SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1993

26 MAY 1993

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MEMBERS OF THE COMMITTEE

Senator The Hon M Tate (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Tierney

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, 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;

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(iii) make such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 1993

The Committee has the honour to present its First Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Act and Bill which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Great Barrier Reef Marine Park Amendment Bill 1993

Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992

GREAT BARRIER REEF MARINE PARK AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for the Environment, Sport and Territories.

The Bill proposes to amend the *Great Barrier Reef Marine Park Act 1975* to provide for the collection of charges imposed by the Great Barrier Reef (Environmental Management Charge-General) Bill 1993 and the Great Barrier Reef (Environmental Management Charge-Excise) Bill 1993.

The main features of these Bills are:

. the Bills are based on the principle that persons benefiting from the continued protection and management of the Great Barrier Reef should contribute to the cost of its protection and management;

. the charge will be applicable to all commercial operators within the Great Barrier Reef Marine Park who presently need a permit from the Authority;

. the revenue collected will be used by the Authority for management, including research and education, to ensure the continued conservation of the Great Barrier Reef.

The Committee dealt with the Bill in Alert Digest No. 1 of 1993, in which it made various comments. The Minister for the Environment, Sport and Territories responded to those comments in a letter dated 24 May 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Imposition of charges by regulation
Clause 5 - proposed new section 39C of the *Great Barrier Reef Marine Park Act 1975*

In Alert Digest No. 1 of 1993, the Committee noted that clause 5 of the Bill proposes to insert a new Part VA into the *Great Barrier Reef Marine Park Act 1975*. That proposed new Part deals with the imposition and collection of the proposed 'environmental management charge' in relation to commercial uses of the Great Barrier Reef Marine Park.

Proposed new section 39B imposes liability for the charge. It provides:

> **Liability to charge**
> **[Liability]**
> 39B.(1) If a chargeable permission is granted or transferred to a person, the person is liable to pay a charge on the grant or transfer.
>
> **[Grants or transfers before commencement date]**
> (2) A reference in subsection (1) to the grant or transfer of a chargeable permission to a person includes a reference to a grant or transfer that occurs before the date of commencement of this section, where the chargeable permission is in force and held by the person on or after that date.

'Chargeable permission' is defined in a proposed amendment to section 3 of the Great Barrier Reef Marine Park Act as

> a permission granted under the regulations, where the permission is of a kind declared by the regulations to be a chargeable permission for the purposes of this Act ...

Proposed new section 39C deals with the level of the proposed new charge. It provides:

> **Amount of charge**
> **39C.(1)** The amount of charge is the amount ascertained in accordance with the regulations.
>
> (2) Without limiting subsection (1), the regulations may provide that the amount of the charge imposed on the grant or transfer of a chargeable permission may be calculated wholly or partly by reference to things which happen during the period:
> (a) beginning on the later of the following days:
> (i) the date of commencement of this section;
> (ii) the date of the grant or transfer of the chargeable permission;
> (b) ending on the day on which the chargeable permission ceases to be in force.

The Committee suggested that the effect of proposed new section 39C, if enacted, would be to allow the Governor-General, acting on the advice of the Federal

Executive Council, to pass regulations which will govern the amount of the charge to be imposed by the proposed amendments.

The Committee noted that it has consistently drawn attention to provisions which allow for the rate of a charge or 'levy' to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than subordinate legislation). Further, the Committee noted that it has generally taken the view that, if there is a need for flexibility in the setting of the levy, then the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

In the present Bill, no such maximum levy (or method of calculation thereof) is prescribed. By way of explanation for the provision, the Explanatory Memorandum states:

> The amount of charge will vary greatly according to the nature and size of the business. For this reason the Bill does not deal with the amount of charge in detail. The regulations will be subject to tabling and disallowance in both Houses of Parliament (section 48, *Acts Interpretation Act 1901*).

While the Committee accepts that the regulations would be disallowable by either House of the Parliament, it should also be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the level of the charge.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> The Bill provides for the amount of the environmental management charge to be fixed by regulations because the necessary flexibility needed can only be achieved by regulations, as opposed to the more time consuming and expensive process of introducing legislation into Parliament whenever the details of charging need to be altered.

The Minister goes on to say:

> I have considered including in the Bill a maximum rate of

> levy, or a method of calculating such a maximum rate, but concluded that there was no way of doing so that would cover all cases adequately. The charge will cover many people engaged in a wide range of activities including reef tours by air and sea, hire of a range of vehicles and vessels for use in the reef, installation and operation of a range of facilities such as pontoons, goods vending, provision of various services, mariculture and operation of sewerage outlets. Given this complexity, the Bill could not fix a maximum charge per permission, or permitted activity, or permit holder, that would be accurate and fair. Similarly, although average charges for different classes of operator could be calculated, there is no method of calculating a maximum charge that would apply with complete accuracy to any particular class. There is no practical alternative to dealing with these matters in the regulations.

The Minister concludes by saying:

> I should add that relevant industry groups have agreed to this method of proceeding.

The Committee thanks the Minister for this response. The Committee continues to draw to the attention of Senators our concern that the Bill allows for a rate of a 'levy' to be prescribed by regulation without the Bill setting either a maximum rate for the levy or a method of calculating such a maximum rate.

HEALTH INSURANCE (QUALITY ASSURANCE CONFIDENTIALITY) AMENDMENT ACT 1992

The Bill for this Act was introduced into the House of Representatives on 4 November 1992 by the Minister for Health, Housing and Community Services.

As presented to the Senate, the Bill proposed to promote the undertaking of a range of quality assurance activities in relation to the provision of health services, relating to certain funding or payments by the Commonwealth under the *Health Insurance Act 1973* and the *National Health Act 1953*. This would be done by providing for statutory confidentiality and immunity protection in respect of quality assurance activities declared by the Minister by a disallowable instrument, in accordance with specified criteria, as declared quality assurance activities for the purposes of the Bill.

The Bill proposed to amend the *Health Insurance Act 1973,* by including of a new Part VC in relation to quality assurance activities in connection with the provision of applicable health services.

The Bill would prohibit the disclosure of information known solely as a result of declared quality assurance activities to another person and also the disclosure of such information or the production of relevant documents to a court. However, the Bill would permit the Minister to authorise disclosure of information about conduct that may constitute a serious criminal offence. The Bill will not preclude the disclosure of information which does not identify (either expressly or by implication) a particular individual or individuals.

The Bill provided statutory immunity from civil proceedings to members of committees carrying out declared quality assurance activities. Statutory immunity would only attach to persons who engage in good faith in declared quality assurance activities in circumstances where the rights or interests of other people who provide health services are adversely affected. A committee would be obliged to act within the law of procedural fairness, as the only action which will lie against committee members is an action for breach of the rules.

This Bill was passed by the House of Representatives on 10 November 1992 and by the Senate on 15 December 1992. Senate amendments were agreed to by the House of Representatives on 16 December 1992. It received Royal Assent on 21 December 1992.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made no

comment on the Bill. However, the Committee subsequently received a letter from Senator Patterson, which raised a concern about a clause in the Bill. Senator Patterson's concern was discussed in Scrutiny of Bills *Nineteenth Report of 1992* and those comments are reproduced below.

The Minister for Health has responded to those comments in a letter dated 24 May 1993. Although the legislation in question is already an Act, the Minister's response may nevertheless be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

In Scrutiny of Bills *Nineteenth Report of 1992*, the Committee stated:

> **Retrospectivity**
> **Clause 3 - proposed new section 106N of the *Health Insurance Act 1973***
>
> Clause 3 of the Bill proposes to insert a new Part VB into the *Health Insurance Act 1973*. The proposed new Part deals with quality assurance confidentiality, which involves the undertaking of certain 'quality assurance activities' (which are intended to evaluate the quality of health services) and the provision of statutory confidentiality and immunity in relation to those activities.
>
> Proposed new section 106M, if enacted, would prohibit (subject to certain exceptions) the disclosure of information that has been acquired solely as a result of a 'quality assurance activity'. The penalty for a breach of this section would be imprisonment for 2 years.
>
> Proposed new section 160N then provides:
>
> > If it appears to the Minister that information that became known after the commencement of this Part solely as a result of a declared quality assurance activity relates to conduct, ***whether the conduct took place before or after that commencement,*** that may have been a serious offence against a law (whether written or unwritten) in force in any State or Territory, the Minister may, by signed writing, authorise the information to be disclosed in a way stated in the instrument of authority for the purposes of law enforcement, a Royal Commission or any other prescribed purpose.

[emphasis added]

> Senator Patterson has pointed out that this proposed new section involves a degree of retrospectivity, as it would apply in relation to certain conduct committed before or after the commencement of the new section. In support of this point, Senator Patterson has provided the Committee with copies of submissions from the Australian Medical Association Limited and the Royal Australian College of General Practitioners. ...
>
> While the Committee accepts Senator Patterson's point about the retrospective aspect of the proposed new section's operation, the Committee notes that the 'serious offences' referred to would have had to have been serious offences at the time that they were committed and that, in that respect, the provision could not be considered to be retrospectively making unlawful something which was previously lawful. The Committee also notes that it may be considered inappropriate that serious offences that come to light as a result of a quality assurance activity should not be able to be prosecuted because of the confidentiality provisions contained in the Bill. However, in making this comment, the Committee seeks the Minister's advice as to whether there is currently (ie apart from the provisions of this Bill) any statutory or other legal prohibition against such information being divulged and used in the way contemplated by proposed new section 160N.
>
> The Committee thanks Senator Patterson for her comments on the Bill.

The Minister for Health has responded as follows:

> I have considered the [nineteenth] report and wish to make two comments.
>
> First, it was not the Government's intention for the Act to have any retrospective application nor does the Act operate in such a way. The Committee was correct in concluding that the 'serious offences' referred to in Section 106N of the Act would have been serious offences at the time that they were committed and the Act does not make unlawful something that was previously lawful.

The Minister goes on to say:

> Secondly, the Committee sought my comments on whether there is currently any other statutory or legal prohibition against the release of information in similar circumstances to that which the Act applies. In New South Wales, Queensland, South Australia, Tasmania and the Australian Capital Territory there is legislation which prohibits the disclosure of information which becomes known solely as a consequence of prescribed quality assurance activities. In that respect the legislation operates in a manner similar to the *Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992*.
>
> However, the State and Territory legislation do not have provisions which operate in the same manner as Section 106N. That is, the confidentiality provided by the State and Territory legislation is absolute. The relevant Acts are:
>
> New South Wales: *Health Administration Act 1982* (Division 6B)
>
> Queensland: *Health Services Act 1991* (Part 2 Division 3)
>
> South Australia: *South Australian Health Commission Act 1976* (Section 64D)
>
> Tasmania: *Health (Regional Boards) Act 1991* (Section 35)
>
> Australian Capital Territory: *Health Services Act 1990* (Part III)
>
> Victoria: *Health Services Act 1988* (Part 7 Division 3)

The Committee thanks the Minister for this response.

Michael Tate
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT

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18 AUGUST 1993

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Senator R Bell
Senator K Carr
Senator B Cooney
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 1993

The Committee has the honour to present its Second Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Broadcasting Services Amendment Act 1993

Protection of the Sea (Oil Pollution Compensation Fund) Bill 1993

BROADCASTING SERVICES AMENDMENT ACT 1993

The Bill for this Act was introduced into the Senate on 6 May 1993 by the Minister for Transport and Communications.

The Bill proposed to amend the *Broadcasting Services Act 1992*, to delay the allocation of licences for subscription television broadcasting services which use MDS as, or as part of, their means of transmission until:

. subscription television broadcasting licences A and B (using satellite delivery) are allocated and a transmission system standard is declared under section 94 of the Act; or

. a licence is allocated under subsection 96(1) for a service (using cable) and is in a position to operate nationally;

whichever is the earlier.

The Bill was passed by the Senate on 13 May 1993 and by the House of Representatives on 14 May 1993. It received the Royal Assent on 14 May 1993.

The Committee dealt with the Bill in Alert Digest No. 1 of 1993, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 14 July 1993. Although the legislation in question in already an Act, the Minister's response may nevertheless be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 4

In Alert Digest No 1, the Committee noted that clause 4 of the (then) Bill proposed to insert new subsections (3A) and (3B) into section 96 of the *Broadcasting Services Act 1992*. The Committee also noted that these proposed new subsections would impose certain additional conditions in relation to the allocation of subscription television broadcasting licences.

The Committee noted that, pursuant to clause 2 of the Bill, the amendments proposed would not operate until the Bill received Royal Assent. However, the Committee also noted that proposed new subsection (3A) explicitly provided that it would apply to applications made before as well as after the commencement of that new subsection.

In that sense, the proposed new section would have a retrospective operation, as it would apply to existing applications, which would have been made on the basis of the conditions applying before the enactment of the proposed amendments.

The Committee drew 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.

The Minister has responded on this issue as follows:

> The Committee commented on the apparent retrospectivity of the new subsection 96(3A) which has been inserted into the *Broadcasting Services Act 1992*.
>
> The amendments to section 96 reflect in substance the policy notification and direction issued on 28 January 1993 by me as Minister for Transport and Communications to the Australian Broadcasting Authority. At the time those instruments were issued, no applications had been lodged with the Authority for the types of licences affected by the instruments and by the amendments to section 96.

The Committee thanks the Minister for his assurance that no application had been made before the issue of his policy notification and direction on 28 January 1993. The Committee notes that this information was contained in the Explanatory Memorandum, and so does not affect the Committee's concerns at the retrospective aspect of the legislation. The Committee's concern is further reinforced by the fact that the Senate amended proposed new subsection 3A so that any applicants who relied on the Minister's policy notification and direction may have been disadvantaged. The situation is similar to 'legislation by press release' and is an example of the pitfalls of that process: no press release (or policy notification) can guarantee passage of the legislation in the form it predicts.

The Committee thanks the Minister for his response. However, the Committee will continue to draw the attention of Senators to the drawbacks of legislating retrospectively.

PROTECTION OF THE SEA (OIL POLLUTION COMPENSATION FUND) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill is one of a package of 4 Bills whose purpose is to give effect to the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the Fund Convention) and to the Protocols of 1976 and 1992 amending the Fund Convention. The purpose of the Bill is to:

. allow for the collection of funds from persons receiving more than 150,000 tons of crude or fuel oil from Australian or Australian territory seas per calendar year;

. pay compensation from the 1971 and 1992 Fund for pollution damage;

. indemnify shipowners through the 1971 Fund for a part of their liability to pay compensation for air pollution damage.

The Committee dealt with the Bill in Alert Digest No. 1 of 1993, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 14 July 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislation
Clause 13 - Regulations to give effect to Article 8 of the 1971 Convention
Clause 34 - Regulations to give effect to Article 8 of the 1992 Convention

The Committee noted that, if enacted, these clauses would enable regulations to be made to give effect to Article 8 of the 1971 and 1992 Conventions, respectively. As the Explanatory Memorandum notes at pages 8 and 15, Article 8 in each Convention provides that where judgment is given against the respective Fund, that judgment shall be recognised in each Contracting State when reversal on appeal in no longer possible. A scheme to accomplish this will necessarily encompass court actions. Clauses 13 and 34 include in the regulation-making power specific reference to investing federal jurisdiction in Supreme Courts.

The Committee also commented that, at first glance, these clauses may appear

inappropriately to delegate legislative power. The vesting of federal jurisdiction would seem to be a matter more appropriate for primary legislation.

The Committee went on to note that the *Protection of the Sea (Civil Liability) Act 1981*, by which the International Convention on Civil Liability for Oil Pollution Damage was applied in Australia, did not use subordinate legislation to invest the State courts with the necessary federal jurisdiction. Section 9 of that Act provided for the vesting of federal jurisdiction in the State courts directly and not by authorising regulations.

In the light of this past practice, the Committee sought the Minister's advice whether it would not be possible to authorise the vesting by primary legislation rather than by regulation.

The Minister has responded as follows:

> Clauses 13 and 34 of this Bill would enable regulations to be made to give effect to Article 8 of the 1971 and 1992 Conventions respectively. Article 8 in each Convention provides that, where judgement is given against the Fund, that judgement shall be recognised in each Contracting State when reversal on appeal is no longer possible. Clauses 13 and 34 specifically provide that regulations may be made to invest Supreme Courts with Federal jurisdiction.
>
> The Committee sought my advice on whether it would be possible to authorise the vesting of jurisdiction by primary legislation rather than by regulation.
>
> The Alert Digest refers to section 9 of the *Protection of the Sea (Civil Liability) Act 1981*. Clauses 11 and 32 of the Bill correspond to that section. Contrary to what was stated in the Alert Digest, the Bill follows the precedent set in the *Protection of the Sea (Civil Liability) Act 1981*. Clauses 13 and 34 of the Bill mirror section 25 of that Act. Regulations (Statutory Rules 1983, No. 221) have been made under section 25 to, amongst other things, confer jurisdiction on Supreme Courts.
>
> Clauses 13 and 34 were drafted in accordance with the precedent set by section 25 of the *Protection of the Sea (Civil Liability) Act 1981*. That precedent was followed because section 25 was acceptable to the Parliament in 1981 and there has not been any doubt cast on the validity of the Regulations made under section 25. While I accept that the vesting of jurisdiction could be provided by primary legislation, in the

light of the precedent set in 1981, I see no strong reasons why it must be provided by primary legislation.

The Committee accepts that the Minister has effectively turned its own argument from precedent against it by his explanation of the mechanism of the Bill and its parallels with the earlier Act. The Committee thanks the Minister for his response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1993

The Committee has the honour to present its Third Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Customs Tariff Amendment Bill 1993

CUSTOMS TARIFF AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Customs Tariff Act 1987*, to overcome a problem with the construction of item 41A of Schedule 4 of the Act and thereby:

. confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan, that for an importer to benefit under paragraph 41A(a) that importer must be the owner of a determination under the Export Facilitation Scheme;

. remove any doubt as to the operation of paragraph 41A(a) and the possibility that a non-plan producer could import vehicles duty free and without export credits under the Export Facilitation Scheme.

The Committee dealt with the Bill in Alert Digest No. 3 of 1993, in which it made various comments. As a result the Committee received a submission from Trade Management Australia Pty Ltd dated 23 August 1993 relating to this Bill and the issues raised were dealt with in Alert Digest No. 4 of 1993.

The Committee's comments from Alert Digest No. 3 of 1993 and Alert Digest No. 4 are repeated below and a copy of the submission is attached to this Report for the information of Senators.

A copy of the submission was also forwarded to the Minister.

The Minister for Science and Small Business and Minister responsible for Customs has responded to the Committee's comments in a letter dated 16 September 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclauses 2(2) and (3)

In Alert Digest No. 3, the Committee noted that clause 2 of the Bill provides:

> Commencement
>
> **2.(1)** Sections 1 and 2 commence on the day on which this

Act receives the Royal Assent.

(2) Section 3 is taken to have commenced on 1 January 1991.

(3) Section 4 is taken to have commenced on 1 January 1992.

The Committee noted that, if enacted, this clause would give sections 3 and 4 retrospective effect.

It appeared to the Committee that the Outline of the Explanatory Memorandum suggests that the purpose of the Bill is to confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan that in order to gain the benefit of importing motor vehicles duty free, an importer must be the owner of a determination under the Export Facilitation Scheme. Doubts, not shared by the Attorney-General's Department, have been expressed that the current paragraph 41A(a) of the Schedule to the *Customs Tariff Act 1987* would not prevent someone outside the Scheme (ie without export credits under the Export Facilitation Scheme) from importing motor vehicles duty free.

The Committee noted that the need for this Bill appears to have arisen because duty free entry of motor vehicles was extended from 1 January 1991. The Explanatory Memorandum of this Bill indicates that the by-law drafted for that extension did not state that it applied only to owners of a determination under the Export Facilitation Scheme.

The Committee indicated that it would not see the retrospectivity as unduly trespassing on personal rights and liberties if the effect of the Bill is merely declaratory of what the Government and the relevant industry have always believed to be the legal obligation and if they have always acted accordingly.

The Committee had, in the past, been willing to accept retrospectivity where this has been necessary to correct a drafting error, without making further comment on the clause.

The Committee suggested, however, that the issue in this case could be more than a drafting error correction. The Financial Impact Statement in the Explanatory Memorandum states:

> The amendments will remove a potential liability of the Commonwealth to refund duty paid in respect of motor vehicle importations since 1 January 1991. But for the amendments, the extent of that liability could be in the vicinity of $500 million.

This admits the possibility that $500 million may have been collected in duty without due authorisation by law.

The Committee was cognisant of the Minister's concern, expressed in his Second Reading Speech, that uncertainty in the Plan's legislative scheme could undermine the benefits achieved to date. But certainty could be restored by the amendment taking effect from the date of Royal Assent, or even, as in some comparable cases, from the date of the introduction of the Bill into Parliament. Such a move would leave intact the rights of parties as they existed prior to the Bill being introduced or assented to.

It had been suggested to the Committee that an action is presently on foot in which a plaintiff is challenging the way in which the Department has administered the Act to date. Accordingly, the Committee sought from the Minister advice about the basis for introducing this legislation and information about whether it would defeat an action now being pursued in the courts. The Committee may be concerned that the litigant's rights were being abrogated.

If the claimant had, in the past, behaved in accordance with the interpretation favoured by Attorney-General's that may indicate that the action is not in the nature of a citizen seeking to protect rights as they were believed to be but rather a claim seeking a windfall resulting from a drafting error. In the past, even where a citizen's rights have been abrogated, the Committee has accepted retrospectivity where that has been in the national interest.

In Alert Digest No. 4 of 1993, the Committee noted the receipt of a submission from Trade Management Australia and that the main points of the submission appeared to be:

. Duty has been paid under protest on a shipment of vehicles.

. Soon after, the by-law under contention was revoked - on 1 March 1993.

. Applications for refunds may only be made in respect of imports made in the preceding twelve months.

. An appeal has been lodged with the Administrative Appeals Tribunal (AAT).

. The proposed legislation would extinguish the right of redress by means of that appeal.

. The Bill could be amended to exclude applications for refunds lodged after 26 May 1993, the day the Bill was introduced into

Parliament. If this were done, the potential liability (that is, if the AAT agreed that no duty was payable) would be $M14, not $M500.

The Minister has responded as follows:

The background to the proposed amendment is as follows:

. Item 41A of the 4th Schedule to the *Customs Tariff Act 1987* provides a "Free" rate of duty for passenger motor vehicles and components entered by passenger Motor Vehicle Plan participants and holders of determinations issued under the Passenger Motor Vehicle Plan Export Facilitation Scheme. Under that Scheme passenger motor vehicle producers are entitled to duty free entry of eligible imports to the value of 15% of their value of production. Duty free entry is effected through item 41A and by-laws made in respect of that item.

. As part of the Government's March 1991 Industry Statement, export producers of components for passenger motor vehicles were to be eligible, from 1 January 1991, to directly use export credits to import goods duty free. Prior to this change, component producers sold their credits to passenger motor vehicle manufacturers, who were then the only companies eligible to use credits to offset their duty liability.

. For passenger motor vehicles item 41A partly specified the goods for which a "Free" rate of duty was to apply but also attempted to further specify requirements by by-law, referring to the Export Facilitation Scheme and requiring the importer to hold a determination under that Scheme.

. In February 1992, a consultant, acting on behalf of a motor vehicle importer, attempted to clear passenger motor vehicles using the by-law, without utilizing an export credit, on the basis that the wording of the by-law did not require the importer to hold export credits. The consultant subsequently paid the duty under protest on behalf of the importer and lodged claims for refund, despite advice at that time that legislation would be introduced if necessary, to preserve the integrity of the Plan.

