SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2015

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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Kate Lundy	ALP, Australian Capital Territory
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2015

The committee presents its *Third Report of 2015* 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 1(a)(v) of Standing Order 24:

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Introduced into the House of Representatives on 24 September 2014
This bill received the Royal Assent on 10 December 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 14 of 2014*. The Minister responded to the committee's comments in a letter dated 3 March 2015. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2014 - extract

Background

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

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

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

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

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

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

Minister's response - extract

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

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

The Bill does not change existing access to review of ASIO assessments. An application may be made to the Administrative Appeals Tribunal under section 54 of the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) for review of an adverse or qualified security assessment under section 37 of the ASIO Act.

If a non-citizen were to receive an adverse or qualified security assessment from ASIO and sought review of that assessment with the AAT, the Minister or delegate may postpone making a decision on whether to refuse to grant or to cancel the visa of the person under section 501 of the Migration Act (on the basis that the person does not pass the character test in paragraph 501(6)(g)) until such time as the merits review process is finalised.

In the event that a visa is cancelled before the person has an opportunity to seek merits review of the adverse or qualified security assessment with the AAT, and the application for merits review is made and is ultimately successful, the Minister could consider granting a visa to a person under section 195A of the Act (provided they were in immigration detention). Note that the person in this situation would not be prevented by section 501E of the Migration Act from making a further application for a visa provided the visa granted to the person under section 195A was a permanent visa (subsection 501E(3) of the Migration Act).

Committee Response

The committee thanks the Minister for this response and notes his advice that the bill does not change existing access to review of ASIO assessments. **However, the committee remains concerned that a visa may be cancelled prior to the making of a merits review application or prior to its finalisation. In addition, a successful review outcome does not automatically result in a visa being reinstated.**

continued

The committee draws these concerns to the attention of Senators. The committee notes that the bill has already been passed by both Houses of the Parliament and therefore makes no further comment in relation to this matter.

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

Introduced into the House of Representatives on 25 September 2014
This bill received the Royal Assent on 15 December 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 14 of 2014*. The Minister responded to the committee's comments in a letter dated 14 November 2014. The committee sought further information and the Minister responded in a letter dated 3 March 2015. A copy of the letter is attached to this report.

Alert Digest No. 14 of 2014 - extract

Background

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

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

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

- introduce temporary protection for those who engage Australia's non-refoulement obligations and who arrive in Australia illegally;
- create the authority to make deeming regulations;
- create the Safe Haven Enterprise Visa class;
- introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT);
- establish the Immigration Assessment Authority within the RRT to consider fast track reviewable decisions; clarify the availability of removal powers independent of assessments of Australia's non-refoulement obligations;

- codify Australia's interpretation of its protection obligations under the Convention for Refugees and clarify the legal status of children of unauthorised maritime arrivals and transitory persons; and

- enable the minister to place a statutory limit on the number of protection visas granted.

Exclusion of review under the *Administrative Decisions (Judicial Review) Act 1977*
Item 31

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

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

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

Minister's initial response - extract

Exclusion of review under the *Administrative Decisions (Judicial Review Act 1977)*
Item 31

The committee seeks the Minister's advice as to why the decisions made under these sections are not reviewable under the Administrative Decisions (Judicial Review) Act 1977.

The Government's position is that a ministerial direction made in the national interest is likely to relate to highly sensitive operational decisions and would be likely to raise complex and novel issues. Accordingly, it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the *Administrative Decisions (Judicial Review) Act 1977*.

Committee's initial response

The committee thanks the Minister for this response, but is unclear why 'it is more appropriate that judicial review be undertaken using a constitutional remedy'. **In order to properly assess this assertion, the committee seeks the Minister's detailed advice as to the rationale for this conclusion.**

Minister's further response - extract

Exclusion of review under the *Administrative Decisions (Judicial Review Act 1977)*
Item 31

The committee is unclear why it is more appropriate that judicial review be undertaken using a constitutional remedy. In order to properly assess this assertion, the committee seeks the Minister's detailed advice as to the rationale for this conclusion.

Noting that the Bill has since passed parliament and received the Royal Assent and that Schedule 1 commenced on the day after the Royal Assent on 16 December 2014, the Minister refers the Committee to the relevant response on page 6 of the letter to the Committee dated 14 November 2014 from the former Minister for Immigration and Border Protection.

As has been previously noted, the Government's position is that a ministerial direction made in the national interest is likely to relate to highly sensitive operational decisions and would be likely to raise complex and novel issues. Accordingly, it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the *Administrative Decisions (Judicial Review) Act 1977.*

Committee's Further Response

The committee thanks the Minister for this response. The committee notes its disappointment that the information requested has not been provided because it remains unclear why 'it is more appropriate that judicial review be undertaken using a constitutional remedy'. **The committee is concerned that the leading and more accessible ADJR Act regime is not being utilised, which also has the effect of fragmenting the Commonwealth approach to judicial review. The committee notes that the bill has now passed; however the committee remained interested in obtaining the further information it had requested in order to appropriately complete its consideration of the matter.**

continued

In the circumstances, the committee draws its concerns to the attention of Senators and reiterates its view that passage of a bill does not impact on the committee's role in considering and reporting on matters of relevance to its terms of reference. In this regard the committee notes the terms of standing order 24 which provide that the committee may report *in respect of Acts of the Parliament*.

