

Senate Standing Committee
for the
Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Albury-Wodonga Development Corporation (Abolition) Bill 2014

Introduced into the House of Representatives on 1 October 2014

Portfolio: Finance

Background

This bill seeks to abolish the Albury-Wodonga Development Corporation by repealing the *Albury-Wodonga Development Act 1973*.

The bill also provides for a number of consequential amendments to other Acts and sets out transitional provisions relating to the transfer of assets and liabilities from the Corporation to the Commonwealth.

The committee has no comment on this bill.

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Introduced into the Senate on 24 September 2014

Portfolio: Attorney-General

The committee has considered this bill, and additional information sought from the Attorney-General, on a number of recent occasions.

As at 29 October 2014 the committee's current views are consolidated in its *Fourteenth Report of 2014*. This report is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2014/index.

Freedom of Information Amendment (New Arrangements) Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Attorney-General

Background

This bill seeks to repeal the *Australian Information Commissioner Act 2010* and amend the *Freedom of Information Act 1982*, the *Privacy Act 1988*, the *Ombudsman Act 1976* and other Acts.

The bill seeks to abolish the Office of the Australian Information Commissioner and amends arrangements for the exercise of privacy and freedom of information functions.

Merits review and trespass on personal rights and liberties—general comments

This bill makes significant changes to the administration of the Commonwealth FOI and privacy laws. The central change is the abolition of the Office of the Australian Information Commissioner (OAIC). The OAIC was established on 1 November 2010 and brought the FOI Act and Privacy Act into a single scheme. A shared objective of both Acts is to improve information management and record keeping in government agencies, and to confer upon individuals the right to access government information and to scrutinise government information practices. Bringing both Acts into a single scheme was an attempt to heighten the responsibility of government agencies to pay close attention to information issues. In creating a single office for the management of information law and policy, statutory office holders within the OAIC were given a number of significant new functions. These functions can broadly be characterised as including:

- conducting merits review of FOI decisions;
- investigating FOI complaints;
- promoting open government;
- issuing guidelines to agencies;
- providing assistance and training;
- reviewing legislation; and

- providing advice to government.

The practical effect of the amendments is that the system for the management of privacy and FOI issues that was in operation prior to the establishment of the OAIC will be largely restored (explanatory memorandum, p.2). The explanatory memorandum states that ‘combining oversight of privacy and FOI into one agency has created an unnecessarily complex system which caused processing delays in FOI and privacy matters’. It is argued that:

...simplifying FOI review processes by removing a level of external merits review will improve efficiencies and reduce the burden on FOI applicants,
and
...streamlining arrangements for investigation of FOI complaints and for privacy regulation will also reduce complexity and make it easier for applicants to exercise their rights under FOI or privacy legislation.

The explanatory memorandum explains that the amendments, in addition to the abolition of the OAIC, will provide for:

- an Australian Privacy Commissioner as an independent statutory office holder within the Australian Human Rights Commission, to be responsible for the exercise of privacy functions under the Privacy Act and related legislation;
- the Administrative Appeals Tribunal (AAT) to have sole jurisdiction for external merits review of FOI decisions;
- compulsory internal review of FOI decisions (where available) before a matter can proceed to the AAT;
- the Attorney-General to be responsible for FOI guidelines, collection of FOI statistics and the annual report on the operation of the FOI Act; and
- the Ombudsman to have sole responsibility for the investigation of FOI complaints.

The FOI Act has established itself as an important part of the accountability framework for administrative decision-making by the executive government. The administration of the Act is part of the legal framework to guard against statutory powers being exercised in a manner which may unduly trespass on rights, liberties and obligations. FOI legislation can also play a significant role in facilitating the exercise of review rights. Broadly speaking, adequate and accurate information about the conduct of government is an essential precondition for the successful operation of review rights. The committee

therefore takes an interest in legislative proposals which may be considered to diminish the efficacy of the FOI regime.

It is a matter of concern that the substantial amendments being proposed do not appear to have been the subject of consultation or to be based on a review of the operation of the OAIC. Although there is some discussion in the explanatory memorandum about the justification for making changes to the current system of merits review (for FOI decisions), it may be noted that the office exercises important functions beyond merits review and that there is very little justification offered for the abolition of the office with reference to these further functions. Some of these functions (for example, issuing guidelines to which agencies must have regard) will be transferred to the Attorney-General. However, the creation of the Office of the Australian Information Commissioner was, at least in part, justified to address a perceived weakness in the initial phase of operation of the FOI Act, namely, the absence of an *independent* and *specialist* agency to provide leadership across government and which could ensure consistency, give active attention to best practice administration of the legislation, and monitor agency practice with a view to advising government on issues of policy and law reform. Transferring certain of the OAIC's functions to the Attorney-General should be considered in this context.

A further concern relates to the possible cost implications of transferring the merit review function back to the AAT. No charge applied to OAIC reviews, however, the AAT cost for applications which attract a fee (which previously included this type of review) is currently \$861 (though a concessional rate of \$100 is available in specified circumstances). The current AAT fee could be a significant impost and a likely deterrent to many potential applicants.

The committee therefore notes the above issues and, in light of the brevity of the explanatory memorandum, does not believe Senators are well placed to determine whether the bill will detract from the efficacy of the FOI regime, a matter which would be of considerable concern to the committee. **The committee therefore seeks a more comprehensive justification for the key elements of the proposed changes. The committee is also interested in advice as to the cost of transferring merits review to the AAT.**

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

Privacy—Student identifiers scheme

Items 75–81

In its *Ninth Report of 2014* the committee considered the Student Identifiers Bill 2014 (pp 368–372). In that report the committee noted:

- the Minister's advice that the Office of the Australian Information Commissioner (OAIC) had welcomed the approach to privacy protection in relation to the student identifiers scheme;
- that the Department of Industry and the OAIC had signed an MOU to ensure that the design and implementation of the scheme takes into account privacy implications and to support the independent regulatory privacy oversight of the scheme;
- that the bill conferred additional functions on the Information Commissioner; and
- that protocols governing the release of information would be developed with the advice of, and in consultation with, the Information Commissioner.

The committee was also aware of the government's Budget decision to disband the OAIC. As a result, the committee stated that it would not be able to determine what impact (if any) the disbandment of the OAIC would have on the operation of the student identifiers scheme (particularly the consideration of privacy implications in the design, implementation and oversight of the scheme) without knowing the content of any relevant transitional provisions. The committee concluded that it would reconsider this matter when the transitional provisions are introduced into the Parliament.

Items 75–81 of the Freedom of Information Amendment (New Arrangements) Bill 2014 contain these transitional provisions. It is proposed to replace all references to 'Information Commissioner.' in the *Student Identifiers Act 2014* with references to the 'Australian Privacy Commissioner'. Thus, for example, the additional functions conferred on the Information Commissioner in

section 24 of the Student Identifiers Act will instead be conferred on the Australian Privacy Commissioner.

The committee is concerned that there is little information in the explanatory memorandum in relation to the functions that will be conferred on the Australian Privacy Commissioner as a result of the ‘consequential amendments’ to 20 Acts (including the Student Identifiers Act) in items 3–22 and 24–104 of the bill. For example, it would have been useful if the explanatory memorandum had explicitly outlined the functions that will be conferred on the Australian Privacy Commissioner as a result of the amendments to the Student Identifiers Act proposed in items 75–81 of the bill. However, as it appears that all of the functions that would have been undertaken by the Information Commissioner in relation to the student identifiers scheme will be undertaken by the Australian Privacy Commissioner the committee makes no further comment on this matter.

In the circumstances, the committee makes no further comment on this matter.

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Introduced into the House of Representatives on 24 September 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Migration Act 1958* to enable a visa to be cancelled or refused for certain non-citizens by:

- broadening the power to refuse to grant or to cancel a visa on character grounds;
- allowing the minister to require a state or territory agency to disclose personal information relevant to the character test and providing for lower thresholds for cancelling temporary visas;
- amending ministerial decision making powers in relation to general visa cancellation provisions; and
- introducing mandatory visa cancellation for certain non-citizens who do not pass the character test.

Merits review

Schedule 1, item 5

The item proposes amendments which ensure that only decisions made by a delegate of the minister to cancel a visa on proposed character grounds relating to Article 1F, 32 or 33(2) of the Refugees Convention, under section 501 of the Act, are AAT-reviewable. Decisions made personally by the Minister to cancel a protection visa on this basis are not reviewable. The explanatory memorandum (at p. 7) states that this approach is consistent with ‘other personal decisions of the Minister to cancel a visa under section 501’.

In the circumstances the committee makes no further comment on this provision.

Merits review and procedural fairness

Schedule 1, item 7

This item has the effect of ensuring that a decision to cancel a visa under proposed new subsection 501(3A) is not merits reviewable, whether the decision is made by the Minister personally or a delegate of the Minister (under current provisions, decisions by delegates are reviewable). New subsection 501(3A) provides that the Minister must cancel a visa without notice (and thus without any hearing whatsoever) where the Minister is satisfied that the person does not pass the character test because of their substantial criminal record (in circumstances where they have either been sentenced to death, life imprisonment or a term of 12 months imprisonment or more) or sexually based offences involving a child, and in both instances the person is in prison. Item 9 provides that the *Migration Act* statutory code of procedures, which would in some cases provide for a fair hearing, do not apply to decisions made under subsection 501(3A).