It is clear that all parties; the Government, Plan producers, component manufacturers and importers have long been

operating in accordance with the spirit and intent of the Passenger Motor Vehicle Manufacturing Plan and were aware of and supported the requirement for determinations under the Export Facilitation Scheme in order to obtain the benefit of concessional entry for particular imports.

A central element of the Government's automotive policy has been to gradually reduce the level of assistance to the industry and thereby encourage it to become world competitive. This intent was well known to both local manufacturers and importers, who had acted accordingly from the Plan's inception.

As previously outlined, since January 1991, importers who have earned export credits have been entitled to obtain from the Australian Customs Service a determination which, in effect, waives payment of duty on imported vehicles and components to the value of the export credit. importers who have not earned those credits simply pay the duty owing in respect of their imports.

The particular motor vehicle importer in question in this case, was aware of the rationale for the Passenger Motor Vehicle Manufacturing Plan and the Export Facilitation Scheme, and had acted in accordance with its intent in paying duty in respect of their imports, up until early this year, when the claimed loophole was discovered by their consultant.

The proposed amendment therefore, whilst retrospective in its operation, and as such operating to defeat any action pursued in the Administrative Appeals Tribunal, may be properly characterised as declaratory of what the Government and the motor vehicle industry have always believed to be the legal position. Indeed, as I have outlined above, all parties have acted accordingly.

The amendment does not expose any producer or importer to any new liability beyond that which they had understood they were subject to, and will not require any additional payments of duty. The proposed amendments, if carried, will not create any additional impost on the public, but merely closes a potential loophole which might otherwise lead to a substantial unearned windfall, with the detrimental flow-on effects to other participants in the Plan who have continued to honour the spirit of the Plan throughout its operation.

The Committee thanks the Minister for this response.

However, the Committee considers an issue does remain that this Bill may unduly trespass on personal rights and liberties.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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, 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 such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1993

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within the principles set out in the terms of reference in Standing Order 24:

Corporate Law Reform Bill (No. 2) 1992

Customs Legislation Amendment Bill 1993

Export Market Development Grants Legislation Amendment Bill 1993

Road Transport Reform (Vehicles and Traffic) Bill 1993

Superannuation Industry (Supervision) Bill 1993

Superannuation (Resolution of Complaints) Bill 1993

Superannuation (Rolled-Over Benefits) Levy Bill 1993

Taxation (Deficit Reduction) Bill (No. 1) 1993
(Taxation (Deficit Reduction) Bill 1993)

CORPORATE LAW REFORM BILL (NO. 2) 1992

This Bill was introduced into the Senate on 26 November 1992 by the Minister for Administrative Services, at the request of the Minister for Justice. However, it had not been dealt with when the Senate rose for its Summer recess and subsequently lapsed when the Parliament was prorogued on 8 February 1993. It was restored to the Notice Paper by a resolution of the Senate on 5 May 1993.

The Bill proposes to amend the Corporations Law to:

. implement continuous disclosure obligations and create an offence for the breach of the obligations;

. require disclosing entities to provide half-yearly reports and in the case of non-companies, annual financial statements as well;

. provide for accounting standards to be made by the Australian Accounting Standards Board;

. allow, subject to certain conditions, the incorporation of certain materials by reference into a prospectus;

. provide a new scheme dealing with insurance and indemnification of company officers and auditors; and

. facilitate the use of documents prepared from the Australian Securities Commission database in court proceedings.

The Committee dealt with the Bill in *Alert Digest* No. 18 of 1992, in which it made several comments on the Bill. Those comments were reproduced in *Alert Digest* No. 1 of 1993. The Attorney-General has responded to those comments in a letter dated 6 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clause 5 - proposed new section 22H of the Corporations Law

In Alert Digest No. 1 of 1993, the Committee noted that clause 5 of the Bill proposed to insert a new Division 3A into Part 1.2 of the Corporations Law. The proposed new

Division would deal with 'enhanced disclosure securities', which are referred to in the Bill as 'ED securities'. The concept of 'ED securities' is defined in the proposed new Division.

Proposed new section 22H provides:

> **Regulations may declare securities not to be ED securities**
>
> 22H.(1) The regulations may declare specified securities of bodies not to be ED securities.
>
> (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

The Committee suggested that, if enacted, this provision would allow the making of regulations to exclude certain types of securities from the definition of 'ED securities'. As such, it would permit, in effect, the amendment of the definition, by the exclusion of certain securities which would otherwise be covered. Given the importance of this definition to the operation of the proposed new Division, this may be considered to be a matter which is more appropriately dealt with in primary rather than subordinate legislation.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Clause 52 - proposed new sections 1084J and 1084K of the Corporations Law

The Committee noted that clause 52 of the Bill proposed to insert a new Part 7.12A into the Corporations Law. The proposed new Part would deal with 'continuous disclosure', which is a system of enhanced statutory disclosure that is to be applied to corporations covered by the Corporations Law.

Proposed new section 1084J provides:

> **Exemption by regulations**
>
> 1084J.(1) The regulations may exempt specified persons from all or specified enhanced disclosure provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to

specified conditions.

(2) Without limiting subsection (1), an exemption under this section may relate to specified securities.

The Committee again suggested that, if enacted, this provision would allow the Governor-General (acting on the advice of the Federal Executive Council) to make regulations to exclude 'specified persons' from any or all of the requirements of the proposed new Part. This may be considered to be an inappropriate delegation of legislative power, as it would allow the Executive to alter (and, perhaps, overturn) the effect of the primary legislation.

Similarly, proposed new section 1084K provides:

Exemption by the Commission

1084K.(1) The Commission may by writing exempt specified persons from all or specified enhanced disclosure provisions:

(a) either generally or as otherwise specified; and

(b) either unconditionally or subject to specified conditions.

(2) Without limiting subsection (1), an exemption under this section may relate to specified securities.

(3) In exercising a power under this section, the Commission may have regard to any of the following:

(a) the desirability of efficient and effective disclosure to investors in securities and to securities markets;

(b) the need to balance the benefits of disclosure against the costs of complying with disclosure requirements;

(c) the desirability of facilitating, subject to appropriate safeguards, dealings in Australia in securities of foreign companies.

(4) Subsection (3) does not limit the matters to which the commission may have regard.

(5) The Commission must cause a copy of an exemption under this section to be published in the

Gazette.

The Committee noted that, if enacted, this clause would, similarly, give the Australian Securities Commission the power to exempt 'specified' persons from any or all of the requirements of the proposed new Part. This may also be considered to be an inappropriate delegation of legislative power.

The Committee drew Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Attorney-General has responded as follows:

> The Committee has indicated that proposed sections 22H, 1084J and 1084K of the Corporations Law, which would be introduced into the Corporations Law if the Bill were enacted in its present form, may be considered to represent an inappropriate delegation of legislative power in breach of principle 1(a)(iv) of the Committee's terms of reference. These provisions would allow the making of regulations or Australian Securities Commission (ASC) instruments to exempt specified securities or specified persons from the proposed enhanced disclosure requirements.
>
> I do not propose to proceed with the Bill in its present form. A new Bill, the Corporate Law Reform Bill 1993, is being prepared which will contain new continuous disclosure requirements. I anticipate that this Bill will be introduced into the House of Representatives in the current Budget Sittings.
>
> The comments which the Committee has made will, of course, be taken into account in the re-drafting of the Bill.
>
> In this regard, I should point out that the Corporations Law already contains a number of provisions similar to those referred to by the Committee, mostly based on predecessors under the co-operative companies and securities legislation. For example, section 1084 of the Law enables the ASC to exempt a particular person or class of persons from the provisions relating to fund raising. In addition, section 633 of the Law provides that the usual restrictions on the acquisition of shares do not apply to acquisitions made in a manner or in circumstances prescribed by the Regulations or with the ASC's written

approval.

> The effective operation of the Corporations Law depends on provisions like these. Because new investment vehicles are constantly being developed, and business practices differ and are subject to change, such provisions are necessary to enable the alteration of the Law in a timely manner where a strict application may otherwise cause hardship or may be inappropriate. Such provisions provide a safeguard against any unintended consequences of new wide-ranging rules. The effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the Corporations Law.

The Committee thanks the Attorney-General for this response.

CUSTOMS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 31 August 1993 by the Minister for Defence for the Minister for the Arts and Administrative Services.

The Bill proposes amendments to:

. the *Customs Act 1901* to refine the rules of origin as a consequence of the 1992 Closer Economic Relations review;

. the *Customs Act 1901* to substitute a new definition for a 'place outside Australia' to ensure tighter Customs control over people and goods moving between Australia and installations in Area A of the Zone of Co-operation in the Timor Gap;

. the *Customs Act 1901* to allow computer transmission of encoded information in the process of entering and clearing goods;

. the *Customs Act 1901* to clarify that the undeclared possessions of ship's crew are forfeited to the Crown;

. the *Anti-Dumping Authority Act 1988* to enable the Authority to keep its recommendations to the Minister confidential until the Minister has made a decision on those recommendations; and

. the *Customs Act 1901*, the *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendments Act 1992* and the *Customs Legislation (Anti-Dumping Amendments) Act 1992* to effect certain minor technical changes.

The Committee dealt with the Bill in Alert Digest No. 5 of 1993, in which it made various comments. The Minister for Science and Small Business and Minister responsible for Customs has responded to those comments in a letter dated 20 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power and insufficient parliamentary

scrutiny

Clause 10 - Insertion of New Division 1A in Part VIII of the *Customs Act 1901*

In Alert Digest No. 5 of 1993, the Committee noted that clause 10, if enacted, would provide under proposed new paragraphs 153J(3)(b) and 153L(4)(b) for the Comptroller to make a determination which would effectively amend paragraphs 153J(3)(b) and 153L(4)(b) respectively. The determination would provide for a lesser percentage of the total factory costs of certain goods than the statutory 50% in order that those goods be included in the preference arrangements for goods manufactured in New Zealand and/or Papua New Guinea or a Forum Island country.

The Committee noted

. the determination is to be gazetted;

. the determination is not disallowable;

. the discretion to allow a lesser percentage is completely unfettered; and

. the marked contrast with proposed new section 153K, which provides that the 50% rule may be taken to be 48% if the Comptroller is satisfied of certain carefully described criteria.

The Committee, therefore, sought the Minister's advice on whether the very wide discretion in paragraph 153J(3)(b) would make the carefully circumscribed discretion in 153K otiose.

The Committee suggested that as the paragraphs give the Comptroller a power to amend the legislation at will and there is no provision for such amendment to be tabled or subject to disallowance, the paragraphs may be considered both to delegate legislative power inappropriately and insufficiently to subject this exercise of legislative power to parliamentary scrutiny.

The Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> The Committee drew attention to proposed new paragraphs 153J(3)(b) and 153L(4)(b) which empower the Comptroller-General to determine by gazettal that a percentage other than the statutory 50% applies to goods in order that they satisfy the preference requirements for goods manufactured in New Zealand and/or Papua New Guinea or a Forum Island country.
>
> These provisions (which have not actually been applied to any preference country), give effect to obligations imposed on Australia under our trade agreements with the countries in question. In particular, paragraph 153J(3)(b) is intended to give effect to Articles 1(c)(ii) and 3.3 of the Australia New Zealand Closer Economic Relations Agreement (ANZCERTA), whilst paragraph 153L(4)(b) is intended to give effect to Articles 1(b)(ii) and 2(b) of the Papua New Guinea Australia Trade Commercial Relations Agreement (PATCRA), and Articles V.1(b)(ii) and V.4(a) of the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA).
>
> It should be noted that Parliament has considered the substance of these provisions previously, and passed them into law. The provisions considered by the Committee in this instance are a restatement of provisions currently in section 151 of the *Customs Act 1901*. Subsection 151(7) provides that the Comptroller may determine, by notice in writing published in the Gazette, that another percentage of the factory or works cost is appropriate for specified goods imported from New Zealand. Similarly, subsection 151(8) applies to goods imported from Papua New Guinea or Forum Island countries.
>
> The mechanism was first introduced into the Customs Act in relation to New Zealand in 1974 by Act No. 120 of 1974. Prior to that amendment, New Zealand relied upon three separate rules of origin:
>
> . 25% New Zealand or NZ/Australia labour and materials in respect of goods not commercially manufactured in Australia;
>
> . 75% NZ/UK or NZ/UK/Australia labour and

materials; or

. 50% NZ or NZ/Australia labour and materials.

At the Ministerial meeting held in March 1973 to review the New Zealand - Australia Free Trade Agreement, it was agreed that common rules of origin be adopted for the Free Trade area. These changes were proposed to take account of the changing trade circumstances, particularly the termination of our Trade Agreement with the UK as they became a full member of the EEC, and the inappropriateness therefore, of continuing with the UK concession. In addition, whilst New Zealand had access to three alternatives for preference as outlined above, Australia had to make up its 50% content from Australian factory and works costs only. The New Zealand 25% and 75% content rules were therefore omitted in relation to New Zealand, leaving the 50% New Zealand, NZ/Australia content only.

Despite the amendment however, it was recognised that the move to a 50% area content could cause problems in a number of instances. That realisation led to the inclusion of a power to determine an alternative level of area content than 50%. It was also intended that this would occur only upon the agreement of both countries.

A similar mechanism was inserted in respect of Papua New Guinea in 1976 and the Forum Island countries in 1980 for the same reasons.

The Committee also contrasted the wide discretion in paragraph 153J(3)(b) with the narrower discretion in new section 153K. The latter provision is the result of specific amendments to ANZCERTA agreed to by Australia and New Zealand last year and is intended to apply as a temporary measure in certain circumstances. On the other hand, in the event that Australia and New Zealand agreed to a lower local content level for particular goods under new paragraph 153J(3)(b), this level would apply to all future imports of those goods.

The Committee thanks the Minister for this explanation.

Non-reviewable decision
Proposed section 153K

The Committee noted that proposed new section 153K would give the Comptroller the discretion to determine whether the allowable factory costs of goods claimed to originate in New Zealand comes within a 2% margin of tolerance. Section 273GA makes many of the discretions throughout the Act reviewable by appeal to the Administrative Appeals Tribunal. However, it does not appear that the discretion in the proposed section 153K will be included in section 273GA. It may be, however, that an action brought under section 167 to resolve a dispute on the correct rate of duty to be paid would effectively review a section 153K decision. The Committee, accordingly, sought the Minister's advice on this issue.

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

The Minister has responded as follows:

> Proposed new section 153K implements the agreement between Australia and New Zealand as part of the 1992 CER review; that, in recognition of difficulties which may arise when unforeseen circumstances (such as adverse movements in exchange rates), result in a shipment failing to qualify for 50% area content, Australia and New Zealand agree to apply a 'margin of tolerance' of 2%. This means that if the allowable factory cost of the preference claim goods gets to 48% it will be deemed to have met the 50% rule.
>
> The Committee queried whether the discretion in section 153K was reviewable by the Administrative Appeals Tribunal (AAT), since it was not mentioned specifically in section 273GA of the *Customs Act 1901*, which gives jurisdiction to the AAT for most of the decisions taken under the Act. Decisions under section 153K are reviewable by the AAT via section 167 of the *Customs Act 1901*. The exercise of the discretion in section 153K affects the duty payable in respect of imported goods, since an unfavourable exercise of the discretion, for example, results in an importer having to pay full duty as opposed to preferential rates of duty if the discretion had been exercised in his or her favour. An unfavourable exercise of the discretion can therefore be challenged in the AAT by simply paying the additional duty under protest in

> accordance with section 167 and then applying for review of the operative decision (the 153K decision), under section 273GA. The same rationale applies to any decision taken in relation to application of the rules of origin.

The Committee thanks the Minister for this advice.

Insufficient parliamentary scrutiny
Proposed section 153R

In Alert Digest No. 5 of 1993, the Committee noted that subsection 153 would provide:

> **Are goods commercially manufactured in Australia?**
> *Comptroller may determine that goods are, or are not, commercially manufactured in Australia*
> **153R.(1)** For the purposes of sections 153P and 153Q, the Comptroller may, by *Gazette* notice, determine that goods of a specified kind are, or are not, commercially manufactured in Australia.

The Committee suggested that this subsection would allow the Comptroller, by a notice in the Gazette, to make a determination the effect of which would be to provide a definition of the term 'goods commercially manufactured in Australia' for the purposes of proposed new sections 153P and 153Q. Defining a term is an exercise of power that is legislative in character. As there is no provision for the notice in the *Gazette* to be a disallowable instrument it may be considered that there is insufficient opportunity for review by the Parliament. Accordingly, the Committee sought the Minister's views on this matter.

The Committee drew Senators' attention to the provision, as it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> Proposed section 153R is a restatement of the current subsection 151(14). The reference to "goods not commercially manufactured in Australia", and to the power to make a determination in respect of such goods, was first inserted in the Customs Act in 1925 (No. 22 of 1925), and reiterated the administrative arrangements that had been in place since 1907 under the Australia-UK Trade Agreement. The arrangements were intended to

apply in circumstances where Australian industry would not be affected by the concessional entry and it assisted those UK exporters who could not meet the higher (75%) content rule if this provision was not otherwise in place. The 1925 provision also applied in the same way to goods imported from any country with which Australia had a preferential Trade Agreement - eventually New Zealand, Ireland, Papua New Guinea and Canada.

It is virtually impossible to identify at any particular point in time, what goods can be commercially manufactured in Australia by reference to particular preference claimed goods, and, for that reason it is left for determination in each case rather than attempting to legislate for the goods in question.

The Committee thanks the Minister for his advice.

EXPORT MARKET DEVELOPMENT GRANTS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 30 September by the Manager of Government Business in the Senate for the Minister for Foreign Affairs and Trade 1993.

The Bill proposes to amend the *Export Market Development Grants Act 1974* to:

. exclude from eligibility persons with criminal convictions under the Corporations Law, or in respect of serious fraud, and certain claimants under schemes of arrangement;

. assist in the cash flow of emerging exporters by providing them with the facility to lodge claims for grant on a half yearly basis;

. make certain technical amendments regarding the administration of ongoing risk management procedures and clarify the established intention of the Legislation.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Foreign Affairs has responded to those comments, on behalf of the Minister for Trade, in a letter dated 19 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospective application
Clauses 10 and 18

In Alert Digest No. 6 of 1993, the Committee noted that clause 10, if enacted, would result in expenditure not being claimable where a person has been convicted of certain serious offences, whether before or after the commencement of the proposed new section 11YA.

The Committee also noted that clause 18, if enacted, would insert proposed new section 14A which would result in certain grants not being payable where there has been a conviction for an offence referred to in proposed new section 11YA. Subsection 14A(3) would prevent payment even if entitlement arose, a claim was made or a conviction occurred before the commencement of the section.

The Committee noted the purpose of these amendments. The Minister, in the second

reading speech, indicates that it is considered that the integrity of the scheme is at risk where it allows convicted persons access to public funds. The Explanatory Memorandum states in respect of new section 11YA:

> 28. This section implements the Government's decision to exclude from eligibility under the Act, for a period of up to five years from release from custody, claimants with criminal convictions for breaches of key corporate duties or for offences which involve fraud or dishonesty and which carry a maximum penalty of at least two years' imprisonment.

The Committee indicated that, while noting the general purpose of the sections, the Committee may be concerned that the retrospective application may be considered to trespass unduly on personal rights in that an adverse consequence may, in practical terms, act as a penalty and be imposed retrospectively on a convicted person in addition to the penalty imposed by the court. It may be that, in future cases, courts may take into account the adverse consequences imposed by this Bill in considering an appropriate sentence. Such an adjustment of sentence is not possible for those already sentenced on whom these adverse consequences are retrospectively imposed.

The Committee drew 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.

The Minister has responded as follows:

> During the development of this Bill, the matter of retrospectivity of penalties was referred to Human Rights Branch, General Counsel Division, Attorney-General's Department, for comment. The response from the Department was that they saw, quote “no human rights problems with this approach”.
>
> It is pointed out to Honourable Senators, also, that this proposed provision will apply only in the case of clearly defined and serious fraud. Persons convicted of more minor offences will not be affected. I do not believe that there should be any serious objection to the proposition that the Commonwealth not pay grants to persons convicted of serious offences.

The Committee thanks the Minister for his response.

ROAD TRANSPORT REFORM (VEHICLES AND TRAFFIC) BILL 1993

This Bill was introduced into the Senate on 18 August 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposes to enable regulations to be made about specific aspects of motor vehicle and trailer operations and rules of the road for all road users and:

. will apply only in the Australian Capital Territory and the Jervis Bay Territory;

. is part of a legislative scheme for uniform road transport legislation throughout Australia set out in the *National Road Transport Commission Act 1991* and the Inter-Governmental Agreements scheduled to that Act.

The Committee dealt with the Bill in Alert Digest No. 4 of 1993, in which it made various comments. The Minister for Transport and Communications has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clauses 7 to 11

In Alert Digest No. 4 of 1993, the Committee noted that the General Outline of the Explanatory Memorandum indicated that Inter-Governmental Agreements provide for all governments in Australia to enact legislation to adopt laws made by the Commonwealth under the scheme to provide a uniform national body of road transport law. This Bill covers some, but not all, of the matters envisaged by the Agreements.

The Committee also noted that the regulation making power in this Bill, if enacted, would permit a wide range of substantive rules relating to road transport to be made by subordinate rather than by primary legislation. Most jurisdictions have until now divided the subject matter of road laws between primary and subordinate legislation - that is, there are Motor Traffic Acts and Motor Traffic Regulations. Traditionally, more substantive matters are set out in primary legislation and subordinate legislation is used to cover the fine detail. Another formulation is that the policy is set out in the primary legislation with the administrative details being filled in by regulations.

The Committee indicated, however, that this Bill proposed merely to outline generally the subject matter to be dealt with by regulation without itself dealing with any of the more important matters. Some matters may be considered of sufficient importance to require that they be dealt with in primary rather than subordinate legislation.

The Committee thought that this Bill was an example of uniform legislation which attracted comment and discussion and resulted in a resolution being passed at the 1993 Conference on Delegated Legislation and on Scrutiny of Bills. It was noted that Councils of Ministers, their advisers and officials were pressuring Parliaments to pass uniform legislation without amendment because of inter-government agreements. On the one hand, this was seen as usurping the function of legislatures to consider and pass legislation; on the other hand, it was readily acknowledged that uniformity in such matters as road transport law was eminently desirable. But the Conference was concerned at the perceived drawbacks of imposing uniform legislation without adequate scrutiny and so passed the following recommendation:

> That the 1993 Conference on Delegated Legislation and on Scrutiny of Bills recommend that, prior to Ministerial Councils agreeing to the introduction of uniform or complementary bills or delegated legislation:
>
> (a) details of the proposals as draft legislation;
>
> (b) supporting discussion papers etc;
>
> (c) the opportunity for comment in response;
>
> be provided to relevant Parliamentary Committees in participating jurisdictions and others, as standard practice.

The Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Committee thanks the Minister for his detailed response which is attached in full to this Report. The Minister points out that this Bill is limited to "technical issues which have traditionally been effected by subsidiary legislation under the general authority of an Act".

