not done—you gave the reasons for why it was not done—and also indicated that there was a separate question of whether it could be done. I did not hear you talk to us about your views on whether it could be done. Could you do so now?

Dr Alderson—Sorry, I was only making the point that it would obviously be possible for government. I was responding to the specific example of the alternative model the Law Council had suggested for how this definition could be framed. It may be that I have actually misunderstood what their alternative proposal was. Instead of this definition of national security which we have got in there, if instead you said AusCheck can use its background checking processes for a background check established under legislation, then in terms of how that would work operationally would actually be a very similar outcome.

Senator FISHER—Legislatively and in a parliamentary sense it is arguably very different. Could this bill say—instead of what it does—for example, that AusCheck will do these tests for these purposes by these mechanisms?

Dr Alderson—That would be very different.

Senator FISHER—And specify them?

Dr Alderson—That one would not be possible.

Senator FISHER—Conceptually it is different. Why would that not be possible?

Dr Alderson—It would be possible.

Senator FISHER—It would, would it not?

Dr Alderson—It would. The difference is that the rationale for going with the broad framework approach into which you plug in new schemes as they come along and as there is legislative authority for them rather than adding things ad hoc is the consistency of the framework.

Senator FISHER—But you do not necessarily sacrifice consistency of framework by having specifics in your primarily legislation, do you?

Dr Alderson—The two downsides of the alternative approach that you are asking about are, firstly, if you have a series of specific schemes listed in the act you risk fragmenting the way it works with individual rules for individual schemes. That is one potential downside.

Senator FISHER—How so, and how are you going to do that more than you will run the risk if this bill is passed, given that all that sort of minutia is arguably in the province of a state government in some cases?

Dr Alderson—In terms of the things this act governs, it sets a framework and the best example is about privacy and disclosure of information. We would say instead of having specific rules on privacy for the aviation, maritime and security biological agents scheme, it is better, if possible, to have a general privacy rule because it will obviously work better. You have a better chance of privacy compliance if you have got consistent rules and it is easier for people to understand what their rights are.

Senator FISHER—With respect, that is a red herring to the issue. You have already said you could legislate by specifics. You are now suggesting some potential downsides about legislating by specifics, but there are also significant upsides that would address many of the concerns that have been put to us; for example, transparency, accountability and public debate at the time about the wisdom of those mechanisms and about the wisdom of them being dealt with by a federal body.

Dr Alderson—Yes. I can only agree. They are all factors in the mix of taking a view on this. I am outlining the reasoning behind the kind of approach that has been taken in this bill.

Senator FISHER—There may well be more reasons as well. I am presuming time is running short, so you may care to take on notice to advise the committee of both. You said it could be done by specifics. Could you advise the committee of the pros and cons of doing it by specifics?

Dr Alderson—Yes.

Senator FISHER—Chair, I have more questions, but others may have, too.

CHAIR—You can keep going.

Dr Alderson—To enable us to answer your question on notice as effectively as possible, in terms of saying the pros and cons of doing it by specifics, do you mean that every time there was a new scheme you would list that scheme and reference it in this legislation?

Senator FISHER—That is it, or a new proposal. Clearly, there is more administrative and arguably parliamentary work, but that is part of the very point, that it should be subject to democratic debate and discussion. For example, your submission lists the areas in which the act currently only allows—aviation transport security, maritime transport and offshore—and you have outlined in response to Senator Barnett some other potentials. You would legislate the potentials—

Dr Alderson—Yes. We will take that on notice.

Senator FISHER—as of today and obviously the legislation would require updating from time to time. Thank you. In respect of biometrics, why does the bill not define biometrics?

Dr Alderson—There has been a lot of discussion on this and, if I may, I will also talk about how these provisions came to be. The reason it does not define ‘biometrics’ is that when we get legal advice, drafting advice and so on, there are certain terms where it is better, instead of trying to fill out the definition and define it to allow that to be applied, in a sense for the term to have its dictionary meaning essentially is the best outcome.

Senator FISHER—You are using those words again, on a case-by-case basis.

Dr Alderson—It means that instead of trying to define it now when the specific technologies within the biometric concept are changing, that the concept is fixed through the word ‘biometric’, but as the technology evolves then different specific things may come within it.