The explanatory memorandum notes the effective exclusion of review, even for decisions made by a delegate of the Minister. It further notes, however, that the criteria for cancellation enable the character test to be determined ‘objectively’ and that a person whose visa has been cancelled on the basis of this provision is able to seek revocation of the decision under new section 501CA (inserted by item 18). Merits review of a decision of a delegate not to revoke the decision to cancel the visa is available under new paragraph 500(1)(ba) (see item 4).

Although it may be accepted that the capacity to apply for revocation of a cancellation decision under new subsection 501(3A) (which is merits-reviewable if made by a delegate of the Minister) will afford a hearing, this scheme for decision-making inverts the normal expectation that a decision which may have a determinative effect on rights and interests will only be made after the affected person has had an opportunity to be heard. The explanatory memorandum argues that this approach reflects the ‘intention...that a decision to cancel a person’s visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued’ (at p. 8). **The committee notes the effect of this provision, but leaves the question of whether or not a sufficient practical justification for excluding a fair hearing prior to the making of the cancellation decision has been provided to the Senate as a whole.**

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

Broad discretionary power

Item 10, proposed new paragraph 501(6)(b)

This item repeals existing paragraph 501(6)(b) which provides that a person does not pass the character test if the person has or has had 'an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'. The purpose of the replacement paragraph 501(6)(b) is 'to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation [such as a criminal motorcycle gang or terrorist organisation] does not pass the character test' (explanatory memorandum, p. 9). Under the new provision the character test will not be passed if a person is a member of such a group or organisation or where there is a reasonable suspicion of membership.

The proposed provision provides that a person does not pass the character test if the Minister reasonably suspects:

- that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
- that the group, organisation or person has been or is involved in criminal conduct.

Although this approach requires the minister to form a reasonable suspicion, it is apparent that reasonable minds may differ about whether evidence before the Minister would justify the formation of the relevant state of mind. It is suggested that this approach gives the Minister a practical area of judgment and that this would not easily be subject to effective judicial review given the lack of objective criteria. Of particular concern may be the fact that a reasonable suspicion that a person has an association with a group or person reasonably suspected of being involved in criminal conduct may be grounded in familial or social connections.

The explanatory memorandum makes an argument for the new approach in relation to membership, but does not specifically argue for the appropriateness of lowering the threshold of evidence required to show an ‘association’ (see paragraph 41, p. 9). **As such the committee seeks the Minister's further explanation for lowering the threshold of evidence required in relation to establishing an association between groups or persons involved in criminal conduct.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Rights, liberties or obligations unduly dependent on insufficiently defined administrative powers
Item 11, paragraph 501(6)(d)

This item makes an amendment to paragraph 501(6)(d), which currently provides that a person does not pass the character test if, in the event they were allowed to enter or remain in Australia, there is a significant risk they would engage in specified activities (for example, criminal conduct) or that they represent a danger to the Australian community or to a segment of that community. The amendment removes the word ‘significant’. The explanatory memorandum explains that the:

...purpose of this amendment is to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act.

It is further explained that the:

...intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.

The lowering of the threshold of risk should be seen in the context of two matters of relevance to the application of paragraph 501(6)(d). First, it should be emphasised that the assessment of risk is to be made in relation to possible outcomes which are inherently contestable. Significantly, whether or not a person represents a danger to the Australian community or to a segment of

that community is a matter about which reasonable minds may disagree in particular circumstances. Second, the Minister is empowered to apply the character test to refuse to grant or cancel visas on the basis of this aspect of the character test without affording a fair hearing in certain circumstances (ie where the Minister is satisfied that the refusal or cancellation is in the national interest, see paragraph 501(3)(d)). This lack of a hearing means that assessments of risk may be based on adverse information to which a visa holder or applicant has not been given an opportunity to respond. In light of these features of the legislative context, lowering of the threshold of risk may be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers. **The committee therefore seeks the Minister's detailed explanation as to why lowering the required degree of risk is necessary and appropriate.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Review rights

Item 12, proposed paragraph 501(6)(g)

This proposed paragraph provides that a person does not pass the character test if they are the subject of an adverse ASIO assessment.

The committee seeks the Attorney-General's advice as to whether ASIO assessments on which these decisions are based will be reviewable in the AAT and, if so, what implications the exercise of merits review right will have for the validity or implementation of decisions based on this paragraph 501(6)(g) of the *Migration Act*.

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

Procedural fairness

Item 17, proposed section 501BA

This item provides that where the cancellation of the visa of a person in prison (see item 18, proposed section 501CA) has been revoked by a delegate of the Minister or the AAT (subsection 501BA(1)), the Minister may (subsection 501BA(2)) exercise a personal power to set aside that revocation decision and cancel the visa if satisfied that the person does not pass the character test and the cancellation of the visa is in the national interest. New section 501CA provides that the Minister may cancel a visa without notice if satisfied that the person does not pass the character test and is in prison.

Subsection 501BA(3) provides that natural justice does not apply to a decision made under subsection 501BA(2) and subsection 501BA(5) provides that merits review is not available for decisions made under subsection 501BA(2).

The justification provided for excluding natural justice is that ‘natural justice will have already been provided to the non-citizen through the revocation process available under subsection 501CA’ and that the:

...intention is that this is a personal power of the Minister to ensure that, despite a decision of a delegate or tribunal to revoke a visa cancellation, the Minister retains the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community.

Two matters may be noted in response to this justification:

- First, if the Minister relies on different material or considerations to that before the decision-maker who decided to revoke the visa cancellation, the fact that a fair hearing was provided at that stage of the decision-making process will not guarantee that the person has a fair hearing in relation to the subsequent decision under subsection 501BA(2) to set aside the original decision and cancel the visa.
- Secondly, even if it is considered appropriate that the fair hearing rule of natural justice not apply to the Minister’s decision under subsection 501BA(2) it is not clear why the rule against apparent and actual bias should not apply.

It is noted that the non-availability of merits review makes the exclusion of natural justice more concerning, as there are no procedural checks on the Minister's exercise of a power which depends on his or her view about the vague criterion of what is in the national interest. The explanatory memorandum indicates that the exclusion of merits review is based on the 'recognition of the fact that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations' (at p.15). The committee is concerned that this argument underestimates the role merit review tribunals can play in reflecting community standards and expectations. As part of their obligation to make the correct and preferable decision merit review tribunals typically apply government policy. Government policy issued by a Minister will, except in exceptional and rare cases, be applied by merit review tribunals. Given this, it is not clear why merits review needs be excluded to ensure that decisions reflect community standards and expectations to an acceptable degree.

Where:

1. procedural fairness obligations do not apply;
2. merits review is not available; and
3. the criteria being applied relate to the application of standards such as what is 'in the national interest'

the result is that the exercise of power is not, as a practical matter, constrained by law. This is of particular concern when decisions single out particular individuals and, thus, necessarily raise questions of fairness in the application of general standards in addition to matters of public policy.

For all of these reasons the committee seeks a more detailed explanation from the Minister as to why it is considered necessary to exclude *all* aspects of the rules of natural justice.

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

**Undue trespass on personal rights and liberties—privacy
Item 25, proposed section 501L**

This section introduces a new power which will enable the Minister to require the head of an agency of a State or Territory to disclose to the Minister personal information about a person whose visa may be cancelled on character grounds under section 501 of the Migration Act, certain to specified (quite limited) exceptions.

The information which may be requested clearly includes highly sensitive information, such as ‘prison lists, information on persons who have received suspended sentences, or any other information that can be considered relevant to a person’s character’ (explanatory memorandum, p. 19). The Statement of Compatibility notes the information may include ‘bio-data of persons entering Australian correctional institutions’ (at p. 12).

The Statement of Compatibility (at p. 12) explains that this item has been introduced to establish a formal basis for obtaining information considered ‘necessary to support the identification and assessment of visa holders of character concern against the character requirements of the Act’. It is noted that ‘without an explicit power...it is either not possible, or not without risk, to attempt to put in place formal arrangements to share information’.

A justification for the significant new power is briefly given in the Statement of Compatibility:

This amendment has been written to be precise for section 501 purposes only. This amendment is necessary as the new Australian Privacy Principles (the ‘APPs’), the Act and the various State and Territory privacy legislations do not provide sufficient coverage for my department to identify and assess all liable non-citizens. This amendment is a reasonable response to providing my department with the ability to properly identify and assess the circumstances of persons who may present a risk to public order, public safety, and the protection of the rights and freedoms of others and therefore, it is not arbitrary. Detailed Memoranda of Understanding will be developed to form the terms of the information sharing agreements and will be in accordance with the APPs.

The committee therefore seeks information from the Minister about whether the Privacy Commissioner has been consulted in developing the amendment and whether consideration has been given to the

appropriateness of providing for additional accountability arrangements in recognition of the highly sensitive nature of the information which may be disclosed and the fact that a great deal of information may be relevant to a person's character in the ordinary sense.

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

Merits review

Items 26 and 27

It appears that these items seek to operate to limit the availability of review by the AAT of some personal decisions made by the Minister under section 501 of the Act; in particular, decisions based on Articles 1F, 32 or 33 of the Convention for Refugees.