The Committee notes the Minister's view that

> Other modules of road transport laws relate to matters that have, to a greater extent, traditionally been the subject of primary, rather than subordinate, legislation in State and Territory laws and would not be appropriate for

inclusion in subordinate legislation. For example, the first module recommended by the Commission related to heavy vehicle charges. It was enacted in the *Road Transport Charges (Australian Capital Territory) Act 1993*. That Act contains a great deal about vehicle classifications and rates of charges and leaves only 3 limited issues to the regulations.

Similarly, it is envisaged that the further proposed modules dealing, respectively, with the transport of dangerous goods, heavy vehicle registration, driver licensing and enforcement procedures will require a much greater application of primary legislation.

The Committee thanks the Minister for his assistance with this legislation.

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the security of superannuation savings and protect the rights of superannuation fund members.

This Bill provides:

. for effective supervisory arrangements for the Insurance and Superannuation Commission regarding funds and trustees;

. for trustees and investment managers to be made subject to legislative sanctions;

. for the proper performance of their fiduciary responsibilities and accountability to members;

. clear delineation of the basic duties and responsibilities of trustees;

. that trustees and investment managers must be suitable to act as fund trustees and to manage fund moneys respectively;

. for financial assistance to be provided to funds that have suffered a loss due to fraudulent conduct or theft;

. mechanisms for dealing with benefits in employer-sponsored funds in respect of members that have left employment or who are lost, and unclaimed benefits;

. for equal member and employer representation;

. certain disclosure obligations in respect of auditors and actuaries of funds; and

. rules relating to invitations and offers to subscribe for

interests in, and disclosure by, public offer superannuation funds, approved deposit funds and pooled superannuation trusts.

The Committee dealt with the Bill in Alert Digest No. 3 of 1993, in which it made various comments. The Treasurer has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 3 of 1993 the Committee noted that subclause 2(2), if enacted, would provide that clause 112 would have retrospective effect from 21 October 1992. On that date the Treasurer issued a statement 'Strengthening Super Security'. Clause 112, if enacted, would provide for the circumstances in which amounts may be paid out of an employer-sponsored fund to an employer-sponsor. It also would provide for civil and criminal penalties which could include 5 years imprisonment. Clause 112 would, then, appear to be an example of 'legislation by press release'.

The Committee further noted that the statement 'Strengthening Super Security', on page 25, indicates that the rules it sets out for returns of surplus to employers will apply to superannuation funds immediately. However, the Committee is concerned that the statement does not indicate that criminal liability would attach to contravention of those rules - rules which in the Bill are more complex than those in the statement.

The Committee drew 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.

The Treasurer has responded as follows:

> The Government considers that the possibility of a return of surplus to an employer-sponsor weakening a fund to be a serious matter. For this reason, clause 112 sets out certain preconditions that must be met before a refund of surplus can take place. These effectively ensure that members are fully informed and that the fund will remain in a satisfactory financial position after the refund of the surplus.
>
> It has been decided that an appropriate penalty is needed to be incorporated into the SIS Bill to ensure that these

preconditions are met. The tax penalty (withdrawal of tax concession) would hurt members rather than the trustee, who would have been responsible for the breach.

The application of a penalty to this provision ensures that any regulatory loophole is closed and the penalty attached to this provision is reasonable in the light of the need to safeguard the entitlements of superannuation entity beneficiaries.

The Committee has no difficulty with the application of civil and criminal penalties to this provision. The Committee's concerns were:

. the general disadvantage of uncertainty as to what the actual law will be that stems from retrospective legislation, where the retrospectivity commences from the date of a 'press release' or other ministerial statement;

. the particular circumstances of this provision.

The Committee noted that in the particular circumstances of this provision the ministerial statement did not mention that a criminal penalty would be applied and that the rules that determine what is legal or illegal in a refund of surplus are more complex in the legislation than in the statement.

The Committee seeks the Treasurer's advice whether the criminal penalty should be made to apply only to actions contravening the provision performed after Royal Assent.

Reversal of onus of proof
Subclause 139(2)

In Alert Digest No 3 of 1993, the Committee noted that clause 139 provided:

> **Fraudulently inducing a person to engage in a regulated act-criminal liability**
>
> 139.(1) A person must not:
>
> (a) by making, publishing or broadcasting a statement or advertisement that the person knows to be false or misleading; or
>
> (b) by dishonestly concealing or withholding material facts; or
>
> (c) by recording or storing in, or by means of, any mechanical, electronic or other device,

information that the person knows to be:

(i) false in a material particular; or

(ii) materially misleading;

intentionally induce another person to engage in a regulated act.

Penalty: Imprisonment for 5 years.

(2) In a prosecution for a contravention of subsection (1) covered by paragraph (1)(c), it is a defence if the defendant proves that, when the information was recorded or stored, the defendant had no reasonable grounds for expecting that the information would be available to the other person referred to in subsection (1).

Proposed new subsection 139(2) may be considered a reversal of the onus of proof in a criminal prosecution. Under this provision, the defence to an alleged breach of the section is that the defendant, when the information was recorded or stored, had no reasonable grounds for expecting that the information would be available to the other person.

Given the nature of the offence, the Committee wondered whether there is any scope for providing a statutory defence and placing any burden of proof on the defendant.

The offence created by proposed subsection 139(1) is committed if a person, by recording or storing certain information, intentionally induces another person to do 'a regulated act'. If those elements are established, it will be unnecessary for the defence to be proved: a person could not, by recording or storing certain information, intentionally induce another to do an act, if the person had no reasonable grounds to expect that the information would be available to that other person. Both sets of facts could not co-exist.

The Committee asked for the Treasurer's advice whether there was need for the statutory defence to be provided by the Bill.

The Committee drew 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.

The Treasurer has responded as follows:

I accept the Committee's conclusion that the defence provided by subclause 139(2) is unnecessary. This provision was originally included in a draft of clause 139 which did not expressly require that the inducement be

intentional and in that context it would have served a useful purpose. When the requirement for intention was inserted it was thought that subclause (2) could continue to provide a defence but, on reconsideration, it has been concluded that it plays no useful role. I will arrange for Parliament to consider deletion of the subsection during passage. I thank the Committee for raising this matter.

The Committee thanks the Treasurer for this advice.

Strict liability offences/reversal of onus of proof
Subclauses 297(2) and 298(2)

In Alert Digest No. 3 of 1993, the Committee noted that clause 297 provided:

> **False or misleading statements**
>
> 297.(1) A person who:
>
> (a) makes a statement to an SIS officer that is false or misleading in a material particular; or
>
> (b) omits from a statement made to an SIS officer any matter or thing without which the statement is misleading in a material particular;
>
> is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units.
>
> (2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person:
>
> (a) did not know; and
>
> (b) could not reasonably be expected to have known;
>
> that the statement to which the prosecution relates was false or misleading.
>
> (3) ...

Clause 298 provided:

> **Incorrectly keeping records etc.**
>
> 298.(1) Where:
>
> (a) a person who is required under this Act or the regulations to keep any accounts,

accounting records or other records keeps them in such a way that they do not correctly record and explain the matters, transactions, acts or operations to which they relate; or

(b) a person who is required under this Act or the regulations to make a record of any matter, transaction, act or operation makes it in such a way that it does not correctly record the matter, transaction, act or operation;

the person is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units.

(2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person:

(a) did not know; and

(b) could not reasonably be expected to have known;

that:

(c) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (a)-the accounts, accounting records or other records to which the prosecution relates did not correctly record and explain the matters, transactions, acts or operations to which they relate; or

(d) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (b)-the record to which the prosecution relates did not correctly record the matter, transaction, act or operation to which the record relates.

The Committee indicated that the offences created by subclauses 297(1) and 298(1) may be regarded as strict liability offences, as they provide that, if the events contemplated occur, an offence is committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences. The defences created by subclauses 297(2) and 298(2) may be regarded as instances of reversal of the onus of proof as they provide for the defendant to prove ignorance or that knowledge could not reasonably be expected.

The Committee noted that clauses 299, 300 and 301 impose criminal liability for similar activities but only on proof by the prosecution of a criminal intent or recklessness.

The Committee accepted that, as a matter of policy, there are matters which are appropriately dealt with by imposing strict liability and then providing a defence of 'reasonable cause' for failure to comply with the obligation imposed. The Committee has also been accustomed to accept a reversal of the onus of proof where the matters to be proved by the defendant are peculiarly within the knowledge of the defendant.

However, in the Committee's view, the matters to be proved under clauses 297 and 298 did not appear to be matters peculiarly within the knowledge of the defendant to any greater degree than the matters which clauses 299 to 301 require the prosecution to prove: intention or recklessness in respect of the same activities. The Committee therefore suggested that the offences created by clauses 297 and 298 should not be of strict liability but should require that the prosecution prove all the components of the offence.

The Committee drew 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.

The Treasurer has responded as follows:

> I acknowledge that there is a reversal of the normal onus of proof in clauses 297 and 298 which is of a character which would not normally be regarded as acceptable. However, in the case of revenue legislation a more robust approach has generally been taken to the question of onus of proof. Compliance with the SIS legislation allows substantial and generous taxation concessions for superannuation funds. If trustees make false or misleading statements, or keep incorrect accounts or accounting records, funds may obtain tax concessions to which they are not entitled. In these circumstances, superannuation trustees should have to satisfy the onus of proof which applies to any other taxpayer under taxation law generally.
>
> Therefore, these provisions have been closely modelled on sections 8K and 8L of the *Taxation Administration Act 1953*. I consider this to be the appropriate model in the circumstances.

The Committee thanks the Treasurer for this advice. The Committee retains the concerns which it originally expressed in relation to these provisions in respect of strict liability and reversal of the onus of proof.

Inappropriate delegation of legislative power
Part 29--EXEMPTIONS AND MODIFICATIONS

In Alert Digest No. 3 of 1993, the Committee noted that Part 29 may be considered an inappropriate delegation of legislative power, as its clauses would allow the Commissioner to modify or exempt the application of specified provisions, both of the primary law and of the regulations, to a particular superannuation entity or class of superannuation entities without reference to, or reporting to, Parliament.

By way of explanation the Explanatory Memorandum states at p 67:

> The Commissioner would exercise this power only when he is satisfied that, if the modification or exemption is given, the particular superannuation entity or class of superannuation entities would still comply with the spirit of the provisions concerned.

The Committee noted that the exemptions or modifications must be published in the *Gazette*, although no period is prescribed within which this must be done. The Committee is concerned that this is a power which allows the Commissioner, in effect, to amend the legislation. The Committee is concerned not only with the wide, virtually unreviewable nature of the power but also at the lack of Parliamentary supervision.

The Committee also noted that the power is one of wide discretion without any criteria for its use set out in the Bill. There is an air of unreality about the suggestion in the Explanatory Memorandum that the Commissioner would only use it when satisfied about future compliance. This is especially so when the future compliance is not compliance with the law but merely with the 'spirit of the provisions'.

While technically the Commissioner's decisions to exempt from the law or to modify its application are reviewable, the Committee saw practical difficulties where there are no legislated criteria and no prescribed time within which the decision must be gazetted.

The Committee did not believe that such a power should be given to the Commissioner and sought the Treasurer's advice on whether it can be more strictly circumscribed. The Committee suggested at least an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declarations and exemptions as disallowable instruments.

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

The Treasurer has responded as follows:

> The Insurance and Superannuation Commission's powers to exempt or modify the legislation in its application to a fund or a class of funds corresponds to a similar power of the Australian Securities Commission (ASC) under the Corporations Law (section 1084).
>
> This power reflects the need for some flexibility under the new regime because of the complexity and diversity of the industry and because of the rapidity of changes in the financial markets. Furthermore, Part 29 does contain various accountability mechanisms. For example, clause 330 of the SIS Bill requires the Commissioner to cause a copy of an exemption or modification under Part 29, or revocation of such an exemption or modification, to be published in the Gazette. Decisions made under these provisions are reviewable by the Administrative Appeals Tribunal.
>
> The ASC has used its modification powers in relation to a number of superannuation issues. The modifiable provisions are quite small part of the Bill, only 51 provisions out of 377. They relate to equal representation, where a number of funds may comply with the spirit of the rules but not the letter, auto rollover provisions for dealing with lost members, the operating standards for superannuation entities and the procedures for offering superannuation interests to the public. I consider this to be the appropriate model in the circumstances.

The Committee thanks the Treasurer for his advice but notes that the Treasurer did not address the Committee's suggestion of an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declarations and exemptions as disallowable instruments. The Committee remains of the view that, to assist the process of review by the Administrative Appeals Tribunal, a time should be prescribed within which the Commissioner must gazette a relevant decision.

SUPERANNUATION (RESOLUTION OF COMPLAINTS) BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes:

. the establishment of a Superannuation Complaints Tribunal to resolve complaints through conciliation and if this is not practicable, to review the decision of the trustees to which the complaint relates;

. the appointment of a Tribunal Chairperson as a full-time statutory officeholder; and

. the appointment of members to the tribunal by the Minister, with two of those persons to be appointed in consultation with the Minister for Consumer Affairs.

This Bill also proposes that the disputes resolution arrangements apply to all superannuation funds and approved deposit funds regulated by the Insurance and Superannuation Commission under the Superannuation Industry (Supervision) Bill 1993.

The Committee dealt with the Bill in Alert Digest No. 3 of 1993, in which it commented on the commencement provision of the Bill. The Treasurer has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Clause 2

In Alert Digest No. 3, the Committee noted that clause 2 of the Bill provides:

Commencement

2.(1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.

(2) If this Act does not commence under subsection (1) before 1 July 1994, it commences on that day.

The Committee noted that the proposed Act could commence outside the period of six months from the date of Royal Assent. This would be contrary to the general rule set out in the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee indicated that it would prefer that, where there is a deviation from the general rules set out in the Instruction, the reasons for the deviation are set out in the Explanatory Memorandum. However, the Explanatory Memorandum for this Bill gave no such indication. The Committee therefore, sought the advice of the Treasurer on this matter.

The Committee drew 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.

The Treasurer has responded as follows:

> In the supplementary explanatory memorandum an amendment has been made to clause 2 explaining that the commencement date is outside the period of six months from the date of Royal Assent because the commencement date will coincide with the commencement of the main provisions incorporated in the Superannuation Industry (Supervision) Bill 1993, in particular, the commencement of internal dispute arrangements for superannuation funds. I thank the Committee for raising this matter.

The Committee thanks the Treasurer for the inclusion of the reasons in the Explanatory Memorandum.

SUPERANNUATION (ROLLED-OVER BENEFITS) LEVY BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes to provide for the imposition of levies on certain superannuation funds and approved deposit funds for the purpose of recouping the cost of maintenance by the Insurance and Superannuation Commission of a register of certain rolled-over benefits pursuant to the provisions of Part 12 of the Superannuation Industry (Supervision) Bill 1993.

The Committee dealt with this Bill in Alert Digest No. 3 of 1993, in which it commented on the imposition of charges by regulation. The Treasurer has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Imposition of charges by regulation
Clause 6

In Alert Digest No. 3 of 1993, the Committee noted that clause 6 provided:

> **Regulations may impose levy**
>
> 6.(1) The regulations may impose in respect of the financial year ending on 30 June 1995 or a later financial year, a levy on each eligible rollover fund that, at the end of the financial year concerned, holds money in respect of benefits of a beneficiary in that fund, being benefits in respect of which the beneficiary has rights against the fund under paragraph 246(b) of the *Superannuation Industry (Supervision) Act 1993*.
>
> (2) The amount of the levy imposed on an eligible rollover fund in respect of a financial year is worked out using the formula:

Applicable rate X Value of assets

where:

"Applicable rate" means the rate (expressed as a decimal fraction) that, under the regulations, is the rate of the levy applicable to eligible rollover funds in respect of that financial year;

"Value of assets", in relation to an eligible rollover fund, means the value of the assets of the fund at the end of that financial year.

(3) The regulations must prescribe the same rate of levy in respect of all eligible rollover funds in respect of the same financial year.

The effect of proposed section 6, if enacted, would have been to allow the Governor-General, acting on the advice of the Federal Executive Council, to make regulations which will govern the amount of the levy to be imposed by the proposed section.

The Committee has consistently drawn attention to provisions which allow for the rate of a levy to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of a levy, the primary legislation should prescribe either a maximum rate of levy or a method of calculating the maximum rate.

In the Bill as introduced into the House of Representatives, no such maximum levy (or method of calculation thereof) was prescribed. By way of explanation the Explanatory Memorandum stated:

> The Insurance and Superannuation Commission estimates that the additional resources needed to give effect to this package of measures will be $4.831m in 1993-94, $4.591m in 1994-95 and $4.631m in 1995-96.
>
> These additional costs will be recovered through the superannuation supervisory levy and the imposition of a new levy on certain superannuation funds and approved deposit funds as provided for in this Bill.

The Committee noted that while it accepted that the regulations would be disallowable by either House of the Parliament, it should also be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to

make a positive input (ie by making an amendment) on the regulations and on the amount of the levy.

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

The Treasurer has responded as follows:

> Since the Committee has examined the Bill, an amendment has been made to subclause 6(2) of this Bill, imposing a maximum rate of levy of $30 000.
>
> Therefore, the Committee's view that this provision may be considered to delegate legislative power inappropriately can now be seen in light of the amendment which rectifies the problem. I thank the Committee for raising this matter.

The Committee thanks the Treasurer for his response.

TAXATION (DEFICIT REDUCTION) BILL (NO. 1) 1993
(TAXATION (DEFICIT REDUCTION) BILL 1993)

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993, which was introduced into the House of Representatives on 17 August 1993 and on which the Committee commented in its Alert Digest No. 4 of 1993 (1 September 1993). The Committee dealt with the replacement package of Bills in Alert Digest No. 6 of 1993 (6 October 1993), making similar comments.

The Bill proposes to:

. increase the medicare low income thresholds;

. remove the concessional treatment that applies to the taxation of unused annual and long service leave;

. allow for changes to the taxation treatment of excess domestic travel allowances and expenses, and of certain non-deductible expenses;

. allow for denial of income tax deductions for car parking expenses for self-employed persons; and

. allow for changes to the taxation treatment of credit unions.

This Bill will commence on the date on which it receives the Royal Assent.

In a letter dated 18 October 1993, the Assistant Treasurer has responded to the comments, made in Alert Digest No. 4 of 1993, on whether there is proposed an inappropriate delegation of legislative power. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clauses 5 and 18

In Alert Digest No. 6 of 1993, the Committee noted that clauses 5 and 18 of the Taxation (Deficit Reduction) Bill (No. 1) 1993 are in the same form as clauses 16 and

32 of the Taxation (Deficit Reduction) Bill 1993 on which the Committee had commented in Alert Digest No. 4 of 1993.

The Committee then reproduced its comments from Alert Digest No. 4:

> **Inappropriate delegation of legislative power**
> **Clauses 16 and 32**
>
> Clauses 16 and 32 insert new provisions in the taxation legislation with respect to fringe benefits and income respectively.
>
> Proposed subsection 31A(2) of the *Fringe Benefits Tax Assessment Act 1986* provides:
>
> > *Excess domestic travel allowance benefit*
> > (2) If:
> > (a) at a particular time, in respect of the employment of an employee, a person (the **'provider'**) pays a domestic travel allowance to the employee; and
> > (b) the amount of the allowance exceeds the prescribed limit in relation to the allowance;
> > the payment of so much of the allowance as exceeds that prescribed limit constitutes a benefit provided by the provider to the employee at that time.
>
> Proposed subsections 51AM(1) and (2) provide:
>
> > **No deduction to employee for excess domestic travel expenses**
> >
> > *When section applies*
> > 51AM.(1) This section applies if, apart from this section, one or more deductions (the **'gross deductions'**) are allowable to an employee under this Act for domestic travel expenses in relation to travel undertaken by the employee.
> >
> > *No deduction for excess domestic travel expenses*
> > (2) If the total of the gross deductions exceeds the prescribed limit in relation to that travel, so much of that total as is equal to the excess is not allowable to the employee.
>
> Proposed subsections 51AN(1) and (2) are in similar terms in

respect of non-employees.

These provisions, if enacted, would leave to regulations the setting of monetary limits on domestic travel beyond which any excess would be subject to fringe benefits tax or not deductible for the purposes of income tax. As the amount of that limit has such a direct effect on taxation liability, the determination of the limit by regulation may be considered to be an inappropriate delegation of legislative power.

The Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Assistant Treasurer has responded to those comments as follows:

The Government's view is that the use of regulations for this purpose is entirely appropriate, especially given the rapid changes that can occur in respect of costs of travel. The use of regulations provides an efficient and flexible means of altering the prescribed limit, subject to appropriate Parliamentary scrutiny. It also does away with the need for complex indexing provisions in the law to deal with inflation and other factors.

I would also note that the use of regulations in similar circumstances which affect the taxation liability of taxpayers is not unusual. Examples of regulations which arguably have a direct effect on taxation liability are:

Fringe Benefits Tax Regulations

Reg 3A & 13A Excludes certain taxpayers from liability for car parking fringe benefits.

Reg 14 Prescribes the “supplementary car rate”.

Income Tax Regulations

Reg 110 Prescribes the rate of rebate on home loan interest.

Reg 111 Prescribes the rate of deduction on home loan interest.

Reg 136 Prescribes the amount of withholding tax deductions from dividends.

Reg 137 Prescribes the amount of withholding tax deductions from interest.

Reg 137A Prescribes the amount of withholding tax deductions from royalties.

Reg 147 Prescribes the rate for car expenses.

Reg 151 Prescribes pension rebate amounts.

Accordingly, I would suggest that the proposed provisions in respect of excess domestic travel expenditure do not breach any of the principles of the Committee's terms of reference.

The Committee thanks the Assistant Treasurer for his response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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, 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 such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 1993

The Committee presents its Fifth Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within the principles set out in the terms of reference in Standing Order 24:

Childcare Rebate Bill 1993

Defence Legislation Amendment Bill 1993

Health Legislation (Professional Services Review) Amendment Bill 1993

Higher Education Funding Legislation Amendment Bill 1993

Overseas Students Tuition Assurance Levy Bill 1993

Primary Industries and Energy Legislation Amendment Bill 1993

Social Security Amendment Bill (No 2) 1993

Social Security (Budget and Other Measures) Legislation Amendment Bill 1993

CHILDCARE REBATE BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services.

The Bill proposes to:

. establish the rebate for expenses incurred for work-related child care;

. set conditions for eligibility;

. set conditions and procedures for claiming the rebate;

. set the amounts which may be paid via the rebate; and

. deal with the administration of the rebate by the Health Insurance Commission.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Family Services has responded to those comments in a letter dated 19 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Requirement concerning tax file number
Paragraph 50(2)(a)

In Alert Digest No. 6 of 1993, the Committee noted that clause 50 of this Bill contains eligibility criteria for becoming registered as a carer. Subclause (2) provides that the applicant is not eligible for registration unless the applicant has a tax file number and the application has a statement to that effect. Subclause (4) does not allow the Health Insurance Commission to ask for the applicant's tax file number but, under subclause (5), may ask the Commissioner of Taxation to provide information on whether an applicant or a registered carer has a tax file number.

The Committee noted the Health Insurance Commission's restrictions with regard to the tax file number of applicants and registered carers. However, the Committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered, even where used in the restricted fashion of this Bill, to be unduly intrusive into a person's private life.

Accordingly, the Committee drew 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 has asked the Minister why the knowledge of tax file numbers is necessary.