Senator FISHER—That is right. That underlines, and indeed possibly exacerbates, the concerns that have been expressed to us along the way about the potential enormity of the reach of the bill.

Dr Alderson—May I take the opportunity to talk briefly and generally about this issue?

Senator FISHER—Yes.

Dr Alderson—Let me start with what happens in practice now. In a small number of cases when we send through a person’s details to CrimTrac to do the criminal history check they will say, ‘There are several people with this name and we do not have an address. We can’t be sure who it is, so we will need a fingerprint from

this person so we can be sure that we have the right criminal history check against that person.’ In those cases, we go back and we notify the person that they will need to take that step and then they can go into a police station, provide the fingerprint and it is then sent through to CrimTrac. We are not directly involved in the process. It does not come through us.

In a small number of cases, by error, the person has sent the fingerprints to us, so we have had that. Our options are to destroy that and tell them they should send it to CrimTrac themselves or we send it on CrimTrac. They are the kinds of options we have. Due to the small number of situations in which that has arisen, when we looked at it and thought what do we do in this situation, we realised that biometric information, that identity information, is actually just part of the concept of personal information in the act now, so therefore the provisions that allow that information to be made available to law enforcement currently extends to those fingerprints and biometric information. I have to say fingerprints are the only example that has ever arisen and that we are aware of.

Senator FISHER—DNA? I am not a scientist.

Dr Alderson—It has never arisen. DNA is biometric, but there has been no case that has arisen, or no case we could foresee where DNA is an issue. So far, the only examples have been fingerprints.

Senator FISHER—I am sorry, I am asking the other way around. Is not DNA information biometric information?

Dr Alderson—It is.

Senator FISHER—Leaving aside the other issues, why can you not specify the sort of biometric testing that you want to be able to be performed, according to the best knowledge today, and if you could do that, would you not specify fingerprinting and DNA evidence?

Dr Alderson—In terms of what we know now and what has happened to date, it is only fingerprints, so fingerprints could be specified. The rationale for putting in the concept of biometrics was to say—the only effect of these amendments is to tighten the controls of what can be done. There is a valid discussion about whether they should be even tighter. That is the only effect of these amendments.

Senator FISHER—You are saying people are currently out there doing vague biometrics anyway.

Dr Alderson—No. If a fingerprint comes to us it just falls within the term ‘personal information’ in the act now, which means as a matter of law we can give that to law enforcement. The effect of these amendments is to tighten that and say, ‘No. If we get that it can only be used to verify the person’s identity.’ It was designed for those rare cases where something comes through this.

In terms of what we know to date we could just say ‘fingerprint’. In addition, we are only a conduit. There is no database now. There is no proposal for a database of fingerprints. The only sensible outcome is a single national database administered by CrimTrac. The intention of these provisions was to put tighter restrictions and say, ‘If we get this identity verification information, in practice fingerprints, all we are ever allowed to do with that is use that for verifying a person’s identity.’

Senator FISHER—Would you compromise that tighter restriction by getting rid of the references to biometrics and replacing it with fingerprinting in the bill? Would you compromise that restriction as of the technology today?

Dr Alderson—As of today, no.

Senator FISHER—You would achieve your aim as of today?

Dr Alderson—Yes. Obviously there is a separation between the decision the government makes and the operational advice we give them about how it impacts. Yes, today fingerprints equals biometrics. The reason it was framed more broadly was, thinking ahead, in five years if things have changed in the way Mr McDevitt is suggesting things may go, we would like these tighter privacy provisions to also apply to other things. That was the rationale for it.

Senator FISHER—You said there was a downside and I cut you off.

Dr Alderson—The downside is that if we said these tighter provisions apply to fingerprints full stop, the issue is that in future if there were other types of biometric information that came into play we would not have privacy rules in here specifically dealing with those. That is the issue.

Senator FISHER—I have one further question and then I will wrap up. In response to Senator Ludlam, you said that the AusCheck has not got such tried and true procedures as we have on the criminal history or testing side. Can you explain what you mean?

Dr Alderson—I was making a very narrow point there. This is about people's ability to appeal. On the criminal history side we get many appeals and reviews every year. As well as the clear legislative framework I, personally, have lots of experience of how this works because it happens all the time. On the security assessment side there is a clear legislative framework in the ASIO Act, but I have never personally experienced it. The only comment I was making was a distinction between something that we do every week, so I can talk personally from my experience of how it works, and something for which there is a legislative framework but has not happened in my time as the head of AusCheck.