The Statement of Compatibility states (at p. 13) that the bill 'restores the intended position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT'. However, the reasons why it is considered inappropriate for merits review to be available where a decision to refuse to grant or cancel a visa is based on Articles 1F, 32 or 33 of the Convention for Refugees are not elaborated. **For this reason, the committee seeks the Minister's more detailed justification of the proposed approach.**

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

Procedural fairness

Schedule 2, item 12, subsections 133A(4) and 133C(4)

This provision states that the 'rules of natural justice, and the procedure set out in subdivision C, do not apply' to decisions made by the Minister to cancel a visa under subsection 133A(3). The explanatory memorandum (p. 45) justifies this approach on the basis that 'in some circumstances the Minister

needs to be able to cancel a visa quickly without notice' and that if this is considered necessary a person who has had their visa cancelled will be invited to make representations to the minister about revocation of the decision under new section 133F. Under section 133F, where a decision has been made under 133A(3) without prior notice to the visa holder, the Minister must give the person a written notice setting out the original decision and the particulars of relevant information. The Minister must also invite the person to make representations to the Minister about the revocation of the original decision. Pursuant to subsection 133F(4), the Minister 'may' revoke the original decision if the person makes representations and the 'person satisfies the Minister that the ground for cancelling the visa...does not exist'.

Two features of this regime for providing a fair hearing to an affected person may be noted:

First, even if the person satisfies the Minister that the ground for cancelling the visa does not exist, the Minister need not revoke the decision; and

Secondly, whereas the original cancellation decision depends upon the Minister being satisfied that a ground for cancellation exists, the decision can be revoked only in circumstances where the person satisfies the Minister that the ground does not exist. This means that an affected person must bear the practical burden of proving that a ground does not exist, which may be a higher burden than merely establishing that there was insufficient material for the Minister to be satisfied that a ground for cancellation does exist.

Finally, it may also be noted that although the explanatory memorandum appears to indicate that cancellation decisions need to be made quickly in some circumstances, the content required by the common law fair hearing rule is adjusted to the circumstances of particular cases which may include the need for urgency.

The same issue also arises under subsection 133C(4).

In light of these matters, the committee seeks the Minister's fuller explanation for the justification for the abrogation of the fundamental principles of natural justice, including the rule against bias.

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

Merits review

Schedule 2, items 18-21

These items all have the purpose of ensuring that MRT review is not available where a decision is made to cancel a visa personally by the Minister in relation to cancellations related to the grounds set out in section 109 and section 116. The explanatory memorandum argues in each case that these cancellation grounds include 'those relating to national security, foreign interests, the health, safety and good order of the Australian community and the integrity of the Migration programme' (at p. 35). It is suggested that decisions made personally by the Minister under section 501 (which relate to the character test) are not reviewable and that it is therefore 'incongruous' for a 'cancellation decision taken by the Minister personally [applying the grounds under section 109 and section 116] to be subject to full merits based administrative review'. It is thus suggested that in each of these cases merits review should not be available because 'the government is ultimately responsible for ensuring that decisions reflect community standards and expectations' (at p. 35).

It appears to the committee that the difficulty with this approach to justifying the exclusion of merits review is that it is over broad. At least some of the grounds for cancellation in question do not appear to be unsuitable for merits review. For example, paragraph 116(1)(a) provides for cancellation if the Minister is satisfied that 'any circumstances which permitted the grant of the visa no longer exist'. Paragraph 116(1)(b) provides for cancellation if the Minister is satisfied that; 'its holder has not complied with a condition of the visa'. It is also the case that paragraph 116(1)(g) enables the prescription, in the regulations, of further grounds for cancellation. For this reason, the committee is concerned that not all of these grounds are suitable for the Minister to determine alone, without any facility for merits review, on the basis that 'the government is ultimately responsible for ensuring that decisions reflect community standards and expectations'. **The committee therefore seeks the Minister's detailed explanation as to why each of the grounds**

for cancellation under sections 109 and 116 should not be subject to merits review.

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

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Maritime Powers Act 2013* to:

- provide clarity and consistency in relation to powers to detain and move vessels and people;
- clarify the relationship between the Act and other laws; and
- provide for the minister to give directions about the exercise of maritime powers.

The bill also seeks to amend the *Migration Act 1958* to:

- introduce temporary protection for those who engage Australia's non-refoulement obligations and who arrive in Australia illegally;
- create the authority to make deeming regulations;
- create the Safe Haven Enterprise Visa class;
- introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT);
- establish the Immigration Assessment Authority within the RRT to consider fast track reviewable decisions; clarify the availability of removal powers independent of assessments of Australia's non-refoulement obligations;
- codify Australia's interpretation of its protection obligations under the Convention for Refugees and clarify the legal status of children of unauthorised maritime arrivals and transitory persons; and
- enable the minister to place a statutory limit on the number of protection visas granted.

Consequential amendments are also made to the *Maritime Powers Act 2013*, *Migration Act 1958*, *Administrative Decisions (Judicial Review) Act 1997*, *Immigration (Guardianship of Children) Act 1946* and Migration Regulations 1994.

**Possible undue trespass on personal rights and liberties—
procedural fairness**

Schedule 1, item 6, proposed section 22B

Proposed subsection 22B(1) provides that the rules of natural justice do not apply to the exercise of a power to give an authorisation under a provision of Division 2 of Part 2 of the Maritime Powers Act. Subsection 22B(2) provides that subsection 22B(1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.

The explanatory memorandum asserts that the ‘purpose of subsection 22B(1) is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation under Division 2 of Part 2 of the Maritime Powers Act’. Further, it is said that this result aligns with the original intention of the Maritime Powers Act, which ‘was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives’. In justification of this claim, the explanatory memorandum quotes from the *Replacement Explanatory Memorandum* to the Maritime Powers Bill 2012 (p. 62) as follows:

Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.

Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the “unique circumstances...in a maritime environment” render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.

The rules of natural justice are considered to be fundamental principles of the common law. The *Maritime Powers Act* contains a number of significant and coercive ‘maritime powers’ and the explanatory memorandum does not provide sufficient justification for the exclusion of natural justice for all of the powers in the *Maritime Powers Act*. Not all the powers are the same or require the same considerations in relation to their exercise. For example, different considerations may arise in relation to powers which enable a person or vessel to be detained than in relation to powers which enable a person or vessel to be transported to a destination (which may be outside of Australia). Without further details and analysis, the claim that application of the rules of natural justice is not consistent with the ‘unique circumstances...in a maritime environment’ does not enable the committee to properly consider the appropriateness of the proposed exclusion of natural justice. **The committee therefore seeks the Minister's advice detailing each maritime power to which this exclusion will apply, accompanied by a justification in each instance as to why the exclusion of natural justice is considered reasonable.**

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

Undue trespass on personal rights and liberties—exercise of coercive powers

Schedule 1, item 7, paragraph 31(a)

The purpose of this amendment is ‘to put it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of the law’ (explanatory memorandum at p. 21). Regrettably the explanatory memorandum does not explain the reasons why this extension of purposes for which maritime powers may be exercised is considered appropriate. Nor does the explanatory memorandum give examples of the sorts of situations that this extension of the application of the coercive powers under the *Maritime Powers Act* is intended to cover. **The committee therefore seeks the Minister's advice as to the justification for the extension of coercive powers.**

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

Undue trespass on personal rights and liberties
Schedule 1, item 11, subsection 69(3) and subsection 69(3A)

Proposed new subsection 69(2) provides that an officer may take a detained vessel or aircraft to a 'destination' and remain in control or direct the person in charge of the vessel or aircraft to remain in control at the destination until either the vessel or aircraft is returned to a person (referred to in subsection 87(1)) or action is taken as mentioned in subsection 87(3).

New subsection 69(3) provides that the destination to which a vessel or aircraft may be taken may be in the migration zone or outside the migration zone (including outside Australia). The destination to which a vessel or aircraft may be taken is clarified by proposed new section 75C (item 19). That provision states that the destination does not have to be in a country, may be just outside a country; and may be a vessel. It also provides that a vessel or aircraft may be taken (or caused to be taken) to a destination under section 69 whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it) and irrespective of the international obligations or domestic law of any other country.

The explanatory memorandum (at p. 29) states:

The effect of new section 75C is to put it beyond doubt that a destination does not need to be inside a country and that a vessel, aircraft or person may be taken to a destination that is not inside a country whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country. While this amendment simply gives explicit voice to Parliament's intent in the original Maritime Powers Act, as demonstrated particularly by the fact that section 40 provides for the agreement of another country only for the exercise of maritime powers inside another country, this amendment puts the matter beyond doubt.

There is a risk that allowing the powers under section 69 to be exercised by taking vessels and aircraft to places outside of Australia, in circumstances where the executive is not subject to legal obligations that may be enforced by affected persons, may leave the manner in which the vessels and aircraft are dealt with is inadequately regulated by law. **In these circumstances the**

committee requests that the Minister detail the legal constraints and accountability mechanisms (if any) which are in place in relation to these powers and to address the question of whether personal rights and liberties of persons affected are adequately protected from undue trespass.

New subsection 69(3A) provides that a maritime officer may change the destination to which a vessel or aircraft is being taken pursuant to subsection 69(2). A note to the subsection indicates that the destination can be changed more than once. This provision introduces the possibility that the powers to take a vessel to a place may be exercised in way that is not temporally limited.