The Minister for Family Services has responded as follows:

> The use of tax file numbers is intended to discourage carers from issuing receipts where no care has been provided or artificially inflating receipts to enable parents to receive larger rebates. It will also encourage carers to declare taxable income to the Australian Taxation Office.
>
> The Committee acknowledges the "restricted fashion" in which tax file numbers will be used. The registration process will not require carers to provide their tax file number to the Health Insurance Commission. All carers have to do is state whether they have a tax file number.
>
> The Commonwealth has a responsibility to minimise fraudulent claims and to ensure that individuals declare taxable income to the Australian Taxation Office. To address the privacy concerns of parents and care providers, the Privacy Commissioner has been consulted during the development of these registration procedures.
>
> I am satisfied that Paragraph 50(2)(a) provides an appropriate balance between the Government's responsibilities of accountability and the protection of individuals' privacy. I do not agree that this provision could be "considered to trespass unduly on personal rights and liberties".

The Committee thanks the Minister for this explanation.

Strict liability/reversal of onus of proof
Clause 60

In Alert Digest No. 6 of 1993, the Committee noted that subclauses 60(1), (2) and (5) of the Bill provide:

> **Making false or misleading statements**
>
> **60.(1)** A person must not make, or authorise the

making of, a statement (whether oral or in writing) that is:

(a) false or misleading in a material particular; and

(b) capable of being used in connection with a claim or an application under this Act.

Penalty: 20 penalty units.

(2) If:

(a) a person makes a statement (whether oral or in writing) that is false or misleading in a material particular; and

(b) the statement is capable of being used in connection with a claim or an application under this Act; and

(c) the material particular in respect of which the statement is false or misleading is substantially based upon a statement made, either orally or in writing, to the person or to an agent of the person by another person who is an employee or agent of the first-mentioned person; and

(d) the statement made by the other person is false or misleading in a material particular;

the other person is guilty of an offence.

Penalty: 2 penalty units

...

(5) It is a defence if a person charged with an offence under this section relating to a statement made by the person did not know, and could not reasonably have been expected to have known, that the statement was:

(a) false or misleading in a material particular; and

(b) capable of being used in connection with a claim or an application under this Act.

These subclauses, if enacted, would create an offence:

. where a statement is made that is false or misleading in a material particular and is capable of being used in connection with a claim or application under this Bill.

. where a similar statement is made (but without the 'capable of being used in connection') to an employer who in turn bases a later statement on the employee's false one - in this case the employer is guilty of an offence.

The Committee suggested that the offences created by subclauses 60(1) and (2) may be regarded as strict liability offences, as they provide that, if the events contemplated occur, an offence is committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences. The defence created by subclause 60(5) may be regarded as an instance of reversal of the onus of proof as it provides for the defendant to prove ignorance or that knowledge could not reasonably be expected.

The effect of such a reversal is to impose criminal liability for negligent conduct in contrast with the normal requirement of knowledge and intention.

The Committee noted that clause 61 would impose criminal liability for similar statements but only on proof by the prosecution that the person knew its false or misleading nature.

The Committee accepted that, as a matter of policy, there are matters which are appropriately dealt with by imposing strict liability and then providing a defence of 'reasonable cause' for failure to comply with the obligation imposed. The Committee has also been accustomed to accept a reversal of the onus of proof where the matters to be proved by the defendant are peculiarly within the knowledge of the defendant.

However, the matters to be proved under subclauses 60(1) and (2) did not appear to the Committee to be matters peculiarly within the knowledge of the defendant to any greater degree than the matters which clause 61 requires the prosecution to prove. The Committee therefore suggested that the offences created by clauses 60(1) and (2) should not be of strict liability but should require that the prosecution prove all the components of the offence.

The Committee was concerned that the same Bill would require the prosecution to prove that a person had knowingly made a false statement but, if the prosecution were unable to prove that knowledge, the person could still be judged guilty unless the person could prove his/her own innocence by showing that he/she did not know or could not reasonably have been expected to have known not only that the statement was false or misleading but also that it was capable of being used in

connection with a claim or an application under this proposed Act.

The Committee was further concerned that the matters to be proved by the defendant are cumulative. The defendant must prove both ignorance of the falsity and ignorance of the connection with a claim. This means that the defence is useless to any person who, however innocently, makes a statement in an application or claim under this proposed Act that is false or misleading in a material particular. The Committee understands that 'false' in these circumstances simply means incorrect.

The Committee drew 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.

The Minister has responded as follows:

> Following receipt of your Committee's comments I sought further advice from the Attorney-General's Department. That Department now agrees it would be preferable that Clause 60 be deleted. The Bill will be amended accordingly.

The Committee thanks the Minister for this response.

DEFENCE LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 1 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes amendments to the *Defence Act 1903*, the *Defence Force (Home Loans Assistance) Act 1990*, the *Military Superannuation and Benefits Act 1991*, the *Royal Australian Air Force Veterans' Residences Act 1953* and the *Services Trust Funds Act 1947* to:

. modify a provision covering superannuation determinations to reflect the fact that they are no longer 'interim';

. modify the right of appeal from Conscientious Objection Tribunals to reflect more accurately the role of the Administrative Appeals Tribunal;

. streamline procedures covering command and discipline where forces of Australia and other countries are serving together;

. provide a special home loans benefit for members of the Defence Force allotted for warlike service;

. remove an unintended double benefit for a small number of members of the Defence Force who have transferred to the new Military Superannuation and Benefits Scheme; and

. enable trustees of four welfare funds to be appointed by a Minister rather than by the Governor-General.

The Committee dealt with the Bill in Alert Digest No. 5 of 1993, in which it made various comments. The Minister for Defence has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 5(2), clauses 12 and 18

In Alert Digest No. 5 of 1993, the Committee noted that subclause 5(2), if enacted, would give retrospective operation to clause 4 and paragraph 5(1)(a) of the Bill.

As the amendments made by these provisions are technical and they will operate beneficially for the members of the Defence Forces, the Committee was prepared to accept the retrospectivity.

By virtue of clause 12, the proposed new section 3C of the *Defence Force (Home Loans Assistance) Act 1990* would allow the Minister to make retrospective declarations that particular duties are warlike services. As such retrospectivity would be beneficial to those who had undertaken such duties, the Committee was prepared to accept the retrospectivity.

The Committee also noted that clause 18, if enacted, would enable Part 4 of the Bill to give effect, retrospective to 1 October 1991, to an Instrument made in 1993 under the *Military Superannuation and Benefits Act 1991*. The Committee noted the reasons for the retrospectivity given at pp 9 to 11 of the Explanatory Memorandum:

. a new military superannuation and benefits (MSB) scheme came into operation on 1 October 1991;

. operation of the MSB scheme revealed unintended double benefits which came about by too wide a definition of 'previous contributions';

. an earlier amendment of the definition was operative from 27 May 1992 to 8 September 1992 when the amending Instrument was disallowed by the Senate on 9 September. The Explanatory Memorandum states:

> It is noted that Instrument No. 2 of 1992 was disallowed because it contained a further amendment to the definition of 'previous contributions' relating to bought back service. That further amendment has now been dropped. The Senate's concern in relation to the amendment now proposed was that the MSB Board of Trustees be formally consulted. The Board has now been consulted and has agreed to the amendment.

. proposed new subsections 51A(3) and (4) will enable the

> Commonwealth to recover amounts paid before the amendments were made.

The Committee concluded that passage of these provisions will disadvantage those who were paid their entitlements under the law, but who received an unintended double benefit; however, non-passage of these provisions will disadvantage those who were paid during the period the earlier amendment was in operation. The Committee sought further explanation from the Minister on this issue.

The Committee drew 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.

The Minister for Defence has responded as follows:

> As indicated in the Explanatory memorandum, the amendments are necessary to avoid an unintended double benefit which would have been payable to certain members who have transferred from the Defence Force Retirement and Death Benefits (DFRDB) to the MSB Scheme.
>
> The essence of the defect in the current provisions that the amendments are designed to correct is that some contributions which had already been applied for pension benefits under the DFRDB Scheme would be applied again for the purpose of a lump sum payment under the MSB Scheme.
>
> As outlined in the Explanatory Memorandum, the amendments need to be retrospective because the unintended double benefit would be payable to the affected members who have separated from the Defence Force between 1 october 1991 and 27 may 1992, and between 9 September 1992 and 22 April 1993.
>
> There are 43 members affected by the retrospectivity of the proposed amendments and the total amount payable to them for the unintended double benefit would be $4.8 million.
>
> Perhaps the aspect of the amendments to be emphasised is that they would save the Commonwealth a large amount of money with no injustice to individuals. The unintended double benefit is so clearly a mistake that there is no

> legitimate expectation that it should be paid. In fact, if the unintended double benefit were paid to the members affected by the legislation, there would be injustice to all the other members who receive the normal intended benefits.
>
> All members who would be affected by the retrospective legislation have been advised of the error in the legislation that has created the unintended double benefit. They have also been advised that any double benefits paid out would be repayable to the Commonwealth when this Bill is passed. In fact, no amount has been paid out and it is not expected that any recovery action will be necessary.
>
> I understand that your Committee would not be unsympathetic to retrospectivity in legislation where it is necessary to remove an unintended benefit and there is no legitimate expectation that the benefit should be paid.
>
> I trust you will appreciate that the amendments in question, while saving the Commonwealth almost $5 million, do not do this at the cost of any injustice to individuals.

The Committee thanks the Minister for this response. However, in relation to the penultimate paragraph of the Minister's letter, the matter in question is not whether the Committee is sympathetic or otherwise about retrospectivity to remove an unintended benefit. The Committee's task is to report to the Senate on whether retrospectivity could trespass unduly on personal rights and liberties in accordance with the Committee's terms of reference. The Committee having reported accordingly, it is for the Senate to consider the matters in the Minister's letter and determine whether the retrospectivity is acceptable.

HEALTH LEGISLATION (PROFESSIONAL SERVICES REVIEW) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill proposes to establish new arrangements for determining whether individual health practitioners have engaged in certain inappropriate professional practices. The Bill amends the *Health Insurance Act 1973* to:

. appoint a Director of Professional Services Review and Deputy Directors of Professional Services Review; and

. establish a Professional Service Review Panel.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Health has responded to those comments in a letter dated 21 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Proposed new section 86

In Alert Digest No. 6 of 1993, the Committee noted that the proposed section, if enacted, would enable the Health Insurance Commission to refer to the Director of the Professional Services Review Panel the conduct of a person with respect to services rendered on or after 1 September 1993. The Act, as a whole, will not commence until 31 March 1994 but this provision would enable review of services rendered since 1 September 1993.

The Committee noted that the Bill gives effect, in the words of the second reading speech, 'to an undertaking given in the Budget to introduce new measures to combat overservicing in the Medicare program'.

Retrospectivity is seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. The Bill introduces new definitions of inappropriate practice (see proposed new section 82) which will, in effect, apply from 1 September 1993 (because the review panel will use the definition to judge services rendered since 1 September 1993). To the extent that services rendered will be judged by a definition that did not exist at the time they were rendered (before the Bill was introduced into Parliament), the

Committee considered that personal rights and liberties may be unduly infringed.

The Committee drew 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.

The Minister has responded as follows:

> I acknowledged that the precise definition of "inappropriate practice" was not publicly available on 1 September 1993, because as the Committee says the Bill had not then been introduced. However, as the Committee also acknowledges the Government's intention to deal with overservicing, with the assistance of the medical profession, was made clear in the Budget. Moreover, what is at issue is not the precise definition of a criminal offence, but a standard against which professional colleagues will make a judgement about professional standards.
>
> Accordingly, I believe that persons who might be subject to review under this process have been put on notice since the Budget was delivered of the possibility of their mode of practice being subject to a more rigorous professional scrutiny and that the limited retrospectivity, which has been agreed by the Australian Medical Association, is appropriate.

The Committee thanks the Minister for these comments. However the Committee thinks that the very vagueness of the definition would militate against retrospective operation. The definition basically states that inappropriate practice is conduct unacceptable to the general body of the members of the specialty in which the specialist was practising or of the profession in which a non-specialist was practising. Prospective operation would enable the 'general body of the members' to have some opportunity to consider and, perhaps, publish what unacceptable conduct might be. While gross overservicing might be readily recognisable, the obvious grey areas need delineation before consequences of infringing a 'standard' are applied. This should not be done retrospectively.

The Committee is still of the opinion that the provision 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 draws it to Senators' attention, accordingly.

Reversal of the onus of proof
Proposed new subsection 106E(6)

In Alert Digest No. 6 of 1993, the Committee noted that this provision, if enacted, would reverse the onus of proof in proceedings for an offence of a witness refusing or failing, without reasonable excuse, to produce a document at a hearing. The defendant is required to prove that the document was not relevant to the subject matter of the hearing.

This appears to mean that:

. the Bill, if enacted, would require a person to produce a document;

. if the person refuses or fails to do so, the person may be prosecuted;

. the prosecution would be required to prove that the person refused or failed to produce the document **without reasonable excuse**;

. the defence could then decide to prove that the document was not relevant to the subject matter of the hearing.

It seemed to the Committee that the document's relevance would be an essential element in the prosecution's proof that non-production was without reasonable excuse.

The Committee has consistently drawn attention to provisions reversing the onus of proof especially, as in this case, where the matters which a defendant would be required to prove are not peculiarly within the defendant's knowledge.

The Committee drew 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.

The Minister has made the following comments:

> In this case, I suggest the matters to be proved are peculiarly within the defendant's knowledge. The referral by the Health Insurance Commission will be largely based on statistics and the Professional Services Review Committee has an inquiry role, which includes looking at documents (including clinical records), to make a finding based on professional judgement. The person under review will have a clear statement in the referral of what has caused his or her practice to come to attention. He or she

> will have a peculiar knowledge as to which of his or her records are relevant to that part of his or her practice which is under review.

The Committee thanks the Minister for this response. However, the Committee considers that the issue of whether the matters may be peculiarly within the defendant's knowledge has deflected attention from the main point which the Committee was raising.

The Committee was suggesting that in order to prosecute a defendant for failing to produce a particular document without reasonable excuse, the prosecution would have to prove that the document was relevant. Unless the document is proved relevant, the prosecution would be unable to prove it was withheld unreasonably. The Committee was asking, in effect, whether the statutory defence involving a reversal of the onus of proof was illusory.

As at present advised, the Committee considers that a statutory defence ought to operate despite the prosecution having proved the elements of the offence. For example, Section 8K of the *Taxation Administration Act 1953* provides for an offence of making a false (ie incorrect) statement in respect of a taxation return. The prosecution can prove that the return contained an incorrect statement, but there is a statutory defence that allows the defendant to prove that despite the incorrectness of the statement, the defendant did not know or could not reasonably be expected to know that it was false or incorrect. In the present case, if the prosecution proves that the document was withheld unreasonably, the document must have been a relevant document. Hence there is no scope for this defence to operate.

Right to representation
Section 103

The Committee would like to take this opportunity to raise another matter which was overlooked in our original discussion of this Bill.

Proposed section 103 provides:

> **Rights of persons under review at hearings**
>
> 103.(1) The person under review is entitled to attend the hearing and to be accompanied by a lawyer or another adviser. However, the person under review is not entitled to be represented at the hearing by a lawyer or another adviser.
>
> (2) The person under review is entitled:
>
> (a) to question any person giving evidence at the

hearing; and

(b) to address the Committee.

(3) The Committee may allow an adviser (other than a lawyer) of the person under review:

(a) to question a person giving evidence at the hearing; and

(b) to address the Committee;

on behalf of the person under review.

(4) In this section:

'lawyer' means a barrister or a solicitor.

This proposed section, if enacted, would exclude legal representation at a hearing, although the Committee notes that the person under review may be "accompanied" by a lawyer. Serious consequences, described in proposed section 106U which include suspension or revocation of the right to prescribe or dispense pharmaceutical benefits and to disqualify, partially or fully, a practitioner from providing services, may flow from a hearing. The Committee therefore believes that the right to legal representation should not be excluded. Where a person's livelihood is at stake, legal representation should be available.

The Committee notes the High Court judgment of 13 November 1992 in *Dietrich and the Queen*. This was an application for special leave to appeal which resulted in the accused's conviction being quashed and a new trial ordered. In the words of Mason CJ and McHugh J:

> The applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

It may be thought that Dietrich's case and a hearing before a Review Committee are dissimilar. But, when proposed section 106N is taken into account, the need for legal representation at the hearing is more manifest. Proposed section 106N requires the Review Committee to suspend its hearing if the Committee thinks that the material before it is indicative of fraud.

The Committee maintains that it is inappropriate for Commonwealth legislation to provide for hearings without legal representation where a person's livelihood may be in jeopardy and complex legal issues regarding fraud may arise.

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.

HIGHER EDUCATION FUNDING LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The purpose of this Bill is to provide funding for higher education for the 1996 funding triennium.

The Bill proposes to amend the *Higher Education Funding Act 1988* to:

- provide funding to continue the Research Infrastructure Program beyond 1994 at an enhanced level;
- provide access to a deferred payment facility for eligible clients of the Open Learning Agency of Australia;
- amend the Higher Education Contribution Scheme to ensure that the present amount of public support for higher education is used by as many Australians as possible;
- modify repayments under the Higher Education Contribution Scheme;
- provide funding to meet spare capacity in institutions;
- provide funding to support the introduction of workplace bargaining in higher education; and
- provide for other minor changes and cost supplementation of Commonwealth grants for higher education to offset movements in prices.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Employment, Education and Training has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Requirement to provide tax file numbers
Proposed subsection 105(3)

In Alert Digest No. 6 of 1993, the Committee noted that legislation requiring the provision of tax file numbers may be considered necessary to prevent persons defrauding the system, it may also be considered to be unduly intrusive into a person's private life.

Accordingly, the Committee drew 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.

The Minister has responded as follows:

> Subsection 105(3) sets out the requirement that eligible clients for the Open Learning Agency of Australia must, in seeking to participate in the Open Learning Deferred Payment Scheme (OLDPS), provide to the Agency their tax file number issued by the Commissioner of Taxation.
>
> Tax file numbers will be recorded by the Agency for use when notifying the Australian Taxation Office (ATO) of participant debt information. This will be necessary because the ATO will be responsible for administering repayments through the tax system of Commonwealth loans made under the OLDPS; the ATO already does this for repayment of Commonwealth loans made under the Higher Education Contribution Scheme (HECS). The Agency will provide tax file numbers to the ATO in the same way that higher education institutions do at present under the HECS.
>
> The proposed subsection 105(3) will serve the functions, under the OLDPS, that subparagraph 41(1)(b)(ii) of the *Higher Education Funding Act 1988* services under the HECS at present.
>
> The proposed subsection 106A of the Bill, together with appropriate cross-references, provides for sections 42 to 53, inclusive, in Chapter 4 of the Act to apply to eligible clients of the Agency. These sections set out the procedures already in place in relation to tax file numbers for the purposes of deferred payments under the HECS.
>
> As a safeguard for students' privacy, sections 52 and 53 of the *Higher Education Funding Act* specifically prohibit the disclosure of students' tax file numbers or their use by the Agency except in accordance with a variety of lawful

purposes.

The Committee thanks the Minister for this response.

OVERSEAS STUDENTS TUITION ASSURANCE LEVY BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Employment, Education and Training.

The Bill proposes to impose a levy on members of a Tuition Assurance Scheme established under section 7A of the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*. This Bill complements the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Employment, Education and Training has responded to those comments in a letter dated 19 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Imposition of charge by regulation
Clause 3

In Alert Digest No. 6 of 1993, the Committee noted that this clause provides for regulations under the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* that establish the tuition assurance scheme for overseas students to allow the rules of the scheme to impose levies on the members of the scheme.

The Committee has consistently drawn attention to provisions which allow for the rate of a charge or 'levy' to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than subordinate legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of the levy, then the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

The Committee considered that in the present Bill, no such maximum levy (or method of calculation thereof) was prescribed nor was there any discussion in the Explanatory Memorandum.

Although the drafting of clause 3 might have left room for doubt, the Committee assumed that the rules of the scheme which impose the levies were part of the regulations and as such would be disallowable by either House of the Parliament. It should be remembered that disallowance is an all-or-nothing mechanism and that

there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the level of the charge.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister, in his response, provides background to the proposed Levy Bill. He goes on to say:

> Your Committee has raised three main issues:
>
> . The concern that by leaving details of the Scheme to the regulations it reduces the scope of either House of Parliament to make an input.
>
> . Details of the levy or its calculation are not specified in the primary legislation.
>
> . Concerns associated with the delegation of legislative power.
>
> In terms of leaving the details of the scheme to the regulations, this approach was taken for a number of reasons. Firstly, during discussions in drafting the Bill, the Office of Parliamentary Counsel advised my Department that it was not appropriate to provide too great a level of detail in an Act.
>
> Secondly, finer details of the Scheme are not yet known. As mentioned, a government/industry Working Group has been set up to develop the Scheme and a consultant firm has been engaged to assist in that process.
>
> The Government is keen for the Tuition Assurance Scheme to be industry owned and driven so that the industry can look after itself. The Commonwealth should not be placed in a situation, similar to that which occurred earlier this year, when a business college collapsed and about 350 overseas students in Australia and up to 10 students who had not yet arrived in Australia lost moneys totalling $2.2 million. This resulted in a special Commonwealth appropriation to make good the loss. For this reason it is important for the Tuition Assurance Scheme Board to have authority to levy its members so that the industry itself is

able to cover any future losses.

> The mechanism for having regulations considered by the Parliament does not allow parts of the regulations to be dealt with separately from the package which is tabled. Given this, I am prepared to bring the regulations pertaining to the Tuition Assurance Scheme forward in isolation from the other ESOS amended regulations so that they can be considered separately.

The Committee noted the undertaking given by the Minister to bring forward the Tuition Assurance Scheme regulations in isolation from the other regulations so that they can be considered separately.

This course of action would in some way address the Committee's concerns if it enables both scrutiny and disallowance of the rate of the levy. However, it is still not clear to the Committee whether the regulations will contain the rate of the levy or merely enable the Tuition Assurance Scheme Board to set a rate which would be neither tabled in Parliament nor disallowable. These are real concerns about the extent of the delegation of the legislative power of imposing a levy.

If it turns out that the rate of the levy is not to be tabled in Parliament nor to be disallowable, would the Minister consider asking the government/industry Working Group which is developing the Scheme to provide for this. The Committee would appreciate clarification from the Minister on this point.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Resources for the Minister for Primary Industries and Energy.

The Bill proposes amendments to the following Acts to reflect changes relating to administrative, commercial, and environmental management in various industries:

- *Agricultural and Veterinary Chemicals Act 1988*
- *Agricultural and Veterinary Chemicals (Administration) Act 1992*
- *Australian Horticultural Corporation Act 1987*
- *Australian Meat and Live-stock Industry Selection Committee Act 1984*
- *Horticultural Research and Development Corporation Act 1987*
- *Meat Research Corporation Act 1985*
- *Primary Industries and Energy Research and Development Act 1989*
- *Primary Industries Levies and Charges Collection Act 1991*
- *Dairy Produce Act 1986*
- *Fisheries Legislation (Consequential Provisions) Act 1991*
- *Snowy Mountains Hydro-Electric Power Act 1949*
- *Wheat Marketing Act 1989*

The Committee dealt with the Bill in Alert Digest No. 5 of 1993, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 20 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 21

In Alert Digest No. 5 of 1993, the Committee noted that under clause 21, if enacted, a definition of 'relevant year' would be inserted in the *Dairy Produce Act 1986*, which would give retrospective operation to the proposed new section 94A of that Act.