Senator FISHER—Is that done by someone else? Is that something else done by CrimTrac?

Dr Alderson—No. CrimTrac get a criminal history check. People seeking review or appeal of their criminal history happens all the time. It is common. When ASIO do a security assessment it is very rare for that to be adverse and it is very rare for any review or appeal.

Senator FISHER—Thank you.

CHAIR—Senator Barnett.

Senator BARNETT—I want to follow up. Senator Fisher has asked most of the questions that we wanted to cover. I wanted to go back to the issue of your view that the act is either silent or does not authorise background checks, but for future legislation that may come into force. I am still not convinced, at this stage, and I would like you to assist the committee and me in that regard. I have got the bill before me. Part 2, clause 8 of the bill talks about the establishment of the AusCheck scheme:

The regulations may provide for the establishment of a scheme relating to the conduct and coordination of background checks of individuals ...

Once this bill is passed, hypothetically, and the regs are passed, why can't background checks be done?

Dr Alderson—The reason we say that is particularly clause 9 subclause 1 which lists the things the AusCheck scheme may make provision for—applications for checks, the information and application, the criteria—it is the absence of anything in that list that is requiring a person to undergo a check.

Senator BARNETT—It still allows it to occur.

Dr Alderson—The act defines what the AusCheck scheme and the regulations can contain and it is not in that list.

Senator BARNETT—The list does set out from (a) to (h) the process in which a check occurs. Is that correct?

Dr Alderson—Yes, that is correct.

Senator BARNETT—What is stopping that happening?

Dr Alderson—If the Attorney-General, through ExCo made an AusCheck regulation that said, 'This category of people must undergo a background check', then you would go back to this and say that is not a valid regulation because there is nothing here that says the AusCheck scheme can require a person to undergo a background check.

CHAIR—There is nothing to say it cannot, either.

Senator BARNETT—But they are authorised to do it. They are empowered to do it. You have given them the criteria under which they would operate and the framework in which they would implement, act out and fulfil these background checks.

Dr Alderson—All of that is true, but as a matter of law a regulation can only be validly made within the description of the things that this says can be within the AusCheck scheme.

Senator BARNETT—You have defined it so broadly that it can cover anything that the government wishes to do at any time in accordance with Section 8(1)(c).

Dr Alderson—That is to do with what is within the subject matter of national security, but then the list of the topics that the Attorney-General can put in AusCheck regulations does not encompass requiring a person to undergo a background check or acquiring a background check as a precondition for XYZ. That is the reasoning on which the current framing is based.

Senator BARNETT—You have then got clause 11:

The secretary may give directions under the AusCheck scheme.

That is the delegation by the secretary in clause 12. It seems to me there are some very broad powers and authority given to AusCheck. I am struggling to be convinced by that argument. As I said earlier in this discussion hearing, there is nothing in the bill that prohibits the government undertaking or proceeding with background checks. There is nothing in the law that stops them from undertaking those checks. Is that right?

Dr Alderson—No. I accept your point that you can argue that there should be an explicit provision saying that. I am not arguing about that.

Senator BARNETT—There is no explicit provision in the bill that says it stops the government requiring an individual to be checked. Is that correct?

Dr Alderson—I am saying that there is a valid policy choice about what you make overt, but the effect of these provisions now—

Senator BARNETT—That is your view.

Dr Alderson—Yes.

Senator BARNETT—There may be other people that have a different view. If there is some doubt or ambiguity about this, then this is the forum in which we need to clarify these doubts and expel them. Let us move on. I have two other quick questions. What is the department's response to the privacy impact assessment?

Dr Alderson—We published a response to that with the PIA and that was also tabled by the Attorney-General. That is a published document.

Senator BARNETT—I have not read that. Perhaps you could table that response.

Dr Alderson—Yes.

Senator BARNETT—Senator Ludlam asked some very pertinent questions about the appeal process. You indicated that you would take it on notice. I am a little concerned that you indicated that the individual may not be able to obtain a copy of the background check relevant to that individual. Is that correct?