It may be noted that although proposed section 69A (see item 12) imposes a reasonableness requirement related to the time a vessel or aircraft may be detained under subsection 69(1) for the purposes of making decisions about which place should be the destination and considering whether the destination should be changed, it is not clear that this deals with the reasonableness of multiple destination changes. The general rule (see section 87), that detained vessel or aircraft must be returned within 28 days, does not resolve the difficulty as the 'holding period should not commence until after the vessel or aircraft reaches its destination' (explanatory memorandum at pp 23-24, referring to proposed subsection 69A(3)).

The committee seeks the Minister's advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.

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

Rights, liberties and obligations unduly dependent on insufficiently defined legislative power

Schedule 1, item 15, proposed subsections 72(3) and (4)

The explanatory memorandum (at p. 25) states that the 'effect of these amendments is to clarify the places to which a [detained] person may be taken

and to harmonise the language between sections 69 and 72. As such, the same issues arise in item 15 as in item 11. **The committee therefore repeats its request in the previous comment seeking the Minister advice as to whether this power may be limited so that multiple changes in destination are not able to unreasonably prolong the period for the exercise of these coercive powers.**

Further, the combined effect of these subsections is that a maritime officer may detain and move a person, including to a place outside of Australia. The Statement of Compatibility (at p. 7) states that, although this provision (along with sections 69, 69A, 72A, and 75F) is capable of authorising actions which are not consistent with Australia's non-refoulement obligations, 'the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of law'. It is further stated that it 'is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government' (p. 7).

This approach can be characterised as making rights which are protected at international law and Australia's obligations to protect those rights unduly dependent on insufficiently defined legislative power. **The committee therefore seeks the Minister's advice as to the justification for this approach.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference and may also be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties— procedural fairness

Schedule 1, item 19, proposed section 75B

Similar to item 6 in relation to proposed section 22B, this item states that the rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H. **The committee therefore repeats its request in the comment on item 6 seeking the Minister detailed**

advice as to the justification for the exclusion of the rules of natural justice in each instance in which this occurs.

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

**Adequacy of Parliamentary oversight; broad discretionary power
Schedule 1, item 19, proposed sections 75D, 75F, 75H**

Section 75D allows for the section 41 statutory limits on the exercise of maritime powers in relation to foreign vessels between countries to be dispensed with in the exercise of power under section 69, 69A, 71, 72, 72A or 74 relating to the detention and movement of vessels, aircraft and persons. The mechanism for dispensing with these statutory limits is a Ministerial determination that is expressed to cover the exercise, in a specified circumstance, of one or more of the listed powers.

From a scrutiny perspective there are two issues of concern. The first is the breadth of the discretion to make a determination. The 'only condition' for the exercise of the Minister's power to make a determination is whether 'the Minister thinks that it is in the national interest to make or vary the determination' (subsection 75D(4)).

The second concern is that a determination is not a legislative instrument (subsection 75D(7)). The explanatory memorandum accepts that this is a substantive exemption from the Legislative Instruments Act, which it justifies as follows:

Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information. dangerous and unique maritime operational environment. *[sic]*

The result, however, is that the exercise of this power is not subject to effective legal or political forms of accountability. The overall purpose of section 75D is 'to provide for flexibility in exercising powers relating to

foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict' (explanatory memorandum, p. 30).

A similar issue arises in relation to section 75F, which empowers the Minister to issue written directions that determine how the powers under section 69, 69A, 71, 72, and 72A must be exercised. The only condition for the exercise of the power to give such a direction is that the Minister thinks that it is in the national interest to do so. Subsection 75F(10) provides that directions are exempt for the LIA, for the same essential reasons as those relating to determinations under section 75E. Similar powers are also available to the Minister under subsection 75H(4) with the only condition again being that the Minister thinks that it is in the national interest (75H(6)).

Unfortunately the explanatory memorandum does not further elaborate the reasons why such a broad discretionary power to dispense with normal statutory requirements is required. Given that the power may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or to insufficiently subject the exercise of legislative power to parliamentary scrutiny, **the committee seeks the Minister's advice as to whether a more detailed justification could be provided for the introduction of the powers.**

Further, if the breadth of the discretionary power is considered necessary, **the committee seeks the Minister's advice as to whether consideration has been given to introducing accountability checks, alternative to the LIA requirements, which would not require the disclosure of sensitive operational matters. For example, a requirement for the Minister to report on the exercise of his power to make determinations could be considered.**

Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference, and may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Exclusion of review under the *Administrative Decisions (Judicial Review) Act 1977*

Item 31

This item has the effect of excluding review under the *Administrative Decisions (Judicial Review) Act 1977* of decisions made under section 75D, 75F or 75H of the *Maritime Powers Act 2013*. There is no justification provided for excluding review. If the rationale for exclusion relates to the requirement under the ADJR Act to give reasons, the committee considers this in itself is insufficient to justify listing the decisions in Schedule 1 (which excludes review) because the reason-giving requirement could be excluded by listing the decisions in Schedule 2 to the Act.

In the absence of any explanation or justification in the explanatory memorandum, **the committee seeks the Minister's advice as to why the decisions made under these sections are not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.**

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

Delegation of legislative power

Schedule 2, item 5, proposed subsection 35A(4)

Proposed subsection 35A(4) provides that the regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas. The explanatory memorandum (at p. 47) explains that the purpose of this provision is to provide for the flexibility to introduce additional classes of protection visas in the Migration Regulations. **The committee seeks the Minister's advice as to why this flexibility is needed and why the recognition of new classes of protection visas should not be considered an important question of policy that is more appropriately determined directly by Parliament than through regulations.**

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

**Undue trespass on personal rights and liabilities—accrued rights
Schedule 2, item 20, proposed subsection 45AA(8)**

This subsection provides that neither subsection 12(2) of the *Legislative Instruments Act 2003* nor subsection 7(2) of the *Acts Interpretation Act 1901* apply to the making of a ‘conversion regulation’. Proposed subsection 45AA(3) provides for the making of conversion regulations, and the purpose of such regulation is to provide, in circumstances specified in subsection 45AA(1), for application made for a particular class of visa to be converted into an application for a visa of a different class.

The explanatory memorandum (at p. 61) clarifies that the purpose of this provision is to ensure that a conversion regulation may affect the accrued rights of an applicant. Subsection 12(2) of the *Legislative Instruments Act 2003* provides that a legislative instrument has no effect if, apart from subsection 12(2), it would take effect prior to the date it is registered (i.e. retrospectively) and as a result would impose liabilities or adversely affect the rights of a person. Subsection 7(2) of the *Acts Interpretation Act 1901* provides that if an Act or instrument under an Act repeals or amends an Act, then the repeal or amendment does not, among other things, affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act.

Regrettably, the explanatory memorandum does not elaborate the nature of any accrued rights that may be adversely affected by these provisions. Nor is the question of the fairness of any detriment that may be suffered by visa applicants addressed. **The committee therefore seeks the Minister's advice as to how the proposed subsection will operate and a justification for its inclusion.**

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

**Make rights or obligations unduly dependent on insufficiently defined administrative powers—broad discretionary power
Schedule 2, item 31, proposed clause 785.227 of the Migration Regulations 1994**

This proposed clause provides that the Minister must be satisfied that the grant of a visa is in the national interest. This enables a visa not to be granted on the basis of a criterion that reposes in the Minister what, in practical terms, is a broad discretionary judgment about what is or is not in the national interest. Given that the criteria also include public interest criteria (see clause 75.226, which is a mechanism by which the character test of the Migration Act can be considered) and a number of criteria related to health and medical examinations, it is unclear why this national interest criterion is necessary and appropriate. **The committee therefore seeks the Minister's advice as to why this criterion should not be considered to make rights or obligations unduly dependent on insufficiently defined administrative powers.**

Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

**Commencement of regulation
Schedule 2, item 38, proposed subregulation 2.08F(3) of the Migration Regulations 1994**

This item provides for a 'conversion regulation', which means that certain applications for Protection (Class XA) visas will be taken to be applications for Temporary Protection (Class XD) visas.

Subregulation 2.08F(3) provides that, in a case in which the Minister has made a decision in relation to a pre-conversion application, the new conversion regulation starts to apply to a pre-conversion application immediately after a tribunal (the RRT or AAT) remits the pre-conversion application for re-decision or a court quashes a decision of the Minister in relation to a pre-conversion application and orders the Minister to reconsider the application in accordance with the law.

The effect of this subregulation is that a visa applicant may succeed in their application to a court or tribunal but that when the matter is re-determined after that proceeding, the law applicable at the time of the court or tribunal application will no longer be applied. Thus even though an applicant may have established in tribunal or court proceedings that the Minister's original decision in relation to their pre-conversion application was in error, they will no longer be entitled to have their application for a Protection (Class XA) visa determined as their application will, by virtue of regulation 2.08F, have been converted into an application for a Temporary Protection (Class XD) visa.

The explanatory memorandum describes the effect of subregulation 7.08F(3). Although the subregulation may not, technically speaking, be considered retrospective, an applicant who has successfully challenged in court or a tribunal the Minister's original decision is then denied having their application decided on the basis of the law that should have been properly applied at the time of that original decision. There is arguably an element of unfairness about this approach and **in the circumstances the committee seeks the Minister's advice as to the justification for the proposed approach.**

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

Merits review and procedural fairness

Schedule 4, item 1, subsection 5(1) and item 21, Part 7AA generally

Item 1 inserts a new defined term, namely, 'fast track applicant' in subsection 5(1) of the Act. In general terms, a fast track applicant means an unauthorised maritime applicant (UMA) who entered Australia on or after 13 August 2012, for whom the Minister has lifted the bar preventing the UMA from making a valid visa application under subsection 46A(1) and who has subsequently made a valid application for a protection visa.