The Committee was concerned that exporters would be required retrospectively to pay a charge which may not have been legally payable at the time they imported the relevant dairy produce. It appeared to the Committee that the doubt as to the proper imposition of the charge had been so great that the Corporation appeared not to have collected it. Accordingly, the Committee sought the Minister's advice on the legal basis on which the scheme was administered and the charge imposed.

The Committee drew 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.

In his response, the Minister explains the import offset arrangement and confirms the uncertainty concerning the basis for it. He goes on to mention a Government amendment to the Bill which will allow a prospective operation rather than a retrospective operation. He says:

> Because of uncertainty concerning the basis of the import offset arrangement the Corporation has not applied the arrangement for the last two seasons. This legislation removes any uncertainty and allows the Corporation to apply the arrangement with respect to 1991-92, 1992-93 and for the remainder of the life of the market support scheme. This is achieved as the amendment allows the Corporation to withhold future market support payments from firms which import and export the same type of dairy product.
>
> The Attorney-General's Department has provided advice on the amendment which indicates that "In my view the proposed amendments ... would not operate retrospectively." I have attached a copy of the Department's advice for your consideration.

The Committee thanks the Minister for arranging this amendment to meet the Committee's concern about retrospectivity. The advice of the Attorney-General's Department is also attached to this Report.

SOCIAL SECURITY AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991* to:

. increase the rate of payment for certain Newstart allowees;

. apply the family payment income and assets tests to student parents;

. reduce the income ceiling and assets test limit for basic family payment; and

. limit arrears of family payment.

The Committee dealt with the Bill in Alert Digest No. 5 of 1993, in which it made various comments. The Parliamentary Secretary to the Minister for Social Security has responded to those comments in a letter dated 18 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Statutory exclusion of general principle of law
Clause 18 - Certain determinations not to be revived

In Alert Digest No. 5 of 1993, the Committee noted that clause 18, if enacted, would insert proposed section 1243A into the *Social Security Act 1991*. This new section may be regarded as trespassing on personal rights in that it would exclude a general principle of administrative law that, if a statutory decision is set aside ab initio, the parties are placed in the same position they would have occupied if the decision had never been made. This principle means that, in certain circumstances, the original decision to grant a social security payment revives where a subsequent decision to cancel it has been overturned on appeal.

The Committee also noted that the effect of the proposed section would be to oust this general proposition of administrative law, by providing that the original decision would not revive and by requiring a new decision to be made to regrant payment from the date on which the appeal was made, (where that appeal was made more than 13 weeks after notice was given to cancel or reduce payment).

The Committee considered that the new section was aimed at closing a gap in the

Government's policy of limiting arrears payments. The Explanatory Memorandum indicates that the Federal Court had identified the effect of the general principle of law and that it could be excluded by an express statutory provision.

The Committee noted that the Explanatory Memorandum further states on page 14 in respect of the Government's policy:

> The policy is to grant full arrears when a decision is given in favour of a client provided that the client has sought review of the adverse decision within three months of being given a notice of that decision. If the client delays beyond the three months, arrears are payable only from the date on which the client sought the review.

However, the Committee noted that the proposed amendment would diminish rights preserved by the general principle of law.

The Committee drew 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.

The Parliamentary Secretary to the Minister for Social Security, in his response, after giving the background to the proposed amendment, goes on to say:

> To assess the real implications of this amendment, it should be noted that the procedure in cases of failure to respond to a notice is that a person's family payment is first suspended and then cancelled if no contact is made within 12 months. (This could occur if the recipient does not check for some long time her bank account into which the payments would have been made.) The person then has 3 months from notification of the cancellation (which she may not receive if she has changed address) in which to apply for review. The new provision limiting arrears therefore applies only to recommencement of payments after cancellation and only if the person does not apparently notice the missed payments and apply for review for a total of approximately 15 months after payments are first suspended. If payments are recommenced after suspension, full arrears would be paid.
>
> Therefore, the people affected by this amendment are those who have not noticed for over 15 months that their family payments have stopped. It can be argued that these people probably did not really need those payments. Furthermore,

> the substantial cost of paying full arrears for an estimated 25,000 recipients is not sustainable in the current expenditure climate.

The Committee thanks the Parliamentary Secretary for this response but questions the relevance of his concluding remarks. It is contentious to argue that 'these people probably did not really need those payments'. It is surely a matter for the recipients concerned whether they use family payments as a means of regular savings.

In addition, family payments are subject to both income and assets limits. Entitlement therefore arises from meeting the criteria set out in the law not on a subjective assessment of whether the payments are 'really needed'.

The Parliamentary Secretary's final sentence is also of concern to the Committee. Recipients who are not paid their full legal entitlement might also plead that they were counting on that sum being in their 'savings' account in the current economic climate. The Committee believes that the argument that full arrears should not be paid in the current expenditure climate, even though a wrong decision was taken to cancel a payment and the recipient is legally entitled to full arrears, is an argument that is entirely inappropriate.

SOCIAL SECURITY (BUDGET AND OTHER MEASURES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes amendments to the *Social Security Act 1991*, the *Social Security Act 1947*, the *Data-matching Program (Assistance and Tax) Act 1990* and the *Veterans' Entitlements Act 1986* to:

. introduce a Mature Age Allowance;

. introduce an earnings credit for Job Search Allowance, Newstart Allowance and Sickness Allowance recipients;

. implement measures to improve the effectiveness of Newstart Allowance;

. introduce an Education Entry Payment for the long term unemployed;

. require certain persons and their partners to claim and pursue entitlement to income support from specified countries;

. introduce measures relating to debt recovery relating to the fraudulent obtaining of monies by Department of Social Security clients;

. introduce measures to preserve the integrity and effectiveness of the compensation provisions in the *Social Security Act 1991*.

. abolish the waiting period for rent assistance served by young people under 18 who claim the homeless or independent rate of Job Search Allowance or Sickness Allowance;

. provide for students of up to 17 years of age to remain in the social security system;

. continue the data-matching program and make amendments to the *Data-matching Program (Assistance and Tax) Act 1990*

. make other minor technical amendments to the *Social Security Act 1991*.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Parliamentary Secretary to the Minister for Social Security has responded to those comments in a letter dated 21 October 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of decisions of Social Security Appeals Tribunals
Subclauses 2(11) to (15)

In Alert Digest No. 6 of 1993, the Committee noted that these subclauses were designed to give retrospective operation to the relevant substantive provisions from 1 January 1988, and other subsequent dates corresponding to the commencement of various amendment Acts.

The Committee noted the summary of the proposed changes given in the Explanatory Memorandum on page 143:

> **1. Summary of proposed changes**
>
> This Division contains changes that will ensure that notices issued by the Secretary to the Department of Social Security to persons receiving pensions, benefits, allowances and family payments under the Principal Act are valid notices even where one or two of the requirements previously mandated for a valid notice are absent.

It appeared to the Committee that the legislation currently allows the Secretary, by written notice, to require that recipients of social security payments give the Department information or particular information as specified in the notice. Failure by the pensioner to comply can result in automatic cessation of entitlement to payment. Because of this possibility, the legislation requires the Secretary to issue the notice in a manner specified in the legislation. The Department has failed to comply with the legislation and Parliament is asked to exempt it retrospectively from doing so in order to overturn decisions of the Social Security Appeal Tribunals.

The Committee noted that it has consistently drawn Senators' attention to retrospective legislation as it may unduly trespass on personal rights and liberties. It would appear that the effect of these amendments would be that recipients of social security

payments who under the law were not required to give certain information, will be deemed retrospectively to have been obliged to have given it and will thereby become liable to repay sums of money for which under the current law there is no legal liability. It would seem, in this case, that the right of recipients of social security to have their actions judged according to the law as it stood at the time of those actions would be breached by this retrospectivity.

The Committee drew 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.

The Parliamentary Secretary to the Minister for Social Security has responded as follows:

> With respect to subclauses 2(11) to (15), your Committee commented that these subclauses are designed to give retrospective operation to various substantive amendments, from 1 January 1988 and other subsequent dates corresponding to the commencement of various amending Acts. Your Committee noted that the Explanatory memorandum to the Bill states that the substantive amendments will ensure that notices issued by the Secretary to the Department of Social Security (the Department) are valid, even it not all of the requirements for such notices are met. Your Committee stated that what the Parliament is being asked to do is to exempt the Department, retrospectively, from complying with the legislative requirements relevant to such notices 'in order to overturn decisions of the SSAT'.
>
> It is not the intention of the amendments to overturn any decisions of the SSAT. The amendments are intended to ensure that what has happened in several SSAT recent decisions does not occur in the future.
>
> As set out in the Explanatory Memorandum, the *Social Security Act 1991* (the Act) sets out various requirements in relation to the validity of 'recipient notification notices' and 'recipient statement notices' issued to social security clients under the Act. These include that, to be valid, a notice must specify how the information requested is to be given to the Department and also that it must specify that it is a recipient notification notice or a recipient statement notice, as the case may be.

In several recent decisions, the SSAT has set aside Departmental decisions to recover overpayments from clients, on the basis that a relevant notice sent to the client did not contain a statement to the effect that it was a 'recipient statement notice' or a 'recipient notification notice' or that it did not specify where the information requested of the client was to be provided. That is, the overpayment decisions were overturned on the basis of a technical deficiency in the notice.

Although the Department does not intend to act to try and overturn these decisions, it is nevertheless anxious that it does not continue to be the case that it cannot recover money paid to clients in excess of their proper entitlements simply because the client received a notice that was technically defective. To do so would be to allow a windfall gain to those clients affected. Further, given that (in the vast majority of the cases in question) the overpayment has arisen because of a failure of the client to notify the Department of a change in their circumstances, to allow the client to keep the overpayment would mean that clients who had not responded to a notice would be in a better position than those clients who had properly complied with their obligation to keep the Department advised of any changes in their circumstances that might affect their rate of payment. This would be inequitable.

The amendments are intended to ensure that a client does not escape the possibility of having an overpayment recovered simply because of a technical deficiency in a notice. The proposed retrospectivity of the amendments is to ensure that this is the situation in relation to any overpayment cases that have not yet come before the SSAT. To do otherwise would (in addition to allowing a windfall gain to those clients affected) jeopardise the recovery of accumulated debts currently estimated to be in excess of $250 million.

The decision to nominate 1 January 1988 as the effective date of commencement of these retrospective amendments results from the six year limitation period for collection of debts that is provided for by section 1231 of the Act.

The Committee thanks the Parliamentary Secretary for this response. However, the Committee would see the matter in a different light.

The *Social Security Act 1991* makes it clear that a determination that a claim for a payment has been granted, or that a payment is payable **continues in effect** until it ceases to be payable under certain sections that automatically cancel payment or until a further determination under other sections has taken effect. Equally, determinations of the rate of a payment **continue in effect** until the payment automatically becomes payable at a lower rate under certain sections or a further determination under other sections has taken effect. This is evident, for example, in Section 71 for age pension, section 175 for wife pension, and section 225 for carer pension. So recipients are **legally entitled to their current rate of payment until the law or a determination under the law decides otherwise.**

Examination of the further sections which provide for automatic cancellation or reduction and those which require a further determination to cancel or reduce leads to two conclusions:

. there is no nexus between the amount that is legally to be paid to a recipient and some lesser 'correct' amount that would result from the perfect application of all factors that could affect payment;

. the rate that is paid in accordance with the current determination is the amount to which the recipient is entitled under the law and may be cancelled or changed only if the conditions set down in the law occur: there is no room for the Department to say 'but if we had known a certain fact that might affect payment' or 'if we had sought different information' or, as in the issue before the Committee, 'if only we had imposed an obligation on the recipient to notify or reply'.

With respect to these conclusions, the Committee understands that the Social Security Act used to prescribe what information a recipient was obliged to give the Department and that entitlement was worked out accordingly. That system was replaced by one which gave to the Secretary the power to require recipients to answer specific relevant questions. It also gave the power, as in the present Act as described above, to cancel or reduce automatically or by determination where a recipient failed to notify or reply or new information showed that cancellation or reduction was warranted.

The Committee questions whether the present desire for retrospectivity stems from some notion that recipients' entitlements should not be in accordance with the scheme of entitlement as set down by the present law, but should be worked out in accordance with the old law or some theoretical possession of perfect information.

The Committee notes the assurance of the Parliamentary Secretary that Social Security Appeals Tribunal decisions will not be overturned.

The Committee, however, takes issue with the statement that 'to allow the client to keep the overpayment would mean that clients who had not responded to a notice would be in a better position than those clients who had properly complied with their obligation to keep the Department advised of any change in their circumstances that might affect their rate of pension. This would be inequitable.' This statement begs the question. The effect of the proposed amendment is to impose retrospectively that very obligation to advise the Department. The whole point of this matter is that the notices issued did not impose an obligation. The Parliamentary Secretary appears to be imposing an obligation at large, which does not exist in law. Is it being asserted that an obligation exists even where it is not legally imposed? That would indeed be inequitable.

With respect to those recipients who voluntarily advise, the Committee understands that the Secretary may request voluntary information and there is nothing in law that would prevent the Secretary from acting on that information to cancel or determine a reduced rate of payment. It is possible to view the voluntary advice, where the Department has not exercised its power to impose an obligation to notify or reply, as resulting in a windfall to consolidated revenue rather than as a loss because the Department thought it was imposing an obligation but did not do so.

In addition, there has no doubt been a further windfall to consolidated revenue where the Department has recovered amounts which were not legally debts owing to the Commonwealth from recipients who have not appealed to the Social Security Appeals Tribunal. Further, the consolidated revenue has benefited from the cancellation of payments for failure to return a notice, where that notice did not properly impose an obligation to return it.

In view of the fact that the retrospectivity requested goes back to 1988, it seems that the Department has had a long period in which it was within its power at any time to bring its notices into conformity with the Act.

Finally, the Committee questions whether it is true to assert that the recovery of $250 million in accumulated debts is in jeopardy.

First, in the cases under consideration, those payments are **not debts**. They are payments to which the recipients were **legally entitled** and there was **no obligation** on the recipients to respond to the notice.

Secondly, assuming that the $250 million is the total accumulated 'debts', many debts would not be affected. For example, claiming more than one payment and all the unemployment benefit/job search debts will not be affected. While there may have been no legal obligation on a recipient of job search allowance to return a 'recipient statement notice', the practical necessity of returning it in order to be paid the next instalment takes this class of debts out of the category we are considering. A debt arising from not declaring income or employment on such a statement is recoverable

because of the false statement.

It seems to the Committee that, of the fifteen or more sections, commencing at section 1223, which describe debts recoverable under the *Social Security Act 1991*, only some of the debts recoverable under subparagraph 1224(1)(b)(ii) are affected. It is that subparagraph which makes recovery depend on the recipient or another person failing or omitting to comply with a provision of the Act. This contravention triggers either the automatic cancellation or reduction in payment or enables a determination to cancel or reduce payments to have a date of effect earlier than the date of the determination. An example would be section 73 and subsection 81(4) for age pension.

The Committee is convinced that the payments were made in accordance with the law and that there was nothing to prevent the Department from properly issuing notices which complied with the law and would therefore impose the obligation to notify or reply.

Thus, the Committee continues to draw the attention of Senators to the retrospectivity as it may be considered to trespass unduly on the personal rights and liberties of social security recipients to have their entitlements paid in accordance with the law, in breach of principle 1(a)(i) of the Committee's terms of reference.

Requirement to provide tax file numbers
Proposed new sections 660XCD, 660XCE, 660XCL and 660XCM

In Alert Digest No. 6 of 1993, the Committee noted that these proposed sections, if enacted, would oblige persons to provide their tax file numbers to the Secretary. Legislation requiring the provision of tax file numbers may be considered necessary to prevent persons defrauding the social security system, it may also be considered to be unduly intrusive into a person's private life.

Accordingly, the Committee drew 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.

The Parliamentary Secretary has responded as follows:

> The rate of payment of mature age allowance and mature age partner allowance for which a person is qualified is dependent on what income the person receives. For members of a couple the partner's income is also taken into account.
>
> The Government decided some time ago to introduce a data-matching program which is authorised by the *Data-*

matching Program (Assistance and Tax) Act 1990. Under that program income information people disclose to paying agencies such as the Department of Social Security is checked automatically against income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. The TFNs of both the recipient and his or her partner can be required for this to be done efficiently.

It should be noted that these provisions would provide an opportunity for the Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity requirements. These provisions would allow the Department to act a agent for the ATO to assist clients who have difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting necessary proof of identity checks. As the Department currently conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit from the Department's involvement in the TFN application process.

The requirements of the new sections are consistent with the requirements for all existing payments under the Act.

The Committee thanks the Parliamentary Secretary for this response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1993

17 NOVEMBER 1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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, 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 such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1993

The Committee presents its Sixth Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Australian Wine and Brandy Corporation Amendment Bill 1993

National Health Amendment Bill (No. 3) 1993

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to implement the EC/Australia Wine Agreement to:

. improve access for Australian wines to the EC;

. provide for mutual recognition of each party's winemaking practices and standards;

. restrict the use of geographical names and indications;

. phase out Australia's use of European geographical indications;

. establish a Geographical Indications Committee as a Committee of the Australian Wine and Brandy Corporation to define the names and boundaries of Australian geographical indications for wine; and

. establish a Register of geographical indications.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 1 November 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Strict liability offences
Proposed subsections 40G(4) and 40H(3)

In Alert Digest No. 6 of 1993, the Committee stated that a strict liability offence is one where, if a certain fact exists or a certain event occurs, an offence has been committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences.

The Committee noted that proposed section 40G would create an offence for the sale, export or import of wine in contravention of certain registered conditions where the person knows that the wine does not comply with those conditions.

The Committee also noted that proposed section 40H would create an offence for the sale, export or import of wine where the person knows that the wine does not comply with certain prescribed blending requirements.

Offences against these sections therefore require the prosecution to prove that the defendant knew that the wine did not comply with the various requirements.

The Committee was concerned, however, that proposed subsections 40G(4) and 40H(3), if enacted, would deem certain people to have committed an offence and be thereby liable to imprisonment because they ought reasonably to have known that the wine did not comply with the registered conditions or the prescribed blending requirements, **even if** they did not, in fact, have such knowledge.

The Committee drew 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.

The Minister has responded in respect of proposed subsections 40G(4) and 40H(3) as follows:

> The formulation of these provisions follows that of subsections 85ZKA(3) and 85ZKB(3) of the *Crimes Act 1914*. This model was adopted on the advice of the Attorney-General's Department, because it was understood to have been acceptable to the Committee in appropriate circumstances in the past. For the reasoning underlying this type of provision generally, I refer you to the letter of 11 June 1989 from the then Attorney-General, the Hon Lionel Bowen MP, to your predecessor Senator Cooney, which was reproduced in your Committee's Twelfth Report of 1989, I have attached a copy of this letter for ease of reference.
>
> Essentially, the provisions still require the prosecution to establish *mens rea* beyond reasonable doubt but import into the mental element an extremely restricted objective aspect intended to eliminate wilful blindness. I note that when similar provisions were inserted into sections 99 and 100 of the *Trade Marks Act 1955* by the *Industry, Technology and Commerce Legislation Act 1992* your Committee did not consider it necessary to comment on the Bill.
>
> In the present case, this type of mental element is considered appropriate because there is a need to ensure

> that those in the wine industry who are in a position to assess whether a product complies with the applicable conditions and requirements referred to in sections 40G and 40H and yet assist in the distribution and sale of non-complying wines cannot use their own wilful blindness as a defence. It is anticipated that in many cases it will be clear that a person with a background in the wine industry should have been put on notice by circumstances surrounding a dealing but direct proof of actual knowledge will not be possible.

The Committee thanks the Minister for his response but notes that the Committee cannot be said to have found clauses such as these to be acceptable in the past. In the Committee's Twelfth Report of 1989, to which the Minister referred, the Committee said:

> The Committee notes the response of the Minister but considers that where legislation creates a serious offence, an element of that offence ought to be a guilty intention or a reckless disregard of the consequences of that act. Mere negligence should not be enough to make a person guilty of a serious crime.
>
> The test provided in the proposed subsections to visit criminality on a person is that he or she 'ought reasonably to have known of the existence of a set of facts'. This test is less stringent than one requiring actual knowledge or a reckless disregard of the facts which the Committee considers the appropriate standard to be applied before a person is found guilty of a serious offence.

The Committee does not have any difficulty with the intention of the legislation: 'to eliminate wilful blindness' as a defence. But the Committee is concerned with the width of the provisions and wonders whether mere negligence would attract criminal liability.

For example: a wine-maker is convicted of a contravention of the blending requirements under subsection 40H(1) in respect of a wine that had been widely distributed throughout Australia. Would it be considered that all restaurateurs and retailers holding stocks of that wine ought reasonably to have known of the conviction and would therefore be liable because, negligently failing to check their stocks, they continued to sell the wine?

What would be the position of a restaurateur who had to admit that he knew of the

conviction but who negligently assumed that his cellar manager would have checked the stocks? The Committee is concerned that the provisions do not sufficiently distinguish between wilful blindness and mere negligence. The Committee confirms its view of 1989 that 'mere negligence should not be enough to make a person guilty of a serious crime'.

The Committee retains the view that this test is less stringent than one requiring actual knowledge or a reckless disregard of the facts which the Committee considers the appropriate standard to be applied before a person is found guilty of a serious offence.

Accordingly, the Committee continues to draw 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.

NATIONAL HEALTH AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill should be read in conjunction with the Nursing Home Charge (Imposition) Bill 1993.

The Bill proposes to amend the *National Health Act 1953* to:

. complement amendments made last year to the nursing home benefit payments scheme by the *National Health Amendment Act 1992*;

. make fee-reducing benefit received for a period up to 30 June 1993 recoverable as nursing home charge;

. allow fee-reducing benefit received for the period from 1 July 1993 to continue to be recovered as an overpayment in accordance with the 1992 amendments;

. provide that where the Commonwealth holds monies in trust for the benefit of the vendor pending completion of an investigation of the nursing home accounts, and on completion it is found that money is repayable to the vendor, the Commonwealth is liable to pay interest at commercial rates on the amount repayable; and

. complement measures in the *National Health Amendment Act 1992* to provide that amounts of unspent benefit paid prior to the recent prospective amendments, are recoverable from the vendor as debts on sale.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Housing, Local Government and Community Services has responded to those comments in a letter dated 3 November 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospective application
Proposed new section 65GA

In Alert Digest No. 6, the Committee noted that proposed new subsection 65GA(1) provides:

> **Notice of fee-reducing benefit**
>
> **65GA.(1)** If:
>
> (a) an investigation under paragraph 65C(1)(c) or 65F(1)(c) or subsection 65G(3) in respect of an approved nursing home is completed after the commencement of this section; and
>
> (b) the investigation establishes that the vendor or an earlier proprietor of the nursing home has received a fee-reducing benefit in respect of the investigation period;
>
> the Secretary must work out whether some or all of that fee-reducing benefit was received in respect of the period beginning on the day determined by the Secretary under paragraph 65C(1)(c) or 65F(1)(c) or subsection 65G(3) (as the case may be) and ending on 30 June 1993 (**'charge period'**).

The Committee noted that proposed new section 65GC makes it clear that the amount of nursing home charge payable by the vendor of the approved nursing home equals the amount of the fee-reducing benefit stated in the notice under section 65GA. The combined effect of the provisions is retrospectively to take into account in determining the amount of the charge matters that occurred before 30 June 1993.