Dr Alderson—No. For criminal history we provide them with a piece of paper that lists all of the offences that we say fall within the criteria of offences that make them ineligible. We provide them with that list of offences. It has the date of the offence, the nature of the offence and the penalty imposed. That is given to them as a sheet of paper. Full details are given. Because of the sensitivity in the security assessment context and the kinds of matters ASIO deals with, a person is not given a report with ASIO's analysis in that situation. The precise rules and procedures are set out in the ASIO Act, so we will provide an answer on that.

Senator BARNETT—I want to finish where I started. This is the issue regarding clause 8(1)(c) and its very broad definition. You have indicated that one of the main purposes is to provide constitutional coverage for you, but you have also indicated that, in your view, the department and AusCheck will read it down, as it were, to such an extent that it will obviously not impede into areas where perhaps AusCheck should not. Is that correct?

Dr Alderson—That is correct. When you read the provision and you administer it, you have to look at the fact that the overarching phrase is national security. Then there are specific national security items listed, then there is the executive power and any other incidental power, so in the way you read and apply that you would have to take account of that overarching national security context.

Senator BARNETT—With respect, that is exactly the concern that many submitters and others have, that is that it is so broad. You are saying to us that it is your intent and AusCheck's intent to read it down, but we have got no guarantee that you will, other than your word sitting here. We do not doubt your word and your integrity, but there is nothing in the legislation to say that that will happen.

Dr Alderson—There are two further safeguards or protections on this point. The first is the new scheme of background checking. As well as having this separate piece of legislation, you do have to update the AusCheck regulations if you bring in this scheme, so the parliament when they review those regulations can look at the question of whether they agree with the Attorney-General that this falls within national security. That is the first step. The second is the predominance of the national security concept in the definition also has some legal effect as well, so if you have something manifestly unrelated to national security and introduce a scheme, then you would be endangering the legal validity of those regulations.

Senator BARNETT—That would need to be challenged at the time. Is that right?

Dr Alderson—You can challenge the validity of a regulation at any time.

Senator BARNETT—They would have to be challenged at the time if there was a problem?

Dr Alderson—Yes.

Senator BARNETT—Thank you.

CHAIR—I have one question before we finish. Just for clarity for our report, we wanted to know if you could take us through the distinction made by amendments to section 13 on the different uses of personal information and identity verification information?

Dr Alderson—Certainly.

CHAIR—What are the main differences in the way the two kinds of information can be used, collected and disclosed?

Dr Alderson—Where you have personal information which currently includes fingerprints, under the AusCheck Act now you can use that for the purposes of background checking for determining whether somebody is eligible for an aviation card or a maritime card. You can also provide that information in de-identified form for research and planning and it is also available to Commonwealth law enforcement and national security agencies, subject to the guidelines. At the moment we can put it on our database; we can use it for determining somebody's eligibility and it is also available for law enforcement. They are the main relevant examples.

Under this proposed amendment, identity verification information can only be used to verify somebody's identity. You cannot just make it part of your information that you hold about the scheme, you cannot provide it for research and planning purposes in de-identified form, and it is not part of what would be available to law enforcement.

The sole intention of this amendment is to say there is this particularly sensitive category of personal information the use of which should be restricted. The effect of these amendments is wholly to restrict it.

The key words in the amendment, in item 13, are that the collection, use and disclosure is taken to be authorised if it is directly necessary for the purpose of verifying the identity of an individual in respect to whom a background check is being conducted.

CHAIR—Thank you for your time here today. I just have a reminder that the answers to any follow-up questions need to be with us by Friday at the latest. Thank you. Senator Ludlam.

Senator LUDLAM—I just had a quick inquiry about *Hansard* transcripts. In a couple of previous inquiries we have had to deal with the report in the absence of transcripts from *Hansard*. I think they were actually left out in consideration of some reports. Do you have a timetable for production of those documents?

CHAIR—Do we know when *Hansard* will be ready? We would hope perhaps by Friday.

Senator LUDLAM—When will you have a Chair's draft circulated? I am aware that we are on a pretty tight turnaround.

CHAIR—I cannot answer that, but I am very conscious of the fact that once I get a Chair's draft I will give you adequate time to look at it, even if it means we might need to consider delaying the reporting date of the bill.

Senator LUDLAM—That is great. It was not that so much, but the delay in the transcript. Thank you for that.

CHAIR—Thank you. The committee stands adjourned.

Committee adjourned at 1.25 pm