Apart from cases involving an 'excluded fast track review applicant', fast track applicants will be subject to a new Fast Track assessment process. Rather than having access to existing merits review mechanisms, most decisions to refuse a visa (other than decisions relying on a number of specified provisions in the Migration Act) will only be reviewable by reference to a new merits review body—the Immigration Assessment

Authority (IAA). Fast track review applicants would not be entitled to apply to the RRT in respect of their fast track reviewable decisions.

The IAA will conduct an automatic and limited form of review for all fast track reviewable decisions (proposed section 473CC). Proposed section 473CA (see item 21) requires the Minister to refer a fast track reviewable decision to the IAA as soon as is reasonably practicable. There are associated obligations on the Secretary of the Department to provide ‘review material’ on which the review is to be based (proposed section 473CB). This material must include:

- a statement that sets out the findings of fact, refers to the evidence on which these findings are based, and gives the reasons for the decision;
- material provided by the applicant; and
- any other material in the Secretary’s possession or control which the Secretary considers relevant to the review.

Proposed subsection 473CC(1) requires the IAA to review a fast track reviewable decision referred to the Authority under section 473CA; subsection 473CC(2) provides that the IAA may either (1) affirm the decision or (2) ‘remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by the regulations’.

Adequacy of merits review

The form of review provided by the IAA can be considered ‘limited’ in two significant ways. First, the remedial powers of the IAA do not, as is the case with the powers of the RRT, MRT and AAT, enable the review body to vary the decision or set the decision aside and substitute a new decision. Although it may be correct to say that there is no canonical form of merits review, one of the key features of merits review tribunals such as the AAT, MRT and RRT (when compared to judicial review) is the remedial power to substitute a new decision if it is considered that the decision under review is not correct or preferable. In this respect, review by the IAA involves a significant departure from the form of review available in existing migration review tribunals.

It is unfortunate that the explanatory memorandum says relatively little about this limited nature of the IAA’s remedial power. What it stated is that:

...the power to remit a fast track decision with directions or recommendations will permit the IAA to review the substantive matters which must be satisfied before the visa application can be approved and, if these are decided in favour of the applicant, to then remit the case back to the Department to consider the more procedural criteria, which would not be appropriate for the IAA to deal with.

This explanation of the provision does not elaborate the sort of directions or recommendations which may be permitted by the regulations. Further, there is nothing to suggest that the Minister would be bound to comply with any directions or recommendations which are given when a decision is remitted for reconsideration. Indeed, the language of reconsideration indicates that the ultimate decision would be left with the Minister (or his or her delegate). Nor does the explanatory memorandum identify the ‘more procedural criteria’ which it is claimed would not be appropriate for the IAA to deal with. Without further information about these issues, **the committee is not well placed to assess the justification for the departure from what may be considered to be the full set of remedial powers which are associated with merits review of decisions which directly affect individual rights or interests. The committee therefore seeks the Minister's more detailed explanation and justification for the limited remedial powers of the IAA.**

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

Procedural fairness

The second sense in which the form of IAA merits review is ‘limited’ is due to the strictly confined scope for participation by a ‘referred applicant’. Division 3 of Part 7AA relates to the conduct of an IAA review. Importantly, section 473DA provides that this Division is an exhaustive statement of the requirements of the natural justice hearing rule. Section 473DB provides that the IAA has an obligation to review decisions referred to it by reference to the provided ‘review material’ without accepting or requesting new information and without interviewing the referred applicant. Section 473FA provides that the IAA, in carrying out its review functions, is to pursue the objective of providing a mechanism of ‘limited review that is efficient and quick’—notably, no mention is made of the objective of fairness.

Although section 473DD does enable the IAA to consider new information if satisfied that there are ‘exceptional circumstances’, this exception to the general rule may have very limited practical utility for two reasons. First, although subsection 473DC(1) provides that the IAA has a discretionary power to seek new information, subsection 473DC(2) makes it clear that it does not have ‘a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances’. It appears that there is no procedural mechanism for a referred applicant to require the IAA to accept information they put forward so that it can at least consider whether there are exceptional circumstances which would justify new information being considered as part of the review. Second, paragraph 473DD(a) provides that new information can only be considered (even in exceptional circumstances) if the referred applicant satisfies the IAA that it was not, and could not have been, provided to the Minister before the Minister made the original decision to refuse the application.

The explanatory materials emphasise that the determination of whether or not there are exceptional circumstances rests ‘entirely with the IAA’ (Statement of Compatibility, p.24) (i.e. is ‘completely discretionary’, explanatory memorandum, p. 132) and the function of limited review rests on the assumption that ‘a fast track review applicant has had ample opportunity to present their claims and supporting evidence...throughout the decision-making process and before a primary decision is made on their application’ (Statement of Compatibility, p. 24; explanatory memorandum, p. 135). Given the exclusion of the common law rules of the natural justice hearing rule, the extremely limited scope for referred applicants to meaningfully participate in the process raises a significant question about whether the statutory scheme does not adequately balance the objective of fairness against those of efficiency and speed. The limited participation that may be afforded to referred applicants appears to be contingent on discretionary decisions made by the IAA about whether new material should be accepted and whether there are exceptional circumstances which justify its consideration.

It should be noted that the explanatory memorandum indicates that it ‘is also proposed to amend the *Migration Regulations 1994* to bring into effect a Code of Procedure with regard to the natural justice obligations and respective timeframes that will apply to reviews conducted by the IAA’ (p. 131). It is suggested, however, that:

1. The exclusion of the fundamental common law rules of natural justice cannot be justified by the making of regulations which may (or may not) adequately balance the referred applicant's interests in a fair hearing with the objectives of efficiency and timely decision-making; and
2. The bill, as currently drafted, does not guarantee sufficient participation of referred applicants in the process to ensure that they have a fair hearing about whether exceptional circumstances justify the consideration of new information.

The committee is concerned that the exclusion of procedural fairness obligations has not been adequately justified and that the objective of a fair hearing has not been adequately balanced with the objectives of efficiency and speed of decision-making in Division 3 of the bill. Despite these concerns, it is noted that there is a relatively detailed justification of the overall scheme of review for fast track applicants in the explanatory materials. **In these circumstances the committee draws the adequacy of the hearing to be afforded to referred applicants in the conduct of the IAA review function to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Merits review

Schedule 4, item 1, subsection 5(1)

Item 1 inserts a number of new defined terms, including 'excluded fast track review applicant'.

If a person falls within the definition of 'excluded fast track review applicant', the consequence is that their applications cannot be determined by the (new) Immigration Assessment Authority. Further, they would not be entitled to apply for review to the Migration Review Tribunal and the Refugee Review Tribunal. In short, excluded fast track review applicants would not be able to seek *any* form of merits review. Given the limitations of judicial review

(which, for example, is in principle unable to correct for serious factual errors), this inability for an applicant for a protection visa to seek any form of merits review is of considerable practical significance. Where a decision has serious effects on individual rights or interests and relates to a particular individual, the committee's expectation is that the opportunity to seek merits review should generally be made available.

The explanatory memorandum (at pp 107-108) indicates that the general rationale for excluding some applicants from any facility of merits review is that they 'are determined to have put forward disingenuous information in support of their application or have access to protection elsewhere'. Further, it is stated that the 'measure is also aimed at discouraging the making of non-genuine, unmeritorious claims for protection as a means of delaying an applicant's departure from Australia'.

Subparagraph (a)(i) of the definition excludes applicants who, in the opinion of the Minister, are covered by section 91C or 91N, provisions which (according to the explanatory memorandum) deal with non-citizens who are entitled to reside in a third country. The justification for denying such applicants access to merits review is that 'Australia's protection framework should be dedicated towards identifying and granting protection to asylum seekers who have no alternative country which they can claim protection from and safely reside in'. **In relation to the specific circumstances in which an applicant has been excluded from merits review on this basis, the committee draws the matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Subparagraph (a)(ii) of the definition excludes applicants who, in the opinion of the Minister, have previously entered Australia and who, while in Australia, made a claim for protection (on the basis of seeking asylum as a refugee) in an application that was refused or withdrawn. The justification given for denying such applicants access to merits review is that 'such persons have already accessed and been refused protection under Australia's

framework and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases' (explanatory memorandum at p. 108).

Two issues are of concern about this rationale for the exclusion of merits review in relation to this category of fast track review applicants. First, it may be that the basis for the claim for asylum has changed and that as such the previous refusal related to different or changed personal or political circumstances from those that form the basis of the present application. Second, the exclusion of review applies not only to previous applications that have been refused but also to withdrawn applications. It is not obvious that withdrawal of an application necessarily indicates it is without substance; nor is it the case that it such a withdrawn application can be said to have been 'already assessed'. **In these circumstances the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister's advice as to the justification for such an approach.**

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

Subparagraph (a)(iii) of the definition excludes applicants who, in the opinion of the Minister, have made a claim for protection in a country other than Australia that was refused by that country. This provision is justified on the basis that 'those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework' should 'be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases'.