While noting in the second reading speech that the amendments are designed to address inequities in the recovery of unspent Commonwealth nursing home benefit when a nursing home is sold, the Committee was concerned that some inequity may remain if the vendor is retrospectively made liable for the 'debt'. This is especially so when the second reading speech alludes to the industry's practice of making appropriate provisions in contracts of sale. If, in a completed purchase, the vendor has allowed for the purchaser to be liable for the repayment, it would be inequitable for the vendor to be retrospectively made liable by this Bill. The Committee sought advice from the Minister on any way in which this issue has been or may be addressed.

The Committee drew 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.

The Minister has responded to the Committee's comments:

The concern outlined in the Secretary's letter is that an inequity may arise if, as a result of the amendments, the vendor of a nursing home on sale is made retrospectively liable for a debt. This perception appears to be based on a misreading of the arrangements and I would like to take the opportunity to clarify the effect of the proposed amendments for the Committee.

The amendments proposed by the Bill must be read in conjunction with, and in the context of, the arrangements introduced this year by the National Health Amendment Act 1992. These arrangements came into effect on 1 July 1993 and are, effectively, extended by the proposed amendments.

Currently the National Health Act 1953 ("the Act") provides that certain investigations must be carried out when the Minister receives notice of a sale of a nursing home. In the course of such investigations, any unspent benefit identified that was advanced after 1 July 1993 is recoverable as a debt from the vendor at the point of sale. Any unspent benefit identified that was advanced prior to 1 July 1993 is only recoverable as an offset or fee loading from the purchaser.

The proposed amendments rely on (and expand on) this process in the following way. Any such unspent benefit, advanced prior to 1 July 1993, will reflect the amount of "charge" payable by the vendor under the new arrangements. For technical reasons, recoverable amounts relating to this period will be characterised as a "charge" rather than an overpayment. The vendor is already liable to repay the unspent benefit and would, in the normal course of events, repay it by a negative loading in the fee (which in fact reduces the Commonwealth benefit paid). Currently, however, where a home is sold, such a liability is transferred to the purchaser as a negative fee loading. The amendments will ensure that this liability will not, as a result of the vendor's actions, be passed onto the purchaser when a nursing home is sold.

There was also a concern expressed that any potential inequity may be compounded by a conflict between arrangement made in the contract of sale and recovery

> action effected under the proposed arrangements. current provisions in the Act, upon which the proposed amendments will rely, are designed to avoid any such conflict.
>
> It is a requirement under the Act that the Minister be given 90 days notice of completion of a sale. Failure to give this notice is an offence attracting a maximum penalty of $20 000.
>
> Once notice has been received, the investigations establish the likely amount of any unspent benefit and this is advised to both the vendor and purchaser prior to completion of the sale, so that both parties are aware of the vendor's liability. This advice will, as a result of the amendments, include the amount of any nursing home charge payable by the vendor.

The Committee thanks the Minister for the advice (in the last paragraph quoted) that the likely amount of any unspent benefit is advised to both vendor and purchaser prior to the completion of the sale, so that both parties are aware of the vendor's liability. Where this occurs, the Committee's concern is allayed.

However, the legislation contemplates that there may be occasions where no notice is given and a sale could be completed without the benefit of advice as to the vendor's liability.

In such a case, the Committee would appreciate the Minister's assurance that, if a vendor and a purchaser completed a contract of sale on the assumption that the purchaser would be liable, the Secretary would not give a notice under the proposed subsection 65GA(2) making the vendor liable. It may be that the Minister could include this matter in the principles to be complied with by the Secretary in accordance with subsections 65F(6) and 65G(7).

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1993

24 NOVEMBER 1993

SENATE STANDING COMMITTEE

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Senator R Bell
Senator K Carr
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(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1993

The Committee presents its Seventh Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Health Legislation (Professional Services Review) Amendment Bill 1993

Superannuation Industry (Supervision) Bill 1993

Taxation Laws Amendment Bill (No. 3) 1993

Telecommunications (Interception) Amendment Bill 1993

Transport and Communications Legislation Amendment Bill (No. 2) 1993

HEALTH LEGISLATION (PROFESSIONAL SERVICES REVIEW) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill proposes to establish new arrangements for determining whether individual health practitioners have engaged in certain inappropriate professional practices. The Bill amends the *Health Insurance Act 1973* to:

. appoint a Director of Professional Services Review and Deputy Directors of Professional Services Review; and

. establish a Professional Service Review Panel.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Health has responded to those comments in a letter dated 21 October 1993. Relevant parts of the response were discussed in the Committee's Fifth Report of 1993 and a copy of that letter was attached to that report.

The Minister has now responded to comments made in the Fifth Report of 1993 in a letter dated 22 November 1993. This response is discussed below and a copy of the letter is attached to this report.

Retrospectivity
Proposed new section 86

In Alert Digest No. 6 of 1993, the Committee noted that the proposed section, if enacted, would enable the Health Insurance Commission to refer to the Director of the Professional Services Review Panel the conduct of a person with respect to services rendered on or after 1 September 1993. The Act, as a whole, will not commence until 31 March 1994 but this provision would enable review of services rendered since 1 September 1993.

The Committee noted that the Bill gives effect, in the words of the second reading speech, 'to an undertaking given in the Budget to introduce new measures to combat overservicing in the Medicare program'.

Retrospectivity is seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. The Bill introduces new definitions of inappropriate practice (see proposed new section

82) which will, in effect, apply from 1 September 1993 (because the review panel will use the definition to judge services rendered since 1 September 1993). To the extent that services rendered will be judged by a definition that did not exist at the time they were rendered (before the Bill was introduced into Parliament), the Committee considered that personal rights and liberties may be unduly infringed.

The Committee drew 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.

In his letter of 21 October 1993, the Minister responded to the Committee's comments as follows:

> I acknowledged that the precise definition of "inappropriate practice" was not publicly available on 1 September 1993, because as the Committee says the Bill had not then been introduced. However, as the Committee also acknowledges the Government's intention to deal with overservicing, with the assistance of the medical profession, was made clear in the Budget. Moreover, what is at issue is not the precise definition of a criminal offence, but a standard against which professional colleagues will make a judgement about professional standards.
>
> Accordingly, I believe that persons who might be subject to review under this process have been put on notice since the Budget was delivered of the possibility of their mode of practice being subject to a more rigorous professional scrutiny and that the limited retrospectivity, which has been agreed by the Australian Medical Association, is appropriate.

The Committee thanked the Minister for these comments. The Committee, however, considered that the very vagueness of the definition would militate against retrospective operation. The definition basically states that inappropriate practice is conduct unacceptable to the general body of the members of the specialty in which the specialist was practising or of the profession in which a non-specialist was practising. Prospective operation would enable the 'general body of the members' to have some opportunity to consider and, perhaps, publish what unacceptable conduct might be. While gross overservicing might be readily recognisable, the obvious grey areas need delineation before consequences of infringing a 'standard' are applied. This should not be done retrospectively.

The Committee remained of the opinion that the provision 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 drew it to Senators' attention, accordingly.

On this issue, the Minister has now responded in the letter dated 22 November 1993:

> In respect of proposed new section 86, I would be most reluctant to agree to the fixing of any date later than the one now in the Bill because the administrative effort required to collect and verify data would inevitably mean that the new procedures could not be used effectively until well into the latter half of 1994.

The Committee notes the Minister's reluctance to agree to a later start date because of the lead time in gathering the statistical data. Nevertheless, the Committee retains its concern about retrospectivity.

The Committee notes the submissions of the Royal Australian College of General Practitioners (RACGP) and the Australian Association of General Practitioners (AAGP) to the Senate Standing Committee on Community Affairs which were incorporated in Hansard at the hearing on 19 November 1993.

The AAGP submitted (p 26):

> There is also a legitimate concern that without clear guidelines as to what constitutes inappropriate practice, anxiety amongst the majority of ethical general practitioners could lead to underservicing or inappropriate utilisation of medical resources.

The RACGP submitted (p 27):

> STANDARDS OF PRACTICE
>
> The concept of "inappropriate practice" pre-supposes that there are in existence already acknowledged "appropriate practices" or "standards". Whilst many doctors may feel that they know what constitutes "appropriate practice", the RACGP considers that such a judgement has the potential to be very subjective, or based on the "average practitioner" rather than on the basis of detailed and codified standards of practice.
>
> The RACGP considers that standards for practice and statements of best practice must be developed, agreement obtained from the profession and promulgated widely to ensure that decisions regarding inappropriate practice have a sound base and are understood and accepted nationally by the medical profession and understood by the public.

The Committee is concerned that a Review Panel in April or May 1994 will be examining the conduct of a practitioner since September 1993 against a concept of inappropriate practice, defined as conduct unacceptable to the general body of his peers, where the boundaries of what is unacceptable are, at present, unknown. This would amount to a retrospective determination of the limits within which the practitioners must operate.

The Committee continues to draw 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.

Right to representation
Section 103

In its Fifth Report of 1993, the Committee took the opportunity to raise another matter which was overlooked in our original discussion of this Bill.

The Committee noted that proposed section 103 provides:

> **Rights of persons under review at hearings**
>
> 103.(1) The person under review is entitled to attend the hearing and to be accompanied by a lawyer or another adviser. However, the person under review is not entitled to be represented at the hearing by a lawyer or another adviser.
>
> (2) The person under review is entitled:
> (a) to question any person giving evidence at the hearing; and
> (b) to address the Committee.
>
> (3) The Committee may allow an adviser (other than a lawyer) of the person under review:
> (a) to question a person giving evidence at the hearing; and
> (b) to address the Committee;
> on behalf of the person under review.
>
> (4) In this section:
> **'lawyer'** means a barrister or a solicitor.

It seemed to the Committee that this proposed section, if enacted, would exclude legal representation at a hearing, although the Committee notes that the person under review may be "accompanied" by a lawyer. Serious consequences, described in proposed section 106U which include suspension or revocation of the right to

prescribe or dispense pharmaceutical benefits and to disqualify, partially or fully, a practitioner from providing services, may flow from a hearing. The Committee therefore believes that the right to legal representation should not be excluded. Where a person's livelihood is at stake, legal representation should be available.

The Committee noted the High Court judgment of 13 November 1992 in *Dietrich and the Queen*. This was an application for special leave to appeal which resulted in the accused's conviction being quashed and a new trial ordered. In the words of Mason CJ and McHugh J:

> The applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

It may be thought that Dietrich's case and a hearing before a Review Committee are dissimilar. But, when proposed section 106N is taken into account, the need for legal representation at the hearing is more manifest. Proposed section 106N requires the Review Committee to suspend its hearing if the Committee thinks that the material before it is indicative of fraud.

The Committee maintained that it was inappropriate for Commonwealth legislation to provide for hearings without legal representation where a person's livelihood may be in jeopardy and complex legal issues regarding fraud may arise.

The Committee drew 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.

On this issue, the Minister responded in his letter of 22 November 1993:

> In addition to the matters raised in the Alert Digest, the Committee drew attention to an additional aspect of the Bill which it thought may be considered to trespass unduly on the personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference. That matter was the right to representation in proposed new section 103, in particular the restriction of oral presentation to non-lawyers.
>
> I am aware that this provision has been the subject of much comment, but I am concerned that the comment is based on a misconception about the role of the Professional Services Review Committee and the effect of a determination under

> proposed new section 106U. The Professional Services Review scheme is not a criminal or disciplinary process, it is a professional review process. Similarly, the scheme is not dealing with a person's entitlement to practice his or her profession, it is about access to Commonwealth benefits.
>
> A person who is found to have engaged in inappropriate practice is not (indeed, cannot) be denied his or her right to practice medicine. That is a matter for State and Territory medical registration boards. Such a person is not, by any action which might be taken under this Bill, denied the right to earn a livelihood as a medical practitioner. They could earn a livelihood as a salaried medical practitioner or from patients who paid their own accounts or who were otherwise insured (eg. workers compensation or motor vehicle).
>
> The relevance of proposed new section 106N to a conclusion that legal representation is required I find a little difficult to comprehend. That section would ensure that any matter which appeared to be fraud was not dealt with by the Professional Services Review Committee, but was referred back to the Health Insurance Commission to be dealt with as fraud, that is investigated and referred to the Director of Public Prosecutions, if that were justified. If a prosecution were launched, then the principles articulated in Dietrich v The Queen would, and ought obviously to, apply.
>
> I would also draw the Committee's attention to the appeal rights of a person under review, where lawyers are permitted and would be expected to participate, and to the several provisions which enable the making of written submissions which may be prepared by lawyers.
>
> Accordingly, I find I cannot accept either of the Committee's premises for concluding that oral presentation by lawyers is necessary. In my view, a person's livelihood will not be in jeopardy and complex issues of fraud cannot arise.

The Committee does not find persuasive the argument that legal representation should be denied because the practitioner who is disqualified from the Medicare system could still earn a livelihood within the medical field.

The Committee notes the submission of Dr Donovan of the Medical Board of the ACT, also incorporated in the transcript of proceedings of the hearings on 19 November of the Senate Standing Committee on Community Affairs, at p 34:

> A practitioner so disqualified would not be able to practise privately, because his services would not attract Medicare benefits. However he would be free to take up salaried employment, and because there is no publicity, would be able to conceal his disqualification from prospective employees.

While not denied the right to practise medicine, the practitioner may be threatened with the loss of his present source of income. This is a matter for the strongest possible defence, which should include the right to legal representation at the Review Committee stage and not only on appeal.

On the relevance of new section 106N, the legislation requires that the Review Committee suspend its hearing if the Review Committee thinks that the material before it is indicative of fraud. Whether such material is indicative of fraud is a question of law.

The Committee is of the view that a legal representative of a practitioner would be more aware than either the practitioner or the Review Committee of when the Review Committee ought to cease its deliberations and not trespass on matters which ought to be left for determination in a judicial forum.

The Committee continues to draw 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.

Reversal of the onus of proof
Proposed new subsection 106E(6)

In Alert Digest No. 6 of 1993, the Committee noted that this provision, if enacted, would reverse the onus of proof in proceedings for an offence of a witness refusing or failing, without reasonable excuse, to produce a document at a hearing. The defendant is required to prove that the document was not relevant to the subject matter of the hearing.

This appears to mean that:

. the Bill, if enacted, would require a person to produce a document;

. if the person refuses or fails to do so, the person may be prosecuted;

. the prosecution would be required to prove that the person

refused or failed to produce the document without reasonable excuse;

. the defence could then decide to prove that the document was not relevant to the subject matter of the hearing.

It seemed to the Committee that the document's relevance would be an essential element in the prosecution's proof that non-production was without reasonable excuse.

The Committee has consistently drawn attention to provisions reversing the onus of proof especially, as in this case, where the matters which a defendant would be required to prove are not peculiarly within the defendant's knowledge.

The Committee drew 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.

In his letter of 21 October 1993, the Minister made the following comments:

> In this case, I suggest the matters to be proved are peculiarly within the defendant's knowledge. The referral by the Health Insurance Commission will be largely based on statistics and the Professional Services Review Committee has an inquiry role, which includes looking at documents (including clinical records), to make a finding based on professional judgement. The person under review will have a clear statement in the referral of what has caused his or her practice to come to attention. He or she will have a peculiar knowledge as to which of his or her records are relevant to that part of his or her practice which is under review.

The Committee thanked the Minister for this response. The Committee, however, considered that the issue of whether the matters may be peculiarly within the defendant's knowledge had deflected attention from the main point which the Committee was raising.

The Committee was suggesting that in order to prosecute a defendant for failing to produce a particular document without reasonable excuse, the prosecution would have to prove that the document was relevant. Unless the document is proved relevant, the prosecution would be unable to prove it was withheld unreasonably. The Committee was asking, in effect, whether the statutory defence involving a reversal of the onus of proof was illusory.

On the advice available to it, the Committee considered that a statutory defence ought

to operate despite the prosecution having proved the elements of the offence. For example, Section 8K of the *Taxation Administration Act 1953* provides for an offence of making a false (ie incorrect) statement in respect of a taxation return. The prosecution can prove that the return contained an incorrect statement, but there is a statutory defence that allows the defendant to prove that despite the incorrectness of the statement, the defendant did not know or could not reasonably be expected to know that it was false or incorrect. In the present case, if the prosecution proves that the document was withheld unreasonably, the document must have been a relevant document. Hence there is no scope for this defence to operate.

At the beginning of his letter of 22 November 1993, the Minister said that he had noted the Committee's further comments on the issue of the reversal of onus of proof in proposed new subsection 106E(6) but he did not make any further response on this issue in his letter.

The Committee would be interested to know whether the Minister shares the Committee's view that there is no scope for this defence to operate.

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the security of superannuation savings and protect the rights of superannuation fund members.

This Bill provides:

. for effective supervisory arrangements for the Insurance and Superannuation Commission regarding funds and trustees;

. for trustees and investment managers to be made subject to legislative sanctions;

. for the proper performance of their fiduciary responsibilities and accountability to members;

. clear delineation of the basic duties and responsibilities of trustees;

. that trustees and investment managers must be suitable to act as fund trustees and to manage fund moneys respectively;

. for financial assistance to be provided to funds that have suffered a loss due to fraudulent conduct or theft;

. mechanisms for dealing with benefits in employer-sponsored funds in respect of members that have left employment or who are lost, and unclaimed benefits;

. for equal member and employer representation;

. certain disclosure obligations in respect of auditors and actuaries of funds; and

. rules relating to invitations and offers to subscribe for interests in, and disclosure by, public offer superannuation funds,

approved deposit funds and pooled superannuation trusts.

The Committee dealt with the Bill in Alert Digest No. 3 of 1993, in which it made various comments. The Treasurer responded to those comments in a letter dated 18 October 1993. Relevant parts of that response were discussed in the Committee's Fourth Report of 1993 and a copy of that letter was attached to that report.

The Treasurer has now responded to those further comments in a letter dated 22 November 1993. This response is discussed below and a copy of the response is attached to this report.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 3 of 1993 the Committee had noted that subclause 2(2), if enacted, would provide that clause 112 would have retrospective effect from 21 October 1992. On that date the Treasurer issued a statement 'Strengthening Super Security'. Clause 112, if enacted, would provide for the circumstances in which amounts may be paid out of an employer-sponsored fund to an employer-sponsor. It also would provide for civil and criminal penalties which could include 5 years imprisonment. Clause 112 would, then, appear to be an example of 'legislation by press release'.

The Committee further noted that the statement 'Strengthening Super Security', on page 25, indicates that the rules it sets out for returns of surplus to employers will apply to superannuation funds immediately. However, the Committee is concerned that the statement does not indicate that criminal liability would attach to contravention of those rules - rules which in the Bill are more complex than those in the statement.

The Committee drew 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.

The Treasurer responded as follows:

> The Government considers that the possibility of a return of surplus to an employer-sponsor weakening a fund to be a serious matter. For this reason, clause 112 sets out certain preconditions that must be met before a refund of surplus can take place. These effectively ensure that members are fully informed and that the fund will remain in a satisfactory financial position after the refund of the surplus.
>
> It has been decided that an appropriate penalty is needed to be

> incorporated into the SIS Bill to ensure that these preconditions are met. The tax penalty (withdrawal of tax concession) would hurt members rather than the trustee, who would have been responsible for the breach.
>
> The application of a penalty to this provision ensures that any regulatory loophole is closed and the penalty attached to this provision is reasonable in the light of the need to safeguard the entitlements of superannuation entity beneficiaries.

The Committee indicated that it had no difficulty with the application of civil and criminal penalties to this provision. The Committee's concerns were:

. the general disadvantage of uncertainty as to what the actual law will be that stems from retrospective legislation, where the retrospectivity commences from the date of a 'press release' or other ministerial statement;

. the particular circumstances of this provision.

The Committee noted that in the particular circumstances of this provision the ministerial statement did not mention that a criminal penalty would be applied and that the rules that determine what is legal or illegal in a refund of surplus are more complex in the legislation than in the statement.

The Committee sought the Treasurer's advice whether the criminal penalty should be made to apply only to actions contravening the provision performed after Royal Assent.

The Treasurer has now responded:

> The Government considers that enough time and information has been given since the first press release about this package of legislation and therefore the criminal penalty should apply to actions contravening the provision performed before Royal Assent. I consider this to be appropriate in the circumstances.

The Committee remains opposed, in principle, to the imposition of a criminal penalty retrospectively especially where a prior statement announcing the legislation is not detailed sufficiently to remove uncertainty about the prohibited activity. Therefore the Committee continues to draw 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.

Inappropriate delegation of legislative power
Part 29--EXEMPTIONS AND MODIFICATIONS

In Alert Digest No. 3 of 1993, the Committee noted that Part 29 may be considered an inappropriate delegation of legislative power, as its clauses would allow the Commissioner to modify or exempt the application of specified provisions, both of the primary law and of the regulations, to a particular superannuation entity or class of superannuation entities without reference to, or reporting to, Parliament.

By way of explanation the Explanatory Memorandum states at p 67:

> The Commissioner would exercise this power only when he is satisfied that, if the modification or exemption is given, the particular superannuation entity or class of superannuation entities would still comply with the spirit of the provisions concerned.

The Committee noted that the exemptions or modifications must be published in the *Gazette*, although no period is prescribed within which this must be done. The Committee is concerned that this is a power which allows the Commissioner, in effect, to amend the legislation. The Committee is concerned not only with the wide, virtually unreviewable nature of the power but also at the lack of Parliamentary supervision.

The Committee also noted that the power is one of wide discretion without any criteria for its use set out in the Bill. There is an air of unreality about the suggestion in the Explanatory Memorandum that the Commissioner would only use it when satisfied about future compliance. This is especially so when the future compliance is not compliance with the law but merely with the 'spirit of the provisions'.

While technically the Commissioner's decisions to exempt from the law or to modify its application are reviewable, the Committee saw practical difficulties where there are no legislated criteria and no prescribed time within which the decision must be gazetted.

The Committee did not believe that such a power should be given to the Commissioner and sought the Treasurer's advice on whether it can be more strictly circumscribed. The Committee suggested at least an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declarations and exemptions as disallowable instruments.

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

The Treasurer responded as follows:

> The Insurance and Superannuation Commission's powers to exempt or modify the legislation in its application to a fund or a class of funds corresponds to a similar power of the Australian Securities Commission (ASC) under the Corporations Law (section 1084).
>
> This power reflects the need for some flexibility under the new regime because of the complexity and diversity of the industry and because of the rapidity of changes in the financial markets. Furthermore, Part 29 does contain various accountability mechanisms. For example, clause 330 of the SIS Bill requires the Commissioner to cause a copy of an exemption or modification under Part 29, or revocation of such an exemption or modification, to be published in the Gazette. Decisions made under these provisions are reviewable by the Administrative Appeals Tribunal.
>
> The ASC has used its modification powers in relation to a number of superannuation issues. The modifiable provisions are quite small part of the Bill, only 51 provisions out of 377. They relate to equal representation, where a number of funds may comply with the spirit of the rules but not the letter, auto rollover provisions for dealing with lost members, the operating standards for superannuation entities and the procedures for offering superannuation interests to the public. I consider this to be the appropriate model in the circumstances.

The Committee thanked the Treasurer for his advice but noted that the Treasurer did not address the Committee's suggestion of an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declarations and exemptions as disallowable instruments. The Committee remained of the view that, to assist the process of review by the Administrative Appeals Tribunal, a time should be prescribed within which the Commissioner must gazette a relevant decision.

The Treasurer has now responded:

> The Government has considered the Committee's suggestion that at least an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declaration and exemptions as disallowable instruments. In response to the Committee's suggestion, the Government has

proposed to amend clause 346 to include a requirement that the Commissioner publish in the Annual Report information relating to the use of his powers under Part 29. I will arrange for Parliament to consider amendment of the clause during passage. I thank the Committee for raising this matter.

The Committee thanks the Treasurer for this response.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Assistant Treasurer.

The Bill proposes to:

. defer initial payment of company tax by small business;

. exempt from income tax income derived by non-profit organisations established for the purpose of promoting the development of tourism;

. exempt various activities of the RSPCA from sales tax;

. change the imputation system as a result of the reduction in the company tax rate;

. allow for determination of tax payable by life insurance companies;

. ensure taxation treatment of capital gains from life assurance policies realised by superannuation funds and similar bodies is consistent with their general concessional taxation treatment;

. retain the current provisional uplift factor of 8% for the purposes of calculating provisional tax;

. ensure that deductions relating to petroleum mining provisions are not available for expenditure incurred in carrying out activities overseas that do not generate assessable income in Australia;

. change the definition of 'stand-by value' as it relates to valuation of fringe benefits tax of airlines;

. allow the superannuation guarantee shortfall component to be paid into a complying approved deposit fund as a taxable contribution;

. ensure the Petroleum Resource Rent Tax Law does not delay

exploration following changes in interests in projects or otherwise distort commercial decision-making, and to ease compliance by resource rent taxpayers; and

. other minor technical amendments.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 16 November 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 18

In Alert Digest No. 6 of 1993, the Committee noted that clause 18, if enacted, would provide that the amendments made by Division 2 of Part 4 apply from 7.30 pm on 21 August 1990.

The Committee also noted that the Explanatory Memorandum indicates that the purpose of the amendments is to cure an unintended defect in the legislation introduced in the 1990 Budget.

The Committee commented that in a comparable case with respect to the Customs Tariff Amendment Bill 1993, the Committee took the view that the Committee would not see retrospectivity as unduly trespassing on personal rights and liberties if the effect of the bill is merely declaratory of what the Government and the relevant industry have always believed to be the legal obligation and if they have always acted accordingly. The Committee has, in the past, been willing to accept retrospectivity where this has been necessary to correct a drafting error, without making further comment on the clause. The Committee would appreciate the Treasurer's advice on these aspects of the amendments.

The Committee drew 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.

The Assistant Treasurer has responded as follows:

> Division 2 of Part 4 of the Bill (clauses 14 to 18) proposes to amend the provisions of the *Income Tax Assessment Act 1936* ("ITAA") that Authorise deductions for certain expenditure incurred in exploring for and mining petroleum. The amendments will correct a defect that allows taxpayers to claim deductions for expenditure incurred in tax-exempt activities.

Clause 18 of the Bill proposes that the amendments apply with effect from 7.30 pm on 21 August 1990, the commencement time of the amendments that created the defect.

The petroleum mining provisions (Division 10AA of the ITAA) provide the basis for deduction of expenditure on exploration or prospecting activities and capital expenditure on developing and operating a petroleum field. Until 21 August 1990, deductions were restricted to expenditure incurred in respect of activities conducted in Australia, as were deductions under a number of other provisions that provide deductions for capital expenditure.

The 1990-91 Budget announced that these restrictions would be removed because the Government considered it was no longer appropriate to discriminate between domestic and foreign source income; that is, foreign sourced income was to be taxed on the same basis as income derived from domestic sources.

In removing these restrictions, it was always intended that the deductions would be available only if expenditure was incurred for the purpose of deriving assessable income. This was clearly stated in the 1990-91 Budget papers and in both the Second Reading Speech and the Explanatory Memorandum on *Taxation Laws Amendment Bill (No. 6) 1990*, which introduced the amendments that removed the restrictions.

This intention was not achieved in relation to the petroleum mining provisions. A requirement that expenditure be incurred for the purpose of producing assessable income was inadvertently not included in the amendments. This means that taxpayers are able to claim deductions for expenditure incurred in petroleum exploration and mining activities in certain overseas locations even though the income from those activities is not taxable in Australia. The deductions can then be used to reduce tax payable on assessable income derived from other sources.

Evidence suggests that taxpayers affected by the amendments have accepted that their expenditure was not deductible. The Commissioner of Taxation is only aware of one taxpayer having claimed deductions for expenditure covered by the proposed amendments. Those claims were disallowed.

> Nevertheless, the defect needs to be remedied. A purely prospective amendment to the law would encourage these taxpayers (about 40 in number) to seek amendments to their assessments. This could impose a significant cost to the revenue (potentially exceeding $1 billion). This cost would have to be met by the general community.
>
> Under the circumstances, the Government believes that a retrospective amendment is justifiable and does not breach principle 1(a)(i) of the Committee's terms of reference.

The Committee thanks the Assistant Treasurer for this response.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to give effect to certain of the recommendations arising out of a review of the *Telecommunications (Interception) Act 1979* by:

. enabling the replacement of the present system of routing interceptions through Canberra with a system under which the AFP maintains control of State interceptions by means of computer links but without listening to, or recording, those communications;

. permitting law enforcement agencies to monitor or record telephone calls without a warrant in certain emergency situations;

. removing the geographical restrictions on State law enforcement agencies provided interceptions made by them are within their functions; and

. including computer related offences under Part VIA of the *Crimes Act 1914*.

The Committee considered this Bill in Alert Digest No. 5 of 1993 and made no comment. However, the Law Society of New South Wales has forwarded to the Committee a copy of its letter to the Minister for Justice, the Hon Duncan Kerr MP, in which it raised several concerns.

The Committee dealt with these concerns in Alert Digest No. 9 of 1993 and attached a copy of the letter from the Law Society.

The Attorney-General has now responded to the Committee's concerns in a response dated 23 November 1993. Relevant parts of the response are discussed below and a copy of his response is attached to this report.

Interceptions without warrants
Clause 10

In Alert Digest No. 9, the Committee noted that clause 10(b), if enacted, would insert several subsections in section 7 of the *Telecommunications (Interception) Act 1979*.

Proposed subsections (4) and (5) would provide:

> (4) Subsection (1) does not apply to, or in relation to, an act done by an officer of an agency in relation to a communication if the following conditions are satisfied:
>
> (a) the officer or another officer of the agency is a party to the communication; and
>
> (b) there are reasonable grounds for suspecting that another party to the communication has:
>
> (i) done an act that has resulted, or may result, in loss of life or the infliction of serious personal injury; or
>
> (ii) threatened to kill or seriously injure another person or to cause serious damage to property; or
>
> (iii) threatened to take his or her own life or to do an act that would or may endanger his or her own life or create a serious threat to his or her health or safety; and
>
> (c) because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a Part VI warrant to be made.
>
> (5) Subsection (1) does not apply to, or in relation to, an act done by an officer of an agency in relation to a communication if the following conditions are satisfied:
>
> (a) the person to whom the communication is directed has consented to the doing of the act; and
>
> (b) there are reasonable grounds for believing that that person is likely to receive a communication from a person who has:
>
> (i) done an act that has resulted, or may result, in loss of life or the infliction of serious personal injury; or
>
> (ii) threatened to kill or seriously injure another person or to cause serious damage to property; or
>
> (iii) threatened to take his or her own life or to do an act that would or may endanger his or her

own life or create a serious threat to his or her health or safety.

In its letter the Council of the Law Society said:

> The Council is concerned about the proposed amendments contained in clause 10 of the Bill which would empower a police officer to listen to or record, without a warrant, a communication between police and a suspected offender in emergency situations. The Council considers that giving a police officer this power is both unnecessary and unacceptable.
>
> It is unnecessary, because the present powers are adequate. Under the present laws police have the power to trace telephone calls in an emergency without warrants (s.30).
>
> Furthermore, police may obtain "telephone" warrants in emergencies by obtaining authorisation from a duty judicial officer (ss.43, 50-52). The judicial officer determines the terms of the warrant (s.50) and the applicant agency must supply the issuing judge with written documentation within 24 hours of the application (s.51).
>
> The Council also believes that the proposed amendments to section 7 of the Act (contained in clause 10 of the Bill) namely the new sub-sections (4) and (5) are unacceptable for the following reasons:
>
> 1. as a matter of principle the Law Society is opposed to telephone tapping without warrant;
>
> 2. the powers are not justified in the sense that there is no explanation as to why the emergency telephone warrant procedure should not be used;
>
> 3. the permission to undertake such tapping is self-issued without the need to justify the tap to an independent third person;
>
> 4. the nature of the interception is unregulated because it is self-issued with no time limit or conditions such as would be imposed by a judge;
>
> 5. there is no responsibility to report later to an independent agency about the use of such a power;

6. there is no accountability as the agencies do not have to provide parliament or the public with an account of how often, in what circumstances, and with what results such powers are exercised as they are required to do with warrants issued under the annual report provisions;

7. the phrase "being a party to the communication" in clause 10 of the Bill is inadequately defined;

8. the provision for tapping without a warrant when one party to the conversation consents to the tapping is a back-door way of introducing "participant monitoring" which has been totally opposed by the Commonwealth Privacy Commissioner, the NSW Privacy Committee and the NSW Council for Civil Liberties.

The Committee viewed the power to place an intercept in the same terms as it had approached search and seizure provisions. The Committee has consistently drawn attention to search and seizure provisions which can operate without the issue of a warrant. Such provisions will only be acceptable if the circumstances and the seriousness of the offence in question justify such a power being given.

The Committee did not have a difficulty with the seriousness of sieges or kidnapping but the issue of whether the circumstances justify the grant of such a power remained.

There appeared to be little room for objection if attention was focussed only on the 'best case scenario'. But the Committee thought that the NSW Law Society had properly raised the unregulated nature of the power because it is self-issued, with no time limit or conditions such as may be imposed by a judge.

The Committee was also of the view that proposed section 102A limited the accountability to reporting annually only the number of occasions on which such an interception has been made - although the Committee noted that, by proposed new section 103, further information could be prescribed to be furnished to the Minister in the annual report.

Further, the Committee noted that the provisions are said, in the Explanatory Memorandum, to cover two distinct sets of circumstances. Urgency ('where it is impracticable to seek a warrant') is put forward as justifying the grant of this power with respect to sieges but nothing is suggested as warranting such a grant where the party receiving the communication is not a police officer but a party who gives consent.

The Explanatory Memorandum states:

> 12. Clause 10 also amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication between police and a suspected offender in emergencies where there are reasonable grounds for suspecting that the offender (who is the other party) is involved in the actual or threatened loss of life, or threat of serious injury or of serious damage to property. This will allow police to take appropriate action in sieges and other like situations where it is impracticable to seek a warrant under Part VI of the Principal Act beforehand.
>
> 13. Clause 10 similarly amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication with the consent of a person to whom the communication is directed. This amendment will allow police to take appropriate action in cases of kidnap or extortion or similar threats. As the consent of the innocent party is a prerequisite, the provision is not limited to emergencies.

The Committee considered that the urgency condition in subsection (4) should apply also in subsection (5), so that, without urgency, a warrant will be needed.

With respect to the 'urgency' cases, the Committee noted that one of the conditions to be satisfied is that it is not reasonably practicable for an application to be made for a warrant. However, that satisfaction is in the mind of the police without any accountability other than the need to report how many times it has been used, as noted above.

The Committee believed that accountability could be greatly enhanced by making the power contingent on immediate steps being taken to seek a warrant by telephone so that a judicial officer could ratify its use and set such terms and conditions as are seen to be necessary. The Committee sought the advice of the Attorney-General on whether appropriate accountability could be achieved by such a measure.

The Committee drew 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.

The Attorney-General has now responded:

> I note that your Committee has considered the Bill and that it makes two recommendations:

- that the urgency condition in subsection (4) should apply also in subsection (5) so that, without urgency, a warrant will be needed; and

- the power should be made contingent on immediate steps being taken to seek a warrant by telephone so that a judicial officer could ratify its use and set such terms and conditions as are seen to be necessary.

The Government has accepted both these amendments in the House and they are included in the Bill as introduced in the Senate.

The Committee also notes that under proposed section 102A agencies reporting obligations in this respect will be limited to the number of occasions on which reliance has been placed on these provisions but that proposed new section 103 would allow further reporting obligations to be prescribed. The Committee makes no recommendations on this matter.

In my view, it is preferable to rely on the proposed new section 103 than amend section 102A. The current reporting obligations are very largely statistical in nature and the proposed provisions accord with the scheme of the Act.

The Government welcomes the Committee's comments and considers that the amendments to which it refers will complement the other civil liberties and privacy safeguards in the Bill.

The Committee thanks the Attorney-General for this response.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the Senate on 21 October 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposes amendments to the following Acts within the portfolio:

. *Air Navigation Act 1920* to provide for Australian ratification of a Protocol to the Convention on International Civil Aviation;

. *Australian Land Transport Development Act 1988* to enable payments through the ALTD Trust fund to the National Rail Corporation Ltd for One Nation projects to be recognised as Commonwealth capital contributions;

. *Australian National Railways Commission Act 1983* to increase the maximum penalty that may be prescribed for offences against the by-laws or regulations from $500 to $1,500 and extend the powers of inquiry into rail safety incidents;

. *Civil Aviation Act 1988* to give effect to Article 83 *bis* of the Chicago Convention when it enters into force internationally, clarify the Authority's ability to regulate foreign registered aircraft employed domestically and empower the Authority to provide regulatory services to other countries and agencies under contract;

. *Navigation Act 1912* to provide for the making of regulations relating to competency standards and licensing where use of marine pilots is required in the Australian Coastal sea;

. *Seafarers Rehabilitation and Compensation Act 1992* to distinguish company trainees from industry trainees for the purposes of claiming compensation, allow employers to insure their liabilities with State insurance offices, rationalise provisions relating to compensation for travelling expenses incurred in seeking medical treatment and ensure that injured seafarers are not required to be examined by a medical panel;

. *Seafarers Rehabilitation and Compensation Levy Act 1992* to

require the Minister to consult in relation to financial matters affecting the operation of the Authority before recommending a particular rate of levy to the Governor General in Council; and

. *Telecommunications Act 1991* to amend numbering provisions and to amend section 88 relating to the protection of the content of communications.

The Committee dealt with the Bill in Alert Digest No. 8 of 1993, in which it made various comments. The Minister for Transport and Communications has responded to those comments in a letter dated 16 November 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement on proclamation
Subclause 2(3)

In Alert Digest No. 8 of 1993, the Committee noted that by subclause 2(3) various provisions of the Bill would come into effect on a day to be proclaimed, 'being a day not before the day on which the Protocol inserting [Article] 83 bis into the Convention on International Civil Aviation comes into force in relation to Australia.'

The Committee also noted that the Explanatory Memorandum points out that the reason for this is that the provisions in question cannot be given legal effect until the Protocol comes into force in relation to Australia.

The Committee pointed out that it has consistently opposed the inclusion of open-ended proclamation provisions because it may be considered an inappropriate delegation of legislative power for the Parliament to enact legislation but have no control over when it will commence.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee was of the view that the circumstances of this Bill would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. However, the Committee suggested that an addition to the proclamation subclause could produce a result more in harmony with the thrust of the Drafting Instruction and with the principle of appropriate delegation of legislative power. The Committee seeks the Minister's advice whether the subclause could also provide that the amendments would commence within (say) 6 months of the Protocol coming into force in relation to Australia.

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

The Minister has responded as follows:

> The Committee has expressed concern in relation to subclause 2(3) of the Transport and Communications Legislation Amendment Bill (No. 2) 1993. That particular subclause provides that the Bill's provisions which will give effect to Article 83 bis of the Convention on International Civil Aviation are to commence on a day to be fixed by Proclamation; the sole restriction being that it be on a day not before the day on which

the Protocol inserting Article 83 bis into the convention comes into force in relation to Australia.

The Committee has acknowledged that the method of commencement adopted by subclause 2(3), complies with paragraph 6 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1991 but has suggested that the amendments "commence within (say) six months of the Protocol coming into force in relation to Australia". I understand the suggestion to mean that the provisions would be repealed automatically if not commenced within six months of coming into force in relation to Australia.

I am concerned that the suggested sunset clause will, however, introduce a significant element of uncertainty into the legislation.

The Protocol comes into effect internationally (and hence in relation to Australia) when it receives its ninety-eighth ratification. Establishing when this occurred may be a difficult task, particularly for a member of the general public, with the result that the operation of sub-clause 2(3) would be uncertain and some confusion may arise as to whether the repeal provision has been triggered.

There is no cause for concern that proclamation might be delayed once the Protocol comes into force. It is in Australia's interest that the amendments which will give effect to Article 83 bis commence as soon as is possible.

Amongst other benefits (including overall air safety gains), the advantages bestowed by Article 83 bis are clearly consistent with the securing of more flexible and efficient non-economic regulatory arrangements broadly of the type envisaged with the formation of a single aviation market between Australia and New Zealand (which, incidentally, has already ratified the Protocol). Furthermore, major Australian airline carriers strongly support the early introduction of Article 83 bis arrangements by Australia.

The Minister's interpretation of the Committee's suggestion discloses some misunderstanding. Paragraph 3 of the Drafting Instruction, which is set out above, envisages alternative methods of restricting the time within which an Act should be proclaimed:

1. The Act to commence automatically on a fixed date after Royal Assent or at the end of a period.

2. The Act to be repealed automatically if it has not been proclaimed by a fixed date or by the end of a period.

The Committee intended to suggest the first method. The Minister has understood that the Committee was suggesting the second.

The Committee was suggesting that

- EITHER the amendment be proclaimed within, say, six months of the ninety-eighth country ratifying the Protocol

- OR the amendments would commence automatically at the end of that six month period.

The suggested six months comes from paragraph 4 of the Drafting Instruction. The Committee, however, would be satisfied to receive advice from the Minister that 9 or 12 months might be needed for the relevant international authority to verify that 98 countries have ratified the Protocol and to notify the Australian authorities accordingly.

The Minister points out that it is in Australia's interest that Article 83 bis commence as soon as possible, and that the major Australian airline carriers strongly support the early introduction of Article 83 bis arrangements. On this basis, the Committee believes that an automatic commencement at the end of a set period after the ninety-eighth ratification ought not to present a problem.

The Committee seeks the Minister's further consideration of the matter.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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, 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 such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 1993

The Committee presents its Eighth Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Environment Protection (Sea Dumping) Amendment Bill 1993

Overseas Students Tuition Assurance Levy Bill 1993

Social Security (Budget and Other Measures) Legislation Amendment Bill 1993

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for the Environment, Sport and Territories.

The Bill proposes to amend the *Environment Protection (Sea Dumping) Amendment Act 1981* to:

. implement the Government's decision to ratify the Protocol for the prevention of Pollution of the South Pacific Region by Dumping, commonly referred to as the SPREP Dumping Protocol, which is one of two protocols to the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

The Committee dealt with the Bill in Alert Digest No. 9 of 1993, in which it made various comments. The Minister for the Environment, Sport and Territories has responded to those comments in a letter dated 7 December 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement on Proclamation
Clause 2

In Alert Digest No. 9 of 1993, the Committee noted that clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
>
> (2) If this Act does not commence under subsection (1) within the period of 12 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

By clause 2 the Bill will come into effect on a day to be proclaimed, or in any event 12 months after Royal Assent.

The Committee noted that it has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

Paragraph 4 of the Drafting Instruction suggests that the Explanatory Memorandum should explain the reason for choosing a period longer than 6 months after Royal Assent.

The Committee noted that no such explanation appears to be included in the Explanatory Memorandum. The Committee, however, also noted, in the second reading speech, that a complementary amendment needs to be made to the *Tasmanian Environment Protection (Sea Dumping) Act 1987* to reflect the additional requirement of the South Pacific Region Environment Protection Dumping Protocol.

The Committee considered that it may be that in these circumstances, paragraph 6 would be applicable in that the commencement depends on an event whose timing is

uncertain. The Committee sought the Minister's advice whether the need to await the amendment of the Tasmanian law was the reason for choosing a 12 month period.

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

The Minister has responded as follows:

> The need for amendment of the Tasmanian law is not the only reason for the commencement clause. Because the Bill gives effect to a treaty, which imposes new restrictions on prospective applicants for sea dumping permits, the commencement provisions in clause 2 of the Bill were given careful consideration by departmental officers.
>
> The commencement clause fixes 12 months after Royal Assent as the commencement date for the *Environment Protection (Sea Dumping) Amendment Act 1993* if it has not already commenced by Proclamation. The 12 month maximum period was chosen to allow the Department of Foreign Affairs and Trade adequate time to complete the ratification procedures and for my Department to notify prospective applicants for sea dumping permits that the SPREP Dumping Protocol adds a new class of compounds, organophosphorous compounds, to the list of prohibited substances. The need also exists to develop suitable technical methods and guidelines for the detection and analysis of substances that belong to this class of compounds that are likely to be found in sediments and dredge spoil which may be disposed of at sea. Laboratories will need some time to make appropriate arrangements to carry out these tests. Consequently, commencement of these provisions 6 months from the date of assent may not provide adequate notice to deal with all the issues mentioned above or allow Tasmania adequate time to amend its legislation.

The Committee thanks the Minister for her assistance with this legislation.

OVERSEAS STUDENTS TUITION ASSURANCE LEVY BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Employment, Education and Training.

The Bill proposes to impose a levy on members of a Tuition Assurance Scheme established under section 7A of the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*. This Bill complements the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Employment, Education and Training responded to those comments in a letter dated 19 October 1993. Relevant parts of that response were discussed in the Committee's Fifth Report of 1993 and the Committee sought further clarification from the Minister.

The Minister has provided further information to the Committee in a letter dated 22 November 1993. A copy of this response is attached to this report.

Imposition of charge by regulation
Clause 3

In Alert Digest No. 6 of 1993, the Committee noted that this clause provides for regulations under the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* that establish the tuition assurance scheme for overseas students to allow the rules of the scheme to impose levies on the members of the scheme.

The Committee has consistently drawn attention to provisions which allow for the rate of a charge or 'levy' to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than subordinate legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of the levy, then the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

The Committee considered that in the present Bill, no such maximum levy (or method of calculation thereof) was prescribed nor was there any discussion in the Explanatory Memorandum.

Although the drafting of clause 3 might have left room for doubt, the Committee assumed that the rules of the scheme which impose the levies were part of the regulations and as such would be disallowable by either House of the Parliament. It should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the level of the charge.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

In its Fifth Report of 1993, the Committee noted the Minister's response in his letter of 19 October 1993. In that response the Minister indicated that "a government/industry Working Group has been set up to develop the Scheme and a consultant firm has been engaged to assist in that process".

The Minister went on the say:

> The Government is keen for the Tuition Assurance Scheme to be industry owned and driven so that the industry can look after itself. The Commonwealth should not be placed in a situation, similar to that which occurred earlier this year, when a business college collapsed and about 350 overseas students in Australia and up to 10 students who had not yet arrived in Australia lost moneys totalling $2.2 million. This resulted in a special Commonwealth appropriation to make good the loss. For this reason it is important for the Tuition Assurance Scheme Board to have authority to levy its members so that the industry itself is able to cover any future losses.
>
> The mechanism for having regulations considered by the Parliament does not allow parts of the regulations to be dealt with separately from the package which is tabled. Given this, I am prepared to bring the regulations pertaining to the Tuition Assurance Scheme forward in isolation from the other ESOS amended regulations so that they can be considered separately.

The Committee noted the undertaking given by the Minister to bring forward the Tuition Assurance Scheme regulations in isolation from the other regulations so that they can be considered separately.