The same justification is also provided in relation **subparagraph (a)(iv)** which excludes applicants who, in the opinion of the Minister, have made a claim for protection outside Australia that was refused by the Office of the United Nations High Commissioner for Refugees'.

A number of issues arise in relation to the justification for excluding merits review for these applicants. First, there is no requirement that the claim be based on the same circumstances. The application of these exclusions may

mean that an applicant who had a claim refused outside of Australia many years ago would be disabled from access to merits review—a form of review which is an important part of the Australian administrative justice system for decisions which are based on the individual circumstances of affected persons. Second, there is a question about the extent to which it is appropriate to exclude important parts of Australia’s administrative justice system on the basis that applications have already been determined in other countries under administrative procedures that may not reflect standards of administrative decision-making applied in Australia. **In these circumstances the committee is not persuaded by the rationale for excluding merits review for this category of applicants and seeks the Minister’s advice as to the justification for such an approach.**

Pending the Minister’s reply, the committee draws Senators’ attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee’s terms of reference.

Subparagraph (a)(v) of the definition excludes applicants who, in the opinion of the Minister, have made ‘a manifestly unfounded claim for protection’ in his or her application. The explanatory memorandum states that ‘[t]his provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia’s asylum process in an attempt to avoid removal’. In these cases, it is concluded:

...that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.

As a general principle, it is suggested that merits review should not be excluded on the basis that the original decision-maker is of the opinion that an application is clearly or manifestly unfounded. Not only is the question of whether an application is manifestly unfounded one about which reasonable minds may disagree, the original decision-maker is arguably not in a position to impartially consider it. Given that whether a claim is ‘manifestly unfounded’ is a matter to be determined by reference to the ‘opinion’ of the Minister, **the committee seeks the Minister’s advice as to whether**

consideration has been given to giving greater guidance for the application of this standard, which is capable of varying interpretations or whether merits tribunals could adopt procedures to eliminate cases from their lists which are genuinely without foundation.

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

Subparagraph (a)(vi) of the definition excludes applicants who, in the opinion of the Minister, have without reasonable explanation provided a bogus document in support of his or her application. In relation to this exclusion it is argued that 'it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time when those documents may have facilitated the asylum seeker's safe passage until such a time as they could claim protection at the first available opportunity'. Further, the exclusion is justified on the basis that it will 'encourage applicants to comply with requirements and assist with providing authentic documents and evidence which support their protection claims' (explanatory memorandum at p. 109). The committee notes that the extent to which exclusion from merits review is an effective response to the problem of bogus documents is not an issue which receives detailed consideration in the explanatory materials. **However, in relation to the specific circumstances in which an applicant has been excluded from merits review on this basis, the committee draws the matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Delegation of legislative power

Schedule 4, item 1, subsection 5(1), paragraph (b); item 2, schedule 4, subparagraph 5(1)(1AA)(a) and subsection 5(1)(1AB)

Paragraph (b) of the definition provides that an excluded fast track review applicant is a person who is, or is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a). The explanatory memorandum (at p.114) states that:

The intention is to exclude from merits review other fast track applicants who do not fall within the definition of paragraph 5(1)(a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to protection elsewhere.

It can be noted, however, that paragraph 5(1AA)(a), inserted by item 2 of schedule 4, does not expressly limit the categories of persons who may be specified in a legislative instrument for the purposes of paragraph (b) of the definition of excluded fast track review applicant. More generally, it is a matter of concern that the exclusion from categories of applicants seeking asylum from the merits review system is a matter of substantive significance and, thus, that it should be dealt with in primary legislation. This concern is heightened given that the instrument would not be disallowable by operation of item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003* (see explanatory memorandum at p.114). The explanatory memorandum does not address the appropriateness of providing for further categories through legislative instrument (other than a reference to providing the Minister with flexibility (explanatory memorandum p. 113)). **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Broad discretionary power

Schedule 4, item 21, proposed section 473BD

This section provides that the Minister may issue a conclusive certificate in relation to a fast track decision if the Minister believes that it would be contrary to the national interest to change the decision or for the decision to be

reviewed. The effect of a conclusive certificate is that the fast track decision is not a fast track reviewable decision and thus no form of merits review is available in relation to the decision.

The explanatory memorandum notes that this section ‘aligns with current subsection 411(3) which provides the Minister with the ability to issue a conclusive certificate in relation to a decision which would normally be reviewable by the RRT’. It is suggested that the Minister would:

...generally only issue a conclusive certificate on the grounds that changing the decision or reviewing the decision could result in a prejudice to Australia’s security, defence, international relations or where a review would require the IAA to consider Cabinet or Cabinet committee documents (explanatory memorandum, p. 127).

It may be acknowledged that a discretion similar to that in proposed s.473D already applies in relation to decisions which would be otherwise reviewable by the RRT. Nevertheless, given the consequence of the exercise of the power to issue a conclusive certificate is to deny a fast track applicant any form of merits review, it is not clear that the exercise of this discretionary power to issue conclusive certificates could not be more narrowly targeted. Notably, the explanatory memorandum indicates that the Minister would ‘generally’ only exercise the power in the circumstances listed above, which suggests that the power may be exercised in an even broader range of circumstances.

Given the potential significance of the exercise of this power the committee seeks the Minister's advice as to whether consideration has been given to narrowing the scope of this broad discretionary power. The committee also seeks an explanation for excluding merits review of a decision with respect to the examples given in the explanatory memorandum which are given in justification for the power.

Further the committee seeks the Minister's advice as to whether:

- 1. It is possible that prejudice to Australia’s security, defence or international relations could be protected through other powers reposed in the Minister for refusing or cancelling a visa; and**
- 2. Why such matters are not adequately dealt with by the definition of non-disclosable information in subsection 5(1) of the Migration Act or proposed section 473GA (to be inserted by item 21) which restricts the disclosure to the IAA of information which would**

prejudice the security, defence or international relations of Australia or would disclose deliberations or decisions of the Cabinet or a committee of the Cabinet.

Pending the Minister's response, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Exclusion of procedural fairness

Schedule 4, Division 3, item 21, proposed section 473DA

Subsection 473DA(1) provides that Division 3 and sections 473GA and 473GB, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. Sections 473GA and 473GB deal with the disclosure of confidential information to and by the IAA.

Subsection 473DA(2) provides that nothing in this Part requires the IAA to give a referred applicant any material that was before the Minister when the Minister made the decision under section 65. The explanatory memorandum explains that the purpose of this subsection is to put beyond doubt that the IAA 'is not required to give a referred applicant any material that was before the Minister for comment'. It is said that this is appropriate because 'under subsection 57(2) of the Migration Act and in relation to their fast track decision, an applicant would have already been provided an opportunity to comment on relevant information that the Minister considered was the reasons, or part of the reason for refusing to grant a visa' (at p. 130).

It is possible, however, that the IAA could affirm a decision under review on the basis of information that was not considered to be information that must be disclosed by the Minister. In these circumstances, procedural fairness (i.e. the natural justice hearing) would be likely to require the review body to disclose the information upon which it proposed to rely in affirming the decision. **The committee therefore seeks the Minister's advice as to whether consideration has been given to amending the bill to ensure that this risk of procedural unfairness does not materialise.**

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

**Procedural fairness; delegation of legislative power
Schedule 4, item 21, proposed paragraph 473DE(c)**

This item provides that the regulations may prescribe certain types of new information that will not be subject to the requirements under new subsection 473DE(1) to give particulars of any new information, if the new information has been considered by the IAA and would be a reason or part of the reason for affirming the fast track reviewable decision. Paragraph 473DE(1)(c) provides that a referred applicant must be invited to give comments on the new information in writing or at an interview, whether conducted in person, by telephone or in any other way.

Providing particulars of new information relied upon by the IAA is the only mechanism in the statutory procedural scheme which guarantees any form of participation for the referred applicant in the process of review. Given that the scheme is taken to be an exhaustive statement of the rules of the natural justice hearing rule, enabling these guarantees to be whittled away by regulations is a matter of concern. Regrettably, the explanatory memorandum does not explain why further exceptions to the obligation to disclose new information may be required. Nor is there an explanation of why it is appropriate that further circumstances in which new information which would be the reason, or part of the reason, for affirming a decision should be disclosed be dealt with by legislative instrument. **The committee therefore seeks the Minister's advice as to the justification for the inclusion of this paragraph and the reasons why it should not be considered to deal with important matters that should be determined in the primary legislation.**

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

Guidance Decisions

Schedule 4, item 21, proposed section 473FC

The proposed section states that the IAA is bound by a *Guidance Decision* of the Refugee Review Tribunal or the IAA. The committee commented extensively on the concept of a Guidance Decision in its consideration of the Migration Amendment (Protection and Other Measures) Bill 2014 (*Alert Digest No.8 of 2014 and Tenth Report of 2014*). **The committee therefore refers Senators to those publications and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Procedural fairness

Schedule 4, item 21, proposed section 473GA and 473GB

Natural justice is excluded in relation to these provisions (see 473DA(1)), which provides that other provisions along with sections 473GA and 473GB provide an exhaustive statement of the natural justice hearing rule. However, there is a risk that the application of these provisions will mean that fast track applicants are not afforded a fair hearing.