The Committee also noted that this course of action would in some way address the Committee's concerns if it enables both scrutiny and disallowance of the rate of the levy. It was, however, still not clear to the Committee whether the regulations will contain the rate of the levy or merely enable the Tuition Assurance Scheme Board to

set a rate which would be neither tabled in Parliament nor disallowable. These are real concerns about the extent of the delegation of the legislative power of imposing a levy.

The Committee asked that, if it turned out that the rate of the levy was not to be tabled in Parliament nor to be disallowable, the Minister consider asking the government/industry Working Group which is developing the Scheme to provide for this. The Committee sought clarification from the Minister on this point.

In his response of 22 November 1993, the Minister indicated:

> However, at this stage the Working Group is not yet able to advise me of its conclusions regarding the operational procedures for industry management and funding of such arrangements. As a consequence, I am not able at present to provide the Committee with a definitive comment on its concerns.
>
> I will write to you again as soon as the Working Group has advised me on the preferred arrangements for a tuition assurance scheme.

The Committee looks forward to a satisfactory resolution of the matter.

SOCIAL SECURITY (BUDGET AND OTHER MEASURES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes amendments to the *Social Security Act 1991*, the *Social Security Act 1947,* the *Data-matching Program (Assistance and Tax) Act 1990* and the *Veterans' Entitlements Act 1986* to:

. introduce a Mature Age Allowance;

. introduce an earnings credit for Job Search Allowance, Newstart Allowance and Sickness Allowance recipients;

. implement measures to improve the effectiveness of Newstart Allowance;

. introduce an Education Entry Payment for the long term unemployed;

. require certain persons and their partners to claim and pursue entitlement to income support from specified countries;

. introduce measures relating to debt recovery relating to the fraudulent obtaining of monies by Department of Social Security clients;

. introduce measures to preserve the integrity and effectiveness of the compensation provisions in the *Social Security Act 1991.*

. abolish the waiting period for rent assistance served by young people under 18 who claim the homeless or independent rate of Job Search Allowance or Sickness Allowance;

. provide for students of up to 17 years of age to remain in the social security system;

. continue the data-matching program and make amendments to the *Data-matching Program (Assistance and Tax) Act 1990*

. make other minor technical amendments to the *Social Security Act 1991*.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Parliamentary Secretary to the Minister for Social Security responded to those comments in a letter dated 21 October 1993. Relevant parts of the response were discussed in the Committee's Fifth Report of 1993 and a copy of that letter was attached to that report.

The Parliamentary Secretary to the Minister for Social Security, in a letter dated 25 November 1993, has responded to comments made in the Fifth Report of 1993. His response is discussed below and a copy of his letter is attached to this report.

Reversal of decisions of Social Security Appeals Tribunals
Subclauses 2(11) to (15)

In Alert Digest No. 6 of 1993, the Committee noted that these subclauses were designed to give retrospective operation to the relevant substantive provisions from 1 January 1988, and other subsequent dates corresponding to the commencement of various amendment Acts.

The Committee noted the summary of the proposed changes given in the Explanatory Memorandum on page 143:

> **1. Summary of proposed changes**
>
> This Division contains changes that will ensure that notices issued by the Secretary to the Department of Social Security to persons receiving pensions, benefits, allowances and family payments under the Principal Act are valid notices even where one or two of the requirements previously mandated for a valid notice are absent.

It appeared to the Committee that the legislation currently allows the Secretary, by written notice, to require that recipients of social security payments give the Department information or particular information as specified in the notice. Failure by the pensioner to comply can result in automatic cessation of entitlement to payment. Because of this possibility, the legislation requires the Secretary to issue the notice in a manner specified in the legislation. The Department has failed to comply with the legislation and Parliament is asked to exempt it retrospectively from doing so in order to overturn decisions of the Social Security Appeal Tribunals.

The Committee noted that it has consistently drawn Senators' attention to retrospective legislation as it may unduly trespass on personal rights and liberties. It would appear

that the effect of these amendments would be that recipients of social security payments who under the law were not required to give certain information, will be deemed retrospectively to have been obliged to have given it and will thereby become liable to repay sums of money for which under the current law there is no legal liability. It would seem, in this case, that the right of recipients of social security to have their actions judged according to the law as it stood at the time of those actions would be breached by this retrospectivity.

The Committee drew 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.

The Parliamentary Secretary to the Minister for Social Security has responded as follows:

> With respect to subclauses 2(11) to (15), your Committee commented that these subclauses are designed to give retrospective operation to various substantive amendments, from 1 January 1988 and other subsequent dates corresponding to the commencement of various amending Acts. Your Committee noted that the Explanatory memorandum to the Bill states that the substantive amendments will ensure that notices issued by the Secretary to the Department of Social Security (the Department) are valid, even it not all of the requirements for such notices are met. Your Committee stated that what the Parliament is being asked to do is to exempt the Department, retrospectively, from complying with the legislative requirements relevant to such notices 'in order to overturn decisions of the SSAT'.
>
> It is not the intention of the amendments to overturn any decisions of the SSAT. The amendments are intended to ensure that what has happened in several SSAT recent decisions does not occur in the future.
>
> As set out in the Explanatory Memorandum, the *Social Security Act 1991* (the Act) sets out various requirements in relation to the validity of 'recipient notification notices' and 'recipient statement notices' issued to social security clients under the Act. These include that, to be valid, a notice must specify how the information requested is to be given to the Department and also that it must specify that it is a recipient notification notice or a recipient statement notice, as the case may be.
>
> In several recent decisions, the SSAT has set aside Departmental

decisions to recover overpayments from clients, on the basis that a relevant notice sent to the client did not contain a statement to the effect that it was a 'recipient statement notice' or a 'recipient notification notice' or that it did not specify where the information requested of the client was to be provided. That is, the overpayment decisions were overturned on the basis of a technical deficiency in the notice.

Although the Department does not intend to act to try and overturn these decisions, it is nevertheless anxious that it does not continue to be the case that it cannot recover money paid to clients in excess of their proper entitlements simply because the client received a notice that was technically defective. To do so would be to allow a windfall gain to those clients affected. Further, given that (in the vast majority of the cases in question) the overpayment has arisen because of a failure of the client to notify the Department of a change in their circumstances, to allow the client to keep the overpayment would mean that clients who had not responded to a notice would be in a better position than those clients who had properly complied with their obligation to keep the Department advised of any changes in their circumstances that might affect their rate of payment. This would be inequitable.

The amendments are intended to ensure that a client does not escape the possibility of having an overpayment recovered simply because of a technical deficiency in a notice. The proposed retrospectivity of the amendments is to ensure that this is the situation in relation to any overpayment cases that have not yet come before the SSAT. To do otherwise would (in addition to allowing a windfall gain to those clients affected) jeopardise the recovery of accumulated debts currently estimated to be in excess of $250 million.

The decision to nominate 1 January 1988 as the effective date of commencement of these retrospective amendments results from the six year limitation period for collection of debts that is provided for by section 1231 of the Act.

The Committee thanked the Parliamentary Secretary for this response. However, the Committee saw the matter in a different light.

The Committee pointed out that the *Social Security Act 1991* makes it clear that a determination that a claim for a payment has been granted, or that a payment is payable **continues in effect** until it ceases to be payable under certain sections that

automatically cancel payment or until a further determination under other sections has taken effect. Equally, determinations of the rate of a payment **continue in effect** until the payment automatically becomes payable at a lower rate under certain sections or a further determination under other sections has taken effect. This is evident, for example, in Section 71 for age pension, section 175 for wife pension, and section 225 for carer pension. So recipients are **legally entitled to their current rate of payment until the law or a determination under the law decides otherwise.**

The Committee considered that examination of the further sections which provide for automatic cancellation or reduction and those which require a further determination to cancel or reduce led to two conclusions:

. there is no nexus between the amount that is legally to be paid to a recipient and some lesser 'correct' amount that would result from the perfect application of all factors that could affect payment;

. the rate that is paid in accordance with the current determination is the amount to which the recipient is entitled under the law and may be cancelled or changed only if the conditions set down in the law occur: there is no room for the Department to say 'but if we had known a certain fact that might affect payment' or 'if we had sought different information' or, as in the issue before the Committee, 'if only we had imposed an obligation on the recipient to notify or reply'.

With respect to these conclusions, the Committee understood that the Social Security Act used to prescribe what information a recipient was obliged to give the Department and that entitlement was worked out accordingly. That system was replaced by one which gave to the Secretary the power to require recipients to answer specific relevant questions. It also gave the power, as in the present Act as described above, to cancel or reduce automatically or by determination where a recipient failed to notify or reply or new information showed that cancellation or reduction was warranted.

The Committee questioned whether the present desire for retrospectivity stems from some notion that recipients' entitlements should not be in accordance with the scheme of entitlement as set down by the present law, but should be worked out in accordance with the old law or some theoretical possession of perfect information.

The Committee noted the assurance of the Parliamentary Secretary that Social Security Appeals Tribunal decisions will not be overturned.

The Committee, however, took issue with the statement that 'to allow the client to keep the overpayment would mean that clients who had not responded to a notice would be in a better position than those clients who had properly complied with their obligation to keep the Department advised of any change in their circumstances that

might affect their rate of pension. This would be inequitable.' This statement begs the question. The effect of the proposed amendment is to impose retrospectively that very obligation to advise the Department. The whole point of this matter is that the notices issued did not impose an obligation. The Parliamentary Secretary appears to be imposing an obligation at large, which does not exist in law. Is it being asserted that an obligation exists even where it is not legally imposed? That would indeed be inequitable.

With respect to those recipients who voluntarily advise, the Committee understood that the Secretary may request voluntary information and there is nothing in law that would prevent the Secretary from acting on that information to cancel or determine a reduced rate of payment. It is possible to view the voluntary advice, where the Department has not exercised its power to impose an obligation to notify or reply, as resulting in a windfall to consolidated revenue rather than as a loss because the Department thought it was imposing an obligation but did not do so.

In addition, the Committee considered that there has no doubt been a further windfall to consolidated revenue where the Department has recovered amounts which were not legally debts owing to the Commonwealth from recipients who have not appealed to the Social Security Appeals Tribunal. Further, the consolidated revenue has benefited from the cancellation of payments for failure to return a notice, where that notice did not properly impose an obligation to return it.

In view of the fact that the retrospectivity requested goes back to 1988, it seemed to the Committee that the Department has had a long period in which it was within its power at any time to bring its notices into conformity with the Act.

Finally, the Committee questioned whether it is true to assert that the recovery of $250 million in accumulated debts is in jeopardy.

The Committee considered that first, in the cases under consideration, those payments are **not debts**. They are payments to which the recipients were **legally entitled** and there was **no obligation** on the recipients to respond to the notice.
Secondly, assuming that the $250 million is the total accumulated 'debts', many debts would not be affected. For example, claiming more than one payment and all the unemployment benefit/job search debts will not be affected. While there may have been no legal obligation on a recipient of job search allowance to return a 'recipient statement notice', the practical necessity of returning it in order to be paid the next instalment takes this class of debts out of the category under consideration. A debt arising from not declaring income or employment on such a statement is recoverable because of the false statement.

It seemed to the Committee that, of the fifteen or more sections, commencing at section 1223, which describe debts recoverable under the *Social Security Act 1991*, only some of the debts recoverable under subparagraph 1224(1)(b)(ii) are affected. It

is that subparagraph which makes recovery depend on the recipient or another person failing or omitting to comply with a provision of the Act. This contravention triggers either the automatic cancellation or reduction in payment or enables a determination to cancel or reduce payments to have a date of effect earlier than the date of the determination. An example would be section 73 and subsection 81(4) for age pension.

The Committee was convinced that the payments were made in accordance with the law and that there was nothing to prevent the Department from properly issuing notices which complied with the law and would therefore impose the obligation to notify or reply.

Thus, the Committee continued to draw the attention of Senators to the retrospectivity as it may be considered to trespass unduly on the personal rights and liberties of social security recipients to have their entitlements paid in accordance with the law, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Parliamentary Secretary, in his letter of 25 November 1993, responded as follows:

> I simply indicate that I do not agree with the interpretation of the proposed amendments that the Committee and that I re-iterate the explanation that I gave in my letter of the Committee of 21 October 1993. I assure the Committee that the amendments are merely intended to ensure that the Department is not prevented from recovering money that should never have been paid to clients, simply because there is a technical deficiency in a notice provided to the client.
>
> That is, the overpayment decisions were overturned on the basis of a technical deficiency in the notice.
>
> While I do not believe it would be helpful to traverse the issues raised by the Committee's interpretation of the proposed amendments, there is one point that I feel must be addressed. In its Report, the Committee states:
>
> > With respect to those clients who voluntarily advise [the Department of a change in their circumstances], the Committee understands that the Secretary may request voluntary information and there is nothing in law that would prevent the Secretary from acting on that information to cancel or determine a reduced rate of payment. It is possible to view the voluntary advice, where the Department has not exercised its power to impose an obligation to notify or reply, as

> resulting in a windfall to consolidated revenue rather than a loss because the Department thought it was imposing an obligation but did not do so.

The Committee goes on to state:

> In addition, there has no doubt been a further windfall gain to consolidated revenue where the Department has recovered amounts which were not legally debts owing to the Commonwealth from recipients who have not appealed to the Social Security Appeals Tribunal. Further, the consolidated revenue has benefited from the cancellation of payments for failure to return a notice, where that notice did not properly impose an obligation to return it.

I strongly disagree with the Committee's view that there has been a windfall to the Consolidated Revenue in these cases. The fundamental point is that the *Social Security Act 1991* operates on the basis that clients' entitlements are adjusted to take account of each individual's personal situation and financial circumstances. For example, those with a greater number of dependants are paid more than those with less dependants. Those with a greater level of private income are paid less, those with a lower level are paid more. This is colloquially known as a 'needs based' system. It strikes a proper balance between the individual claimant and the taxpayer, represented by the Consolidated Revenue.

The notification provisions are there to facilitate the operation of this system, by allowing the Department to collect information, on the basis of which it can then assess need and also to adjust the rate of payment according to the need of the particular client at any given time. If a person was able to receive a higher rate of payment than a person with an identical level of personal income simply because of a technical defect in the notice requesting such information, this would result in a windfall gain to that person. If enacted, these amendments will ensure that the system operates in a fair way, both in the recent past and in the future.

There is no windfall gain to the Commonwealth.

The Committee thanks the Parliamentary Secretary for these views. The Committee,

however, retains its view that no debts were incurred because the necessary pre-condition for a debt to arise did not exist: no legal obligation to notify changes in circumstances was imposed by the Department. The Committee therefore continues to draw 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.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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, 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 such 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 1993

The Committee presents its Ninth Report of 1993 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Health Legislation (Professional Services Review) Amendment Bill 1993

HEALTH LEGISLATION (PROFESSIONAL SERVICES REVIEW) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill proposes to establish new arrangements for determining whether individual health practitioners have engaged in certain inappropriate professional practices. The Bill amends the *Health Insurance Act 1973* to:

. appoint a Director of Professional Services Review and Deputy Directors of Professional Services Review; and

. establish a Professional Service Review Panel.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Health responded to those comments in a letter dated 21 October 1993. The response was discussed in the Committee's Fifth Report of 1993 and a copy of that letter was attached to that report.

The Committee made further comments on the Bill in its Fifth Report and the Minister for Health has now responded to those comments in a response dated 9 December 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Proposed new section 86

In Alert Digest No. 6 of 1993, the Committee noted that the proposed section, if enacted, would enable the Health Insurance Commission to refer to the Director of the Professional Services Review Panel the conduct of a person with respect to services rendered on or after 1 September 1993. The Act, as a whole, will not commence until 31 March 1994 but this provision would enable review of services rendered since 1 September 1993.

The Committee noted that the Bill gives effect, in the words of the second reading speech, 'to an undertaking given in the Budget to introduce new measures to combat overservicing in the Medicare program'.

Retrospectivity is seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. The

Bill introduces new definitions of inappropriate practice (see proposed new section 82) which will, in effect, apply from 1 September 1993 (because the review panel will use the definition to judge services rendered since 1 September 1993). To the extent that services rendered will be judged by a definition that did not exist at the time they were rendered (before the Bill was introduced into Parliament), the Committee considered that personal rights and liberties may be unduly infringed.

The Committee drew 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.

On 21 October 1993, the Minister responded as follows:

> I acknowledged that the precise definition of "inappropriate practice" was not publicly available on 1 September 1993, because as the Committee says the Bill had not then been introduced. However, as the Committee also acknowledges the Government's intention to deal with overservicing, with the assistance of the medical profession, was made clear in the Budget. Moreover, what is at issue is not the precise definition of a criminal offence, but a standard against which professional colleagues will make a judgement about professional standards.
>
> Accordingly, I believe that persons who might be subject to review under this process have been put on notice since the Budget was delivered of the possibility of their mode of practice being subject to a more rigorous professional scrutiny and that the limited retrospectivity, which has been agreed by the Australian Medical Association, is appropriate.

In its Fifth Report of 1992 (27 October 1993) the Committee thanked the Minister for these comments. The Committee, however, thought that the very vagueness of the definition would militate against retrospective operation. The definition basically states that inappropriate practice is conduct unacceptable to the general body of the members of the specialty in which the specialist was practising or of the profession in which a non-specialist was practising. Prospective operation would enable the 'general body of the members' to have some opportunity to consider and, perhaps, publish what unacceptable conduct might be. While gross overservicing might be readily recognisable, the obvious grey areas need delineation before consequences of infringing a 'standard' are applied. This should not be done retrospectively.

The Committee was still of the opinion that the provision 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 drew it to Senators' attention, accordingly.

Right to representation
Section 103

In its Fifth Report the Committee took the opportunity to raise another matter which had been overlooked in our original discussion of this Bill.

Proposed section 103 provides:

> **Rights of persons under review at hearings**
>
> 103.(1) The person under review is entitled to attend the hearing and to be accompanied by a lawyer or another adviser. However, the person under review is not entitled to be represented at the hearing by a lawyer or another adviser.
>
> (2) The person under review is entitled:
> (a) to question any person giving evidence at the hearing; and
> (b) to address the Committee.
>
> (3) The Committee may allow an adviser (other than a lawyer) of the person under review:
> (a) to question a person giving evidence at the hearing; and
> (b) to address the Committee;
> on behalf of the person under review.
>
> (4) In this section:
> **'lawyer'** means a barrister or a solicitor.

This proposed section, if enacted, would exclude legal representation at a hearing, although the Committee noted that the person under review may be "accompanied" by a lawyer. Serious consequences, described in proposed section 106U which include suspension or revocation of the right to prescribe or dispense pharmaceutical benefits and to disqualify, partially or fully, a practitioner from providing services, may flow from a hearing. The Committee therefore believed that the right to legal representation should not be excluded. Where a person's livelihood is at stake, legal representation should be available.

The Committee noted the High Court judgment of 13 November 1992 in *Dietrich and the Queen*. This was an application for special leave to appeal which resulted in the accused's conviction being quashed and a new trial ordered. In the words of Mason CJ and McHugh J:

> The applicant is entitled to succeed because his trial miscarried

> by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

It may be thought that Dietrich's case and a hearing before a Review Committee are dissimilar. But, when proposed section 106N is taken into account, the need for legal representation at the hearing is more manifest. Proposed section 106N requires the Review Committee to suspend its hearing if the Committee thinks that the material before it is indicative of fraud.

The Committee maintained that it was inappropriate for Commonwealth legislation to provide for hearings without legal representation where a person's livelihood may be in jeopardy and complex legal issues regarding fraud may arise.

The Committee drew 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.

On 9 December 1993 the Minister responded as follows:

> Notwithstanding the Committee's further comments on the two issues of retrospectivity in proposed new section 86 and the restriction on oral presentation by lawyers in proposed new section 103, I do not believe the Bill needs amendment in these respects.
>
> I note in particular that the issues of oral representation by lawyers was raised specifically with the Senate Standing Committee on Community Affairs which has recommended that the Bill should proceed with four minor amendments not dealing with any of the issues raised by your Committee.

The Committee thanks the Minister for his advice in relation to the Standing Committee on Community Affairs. The Committee notes, however, that the two committees have different terms of reference. The terms of reference of this Committee are listed at the front of this report. They place an obligation on the Committee to report to the Senate on any clauses in Bills which appear to breach the principles set out in the terms of reference. It is a matter for the Senate whether or not it wishes to pass the Bill in its present form.

In spite of the Minister's comments, the Committee retains its view of these clauses and so is obliged to adhere to its original advice to the Senate. It therefore continues to draw 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.

Reversal of the onus of proof
Proposed new subsection 106E(6)

In Alert Digest No. 6 of 1993, the Committee noted that this provision, if enacted, would reverse the onus of proof in proceedings for an offence of a witness refusing or failing, without reasonable excuse, to produce a document at a hearing. The defendant is required to prove that the document was not relevant to the subject matter of the hearing.

This appears to mean that:

. the Bill, if enacted, would require a person to produce a document;

. if the person refuses or fails to do so, the person may be prosecuted;

. the prosecution would be required to prove that the person refused or failed to produce the document **without reasonable excuse**;

. the defence could then decide to prove that the document was not relevant to the subject matter of the hearing.

It seemed to the Committee that the document's relevance would be an essential element in the prosecution's proof that non-production was without reasonable excuse.

The Committee has consistently drawn attention to provisions reversing the onus of proof especially, as in this case, where the matters which a defendant would be required to prove are not peculiarly within the defendant's knowledge.

The Committee drew 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.

On 21 October 1993, the Minister made the following comments:

> In this case, I suggest the matters to be proved are peculiarly within the defendant's knowledge. The referral by the Health Insurance Commission will be largely based on statistics and

> the Professional Services Review Committee has an inquiry role, which includes looking at documents (including clinical records), to make a finding based on professional judgement. The person under review will have a clear statement in the referral of what has caused his or her practice to come to attention. He or she will have a peculiar knowledge as to which of his or her records are relevant to that part of his or her practice which is under review.

In its Fifth Report of 1993 the Committee thanked the Minister for this response. The Committee, however, considered that the issue of whether the matters may be peculiarly within the defendant's knowledge had deflected attention from the main point which the Committee was raising.

The Committee was suggesting that in order to prosecute a defendant for failing to produce a particular document without reasonable excuse, the prosecution would have to prove that the document was relevant. Unless the document is proved relevant, the prosecution would be unable to prove it was withheld unreasonably. The Committee was asking, in effect, whether the statutory defence involving a reversal of the onus of proof was illusory.

The Committee considered that a statutory defence ought to operate despite the prosecution having proved the elements of the offence. For example, Section 8K of the *Taxation Administration Act 1953* provides for an offence of making a false (ie incorrect) statement in respect of a taxation return. The prosecution can prove that the return contained an incorrect statement, but there is a statutory defence that allows the defendant to prove that despite the incorrectness of the statement, the defendant did not know or could not reasonably be expected to know that it was false or incorrect. In the present case, if the prosecution proves that the document was withheld unreasonably, the document must have been a relevant document. Hence there is no scope for this defence to operate.

On 9 December 1993 the Minister responded as follows:

> In respect of the reversal of the onus of proof in proposed new subsection 106E(6), I acknowledge the Committee's argument that the provision may have no application. Accordingly, I would be prepared to consider its deletion.

The Committee thanks the Minister for his further consideration of this matter and looks forward to a satisfactory resolution.

Mal Colston
(Chairman)