Section 473GA provides that the Minister may issue a conclusive certificate that prevents the Secretary from giving the IAA certain documents or information if the disclosure would be contrary to the public interest. The explanatory memorandum provides little in the way of justification for the proposed power. **The committee therefore seeks the Minister's advice as to whether the exercise of this power may deny a fast track applicant a fair opportunity to be heard in relation to adverse information.**

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

According to the explanatory memorandum, proposed section 473GB:

...deals with a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest ... or the document [or information] was given in confidence. Where the Secretary gives information or a document to the IAA, the Secretary shall notify the IAA in writing that the section applies and may give the IAA written advice that the Secretary thinks relevant about the significance of the document or information.

In exercising the discretion to disclose [this information], the IAA should consider the advice of the Secretary about the significance of the information or document. It is intended that the IAA may rely on such documents or information in making its decision without breaching the rules of natural justice if the referred applicant is not advised of that document or information. It is also intended that if the IAA chooses to release the document or information in full knowledge of the Secretary's advice, it should be responsible for the release. (p. 145)

The committee is concerned that this may result in adverse information not being disclosed. This may replace common law requirements with no enforceable fairness based requirements at all. In these circumstances, **the committee seeks the Minister's advice firstly as to why disclosure should be left entirely to the discretion of the IAA, and secondly, why it is considered appropriate to have no requirements directed to ensuring a fair hearing in relation to information covered by this section.**

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

In this respect the committee also notes that although the IAA is described as providing independent and impartial review (e.g. Statement of Compatibility, p. 27) the bill does not appear to include (in division 8) any of the typical measures designed to promote independence in tribunal decision-making (such as fixed term appointments). **The committee therefore seeks the Minister's advice as to whether consideration has been given to prescribing measures to ensure that the IAA acts, and is seen to act, in an independent and impartial manner.**

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

Retrospective application Schedule 6

The purpose of this schedule is to establish the legal status of children of unauthorised maritime arrivals and transitory persons. As explained by the explanatory memorandum (p. 13):

Section 5AA of the Migration Act will be amended to include the children of UMAs, who are born in Australia or in a regional processing country, within the definition of UMA in this section. Such children are not currently explicitly included in the definition of UMA in the Migration Act. This means that the policy intent, which is that such children are prevented from applying for a Permanent Protection visa while in Australia by virtue of being a UMA, is not explicit on the face of the legislation.

The amendments in this schedule also make it clear that children of UMA's who arrived post-13 August 2012 are subject to transfer to a regional processing country. This means that children will be in a position consistent with their parents. The schedule also contains a number of consequential amendments to account for the new definition of UMA.

As made clear in the explanatory material, these measures will apply with retrospective effect (subject to limited exceptions). The justification for the retrospective application of the amendments appears to be that this will 'ensure, as far as possible that all members of a family are treated in the same way and will limit the possibility of separation of the child and parent due only to the operation of the Migration Act' (explanatory memorandum, p. 197). In short, the justification is that consistent treatment of children and their parents is desirable.

Although as a general proposition it may be accepted (recognising that there may be exceptions) that the status of children under the Migration Act should be consistent with that of their parents, acceptance of this principle does not of itself justify its retrospective application. **The committee therefore seeks a detailed justification from the Minister for the retrospective application of the amendments in Schedule 6.**

Further, the committee seeks the Minister's advice on the extent of any adverse impact on children affected by these amendments being given retrospective effect and whether the amendments may affect any litigation or tribunal matters concerning the inclusion of children born to

an unauthorised maritime arrival parent within the definition of ‘unauthorised maritime arrival’.

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

Parliamentary Entitlements Legislation Amendment Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Special Minister of State

Background

This bill amends the *Members of Parliament (Life Gold Pass) Act 2002* to:

- rename the Act as the *Parliamentary Retirement Travel Act 2002*;
- impose certain limits on access to the parliamentary retirement travel entitlement and reduce the number of trips available under the entitlement;
- remove the ability of spouses or de facto partners (other than those of a former prime minister) to access the entitlement and reduce the entitlement of spouses or de facto partners of a former prime minister; and
- require that all travel under the entitlement be subject to a public benefit test.

The bill also amends the *Parliamentary Entitlements Act 1990* to:

- apply a 25 per cent loading to any adjustment to a prescribed travel benefit and to limit the domestic travel entitlement of dependent children of senior officers to those under 18 years of age; and
- enable the recovery of payments made which are beyond the entitlement.

The committee has no comment on this bill.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Social Services

Background

This bill reintroduces several measures previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014.

Schedule 1 implements the following changes to Australian Government payments:

- pauses indexation for three years of the income free areas for all working age allowances (other than student payments), and the income test free area for parenting payment single from 1 July 2015;
- indexes parenting payment single to the Consumer Price Index (CPI) only, by removing benchmarking to Male Total Average Weekly Earnings;
- pauses indexation for three years of several family tax benefit free areas from 1 July 2015; and
- pauses indexation for three years of the income free areas and other means-test thresholds for student payments, including the student income bank limits from 1 January 2015.

Schedule 2 amends the family payment from 1 July 2015 to:

- revise family tax benefit end-of-year supplements to their original values, and cease indexation;
- limit family tax benefit Part B to families with children under six years of age, with transitional arrangements applying to current recipients with children above the new age limit for two years; and

- introduce a new allowance for single parents on the maximum rate of family tax benefit Part A for each child aged six to 12 years inclusive, and not receiving family tax benefit Part B.

Schedule 3 extends the ordinary waiting period for all working age payments from 1 January 2015.

Schedule 4 ceases the pensioner education supplement from 1 January 2015.

Schedule 5 ceases the education entry payment from 1 January 2015.

Schedule 6 extends youth allowance (other) to 22 to 24 year olds in lieu of newstart allowance and sickness allowance from 1 January 2015.

Schedule 7 requires young people with full capacity to earn, learn, or Work for the Dole from 1 January 2015.

Schedule 8 removes the three months' backdating of disability pension under the *Veterans' Entitlements Act 1986*.

Delegation of legislative power—important matters in legislative instrument

Schedule 3, item 1, proposed subsection 19DA(3)

This measure to extend the ordinary waiting period for all working age payments was originally introduced as Schedule 6 to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. The committee commented on the delegation of legislative power in proposed subsection 19DA(3) in its *Alert Digest No. 7 of 2014* (p. 37). The same issue arises in relation to this reintroduced measure.

This proposed subsection provides that the Secretary may, by legislative instrument, prescribe circumstances that are required for a person to, pursuant to subsection 19DA(1), qualify as experiencing a personal financial crisis. These prescribed circumstances will form part of the requirements necessary to establish an exception to ordinary waiting periods (that is, a period which must be served before certain allowances are payable). The explanatory memorandum to the original bill did not explain why these matters, which may have an important impact on entitlements to benefits when a person is in severe financial crisis, cannot be provided for in the primary legislation. The

committee therefore sought the Minister's advice as to the justification for the proposed approach.

The Minister provided a response to the committee on 17 July 2014 and the committee commented on the response in its *Tenth Report of 2014* (pp 474–475). The Minister stated that:

Because the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

Proposed subsection 19DA(3) allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to prescribe, by legislative instrument, the circumstances which constitute a personal financial crisis for the purposes of waiving the Ordinary Waiting Period.

This provision provides the Secretary with the flexibility to consider any unforeseeable or extreme circumstances which are identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. I note that this power can only be used beneficially and that any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.

The committee noted that the justification for the proposed delegation of legislative power provided by the Minister and the fact that any instruments made under the power will be subject to disallowance. **The committee therefore left the appropriateness of this approach to the Senate as a whole and does so again in relation to this reintroduced provision.**

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

Delegation of legislative power—important matters in legislative instrument

Schedule 7, item 1, proposed subsection 1157AB(3)

This measure (which makes amendments to require young people with full capacity to earn, learn or work for the dole) was originally introduced as

Schedule 9 to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014. The committee commented on the delegation of legislative power in proposed subsection 1157AB(3) in its *Alert Digest No. 7 of 2014* (p. 40). The same issue arises in relation to this reintroduced measure.

This proposed subsection provides that the Minister may, by legislative instrument, determine (a) the kind of social security pensions and benefits for the purposes of item 1 of the table in subsection (2), and (b) conditions for the purposes of that table item.

The table in subsection 1157AB(2) indicates that a person will not be subject to a Part 3.12B exclusion period if they are transferring from a pension or benefit of a kind determined by the Minister in a legislative instrument and where the Minister has determined conditions which have been met. Given the significance of the policy decisions as to when a person under 30 will be excluded from receipt of the Newstart allowance, the committee noted that it is unclear why these matters should not be dealt with in the primary legislation. The committee therefore sought further advice from the Minister as to the justification for these matters being determined by legislative instrument rather than being included in the bill itself.

The Minister provided a response to the committee on 17 July 2014 and the committee commented on the response in its *Tenth Report of 2014* (pp 478–479). The Minister stated that:

Proposed subsection 1157AB(3) provides flexibility for the Minister to prescribe, by legislative instrument, the conditions when a person transferring from another pension or benefit will not be subject to a part 3.12B exclusion period.

This provision within the Bill will enable the Minister to exempt persons who transfer from certain payments, under certain circumstances, from the initial waiting period. Giving the Minister the flexibility to determine these exemptions via an instrument will reduce the risk of the legislation unintentionally applying an exclusion period to people whose circumstances fall within the Government's exemptions policy. I note that this power can only be used beneficially and that any instrument issued by the Minister would be subject to Parliamentary scrutiny and disallowance.

The committee thanked the Minister for the response and requested that the key information provided be included in the explanatory memorandum. **The committee notes that no further explanation in relation to the**

appropriateness of utilising delegated legislation in this provision was included in the explanatory memorandum to the current bill. The committee therefore seeks the Minister’s advice as to why the key information provided to the committee was not included in the new explanatory memorandum.

Delegation of legislative power—important matters in legislative instrument

Schedule 7, item 1, proposed subsections 1157AC(3), 1157AE(4) and 1157AE(6)

As noted above, this measure (which makes amendments to require young people with full capacity to earn, learn or work for the dole) was originally introduced as Schedule 9 to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014. The committee commented on the delegation of legislative power in proposed subsections 1157AC(3), 1157AE(4) and 1157AE(6) in its *Alert Digest No. 7 of 2014* (pp. 40–41). The same issue arises in relation to this reintroduced measure.

Proposed subsection 1157AC(3) provides that the Minister may, by legislative instrument, determine what previous periods of gainful work cause a reduced waiting period to apply, what particular kinds of gainful work do not cause a reduced waiting period to apply, and a method for working out the reduced period. Proposed subsection 1157AE(4) provides for the Minister to determine the extension of the exclusion period for failures to comply with requirements of an employment pathway plan, and under proposed subsection 1157AE(6) the Minister may determine the method for working out the number of weeks a person’s waiting period may be extended by as a penalty for providing false or misleading information.

Given the practical importance of these matters to eligibility for newstart allowance, and the committee’s expectation that important matters will be included in primary legislation unless a comprehensive justification is provided, the committee considered that it is unclear why these matters should not be dealt with in the bill itself. The committee noted that this approach would have the advantage that Parliament would be better able to evaluate the overall policy approach envisaged by the schedule in relation to waiting periods for newstart allowances. The committee therefore sought the Minister’s advice as to the justification for the proposed approach.

The Minister provided a response to the committee on 17 July 2014 and the committee commented on the response in its *Tenth Report of 2014* (pp 479–480). The Minister stated that:

Proposed subsection 1157AC(3) of the Bill enables the Minister to prescribe, by legislative instrument, the circumstances when gainful work may cause a reduced waiting period to apply, and a method for working out the reduced period.

This will allow the Minister to prescribe the specific formula for taking periods of gainful work into account and also to ensure that certain activities are excluded, such as criminal activities. Using an instrument will allow the Minister to refine the policy to ensure that it is operating efficiently and fairly without having to amend the primary legislation.

Proposed subsection 1157AE(4) allows the Employment Minister to determine, by legislative instrument, the extension periods applying for failures to enter into employment pathway plans, and failures to comply with particular requirements in employment pathway plans.

Proposed subsection 1157AE(6) allows the Minister to, by legislative instrument, determine a method for working out the number of weeks to extend a part 3.12B waiting period, and a method for working out the duration and commencement day for a part 3.12B penalty period, both imposed as consequences for the provision of false or misleading information.

Again, these instrument making powers will ensure that the Minister is able to refine the rules to ensure that these compliance related elements of the policy operate efficiently and fairly.

Taking into account that any instrument seeking to alter application of the provisions will be subject to the scrutiny of Parliament, I do not consider the provisions in Schedule 6, proposed subsection 19DA(3) of Bill No. 1 and in Schedule 9, proposed subsections 1157AB(3), 1157AC(3), 1157AE(4) and 1157AE(6) of Bill No. 2 to be an inappropriate delegation of power.

The committee thanked the Minister for the response and requested that the key information provided be included in the explanatory memorandum. **The committee notes that no further explanation in relation to the appropriateness of utilising delegated legislation in these provisions was included in the explanatory memorandum to the current bill. The committee therefore seeks the Minister’s advice as to why the key information provided to the committee was not included in the new explanatory memorandum.**

Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Social Services

Background

This bill implements the following changes to Australian Government payments to:

- maintain for three years the current income test free areas for all pensions (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017;
- ensure all pensions (other than parenting payment) are indexed to the Consumer Price Index only, by removing from 20 September 2017:
 - benchmarking to Male Total Average Weekly Earnings; and
 - indexation to the Pensioner and Beneficiary Living Cost Index;
- reset the social security and veterans' entitlements income test deeming thresholds to \$30,000 for single income support recipients, \$50,000 combined for pensioner couples, and \$25,000 for a member of a couple other than a pensioner couple from 20 September 2017.

The bill also increases the qualifying age for age pension, and the non-veteran pension age, to 70, increasing by six months every two years and starting on 1 July 2025.

The committee has no comment on this bill.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Social Services

Background

This bill reintroduces the following measures, previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014.

Schedule 1 ceases indexation of the clean energy supplement, and renames the clean energy supplement as the energy supplement from 20 September 2014.

Schedule 2 amends indexations of Australian Government payments by:

- pausing indexation for two years of the assets value limits for all working age allowances, student payments and parenting payment single from 1 July 2015; and
- pausing indexation for three years of the assets test free areas for all pensions (other than parenting payment single) from 1 July 2017.

Schedule 3 provides for disability support pension recipients under age 35 to be reviewed against revised impairment tables and have program of support requirement applied.

Schedule 4 limits the six-week overseas portability period to absences that are for the purpose of seeking eligible medical treatment or attending to an acute family crisis for student payments from 1 January 2015.

Schedule 5 limits the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015.

Schedule 6 amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to ensure that a payment of a bursary under the programme established by the Commonwealth and known as the Young Carer Bursary Programme is not counted as income.

Schedule 7 includes tax-free superannuation income in the assessment of income for qualification for the seniors health card from 1 January 2015.

Schedule 8 restricts qualification for the relocation scholarship payment to students relocating to or from regional or remote areas from 1 January 2015.

Schedule 9 amends following family payment reforms from 1 July 2015 by:

- limiting the family tax benefit Part A large family supplement to families with four or more children;
- removing the per-child add-on that currently applies for each child after the first under the income test for the base rate of family tax benefit Part A; and
- reducing the income limit from \$150,000 per annum to \$100,000 per annum for family tax benefit Part B.

Schedule 10 adds the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, allowing payment of Commonwealth supplementation to service providers affected by the decision.

The committee has no comment on this bill.

Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014

Introduced into the House of Representatives on 2 October 2014

Portfolio: Social Services

Background

This bill amends the: *Social Security Act 1991*, *Social Security (Administration) Act 1999* and *Veterans' Entitlements Act 1986* to abolish the senior supplement for holders of the Commonwealth seniors health card or the veterans' affairs gold card from 20 September 2014.

The bill also amends *Income Tax Assessment Act 1997* and *Military Rehabilitation and Compensation Act 2004* to make consequential amendments.

Retrospective commencement

Schedule 1

This bill reintroduces a measure originally introduced as Schedule 1 to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. The committee commented on the retrospective commencement of this measure in its *Alert Digest No. 7 of 2014* (p. 36). A similar issue arises in relation to this reintroduced measure.

Schedule 1 of the current bill will commence on 20 September 2014 and therefore the commencement will be retrospective. However, the explanatory memorandum (at p. 2) explains that no person's interests will be adversely affected by the retrospective commencement:

... the amendments will generally only affect payment of the supplement from 20 December 2014, which marks the next relevant quarter. No person's interests will be adversely affected because of the apparent retrospective commencement of Schedule 1, noting that a transitional provision will prevent any debts arising if seniors supplement is paid on or after 20 September 2014 but before passage of the Bill.

In light of this explanation the committee makes no further comment on this provision.

COMMENTARY ON AMENDMENTS TO BILLS

National Security Legislation Amendment Bill (No. 1) 2014

[Digest 10/14 – Reports 12 and 13/14]

On 25 September 2014 the Senate agreed to 56 Government and four Palmer United Party amendments. The Attorney-General (Senator Brandis) tabled a replacement explanatory memorandum, a supplementary explanatory memorandum and a further supplementary explanatory memorandum. On 1 October 2014 the Minister for Justice (Mr Keenan) tabled a revised explanatory memorandum and the bill was passed.

Palmer United Party amendment (3) on sheet 7564 inserted item 5A into the bill. This item increased the maximum penalty (from one year imprisonment to ten years' imprisonment) applying to the offences in section 92 of the *Australian Security Intelligence Organisation Act 1979* for the publication of the identity of an ASIO employee or affiliate.

Palmer United Party amendment (4) on sheet 7564 inserted item 19A into the bill. This item increased the maximum penalty (from one year imprisonment to ten years' imprisonment) applying to the offence in section 41(1) of the *Intelligence Services Act 2001* for persons who publicly disclose the identity of a staff member or agent of ASIS.

The committee notes that this is a significant increase in the maximum penalty applying to these offences. However, given that the bill has already passed both Houses of the Parliament, and noting that there is some explanation for the approach (including an overview of applicable safeguards) in the revised explanatory memorandum, the committee makes no further comment on these amendments.

SCRUTINY OF STANDING APPROPRIATIONS

The committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses in the 43rd Parliament since the previous *Alert Digest*

Parliamentary Entitlements Legislation Amendment Bill 2014

Schedule 2, item 8, section 11

Schedule 2, item 9, section 31

Other relevant appropriation clauses in bills

Nil