Private Health Insurance Amendment Bill (No. 2) 2014

Introduced into the House of Representatives on 4 December 2014
Portfolio: Health

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2015*. The Minister responded to the committee's comments in a letter dated 5 March 2015. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2015 - extract

Background

This bill amends the *Private Health Insurance Act 2007* and the *Ombudsman Act 1976* to:

- transfer the functions of the Private Health Insurance Ombudsman to the Office of the Commonwealth Ombudsman; and
- ensure that provisions of the *Private Health Insurance Act 2007* relating to the calculation of the Australian Government Rebate on private health insurance that were intended to be repealed by the *Private Health Insurance Legislation Amendment Act 2014* will be taken never to have commenced.

Delegation of legislative power
Schedule 1, item 5, proposed subsection 20Y(2)

Proposed subsection 20Y(2) provides that the Private Health Insurance Ombudsman Rules may prescribe matters to which the Private Health Insurance Ombudsman is to have regard when deciding whether or not to give a direction (pursuant to subsection 20Y(1)) requiring participation in mediation. **As the explanatory memorandum does not explain why these matters are not appropriately contained in the primary legislation the committee seeks the Minister's advice at to the rationale for the proposed approach.**

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

Minister's response - extract

Delegation of Legislative Power
Schedule 1, item 5, proposed subsection 20Y(2)

The Committee for the Scrutiny of Bills (the Committee) has drawn attention to proposed subsection 20Y(2) of the Bill. This subsection provides that the Private Health Insurance Ombudsman Rules (the PHIO Rules) may prescribe matters which the Private Health Insurance Ombudsman is to have regard to when deciding whether or not to give a direction pursuant to subsection 20Y(1), i.e. requiring participation in mediation. Directions may be given to a private health insurer, or health care provider, that is the subject to an investigation under proposed Division 4, or to a private health insurer, health care provider or private health insurance broker against whom a complaint has been made to the PHIO. The Committee has noted that this provision may be considered to delegate legislative powers inappropriately.

The proposed subsection 20Y(2) of the Bill replicates subsection 247-5(2) of the PHI Act, which similarly provides for PHIO Rules to specify matters to which the PHIO must have regard when deciding whether to give a direction for compulsory participation in mediation. In line with the intended approach to the transfer of functions of the PHIO from under the PHI Act to under the [*Ombudsman Act 1976*], it has not been proposed that the operation of provisions relating to participation in compulsory mediation change.

For the information of the Committee, the current PHIO Rules specify that for the purposes of subsection 247-5(2) of the PHI Act, the matters to which the PHIO is to have regard when deciding whether to give a direction for compulsory participation in mediation are:

(a) if an entity has already participated in mediation, whether that mediation was unsuccessful; and

(b) if there are avenues for dispute resolution contained in contractual arrangements, whether these avenues have been utilised.

Additionally, the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to Parliamentary scrutiny and disallowance.

Committee Response

The committee thanks the Minister for this response.

The committee notes that proposed subsection 20Y(2) replicates an existing provision of the *Private Health Insurance Act 2007*. This provision allows the PHIO Rules (i.e. delegated legislation) to specify matters to which the Private Health Insurance Ombudsman must have regard when deciding whether to give a direction for compulsory participation in mediation.

The committee further notes that the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to disallowance by either House of the Parliament.

The committee leaves the question of whether this is an appropriate delegation of legislative power to the Senate as a whole.

Alert Digest No. 1 of 2015 - extract

Delegation of legislative power
Schedule 1, item 5, proposed subsection 20ZA(3)

Proposed subsection 20ZA(3) provides that the Private Health Insurance Ombudsman Rules may prescribe matters to which the Private Health Insurance Ombudsman is to have regard before concluding that a matter cannot be settled by mediation. **As the explanatory memorandum does not explain why these matters are not appropriately contained in the primary legislation the committee seeks the Minister's advice at to the rationale for the proposed approach.**

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

Minister's response - extract

Delegation of Legislative Power
Schedule 1, item 5, proposed subsection 20ZA(3)

The Committee has drawn attention to proposed subsection 20ZA(3) of the Bill. This subsection provides that the PHIO Rules may prescribe matters to which the PHIO is to have regard before concluding that a matter cannot be settled by mediation. The Committee has noted that this provision may be considered to delegate legislative powers inappropriately.

The proposed subsection 20ZA(3) of the Bill replicates subsection 247-15(3) of the PHI Act, which similarly provides for PHIO Rules to prescribe matters to which the PHIO is to have regard before concluding that a matter cannot be settled by mediation. In line with the intended approach to the transfer of functions of the PHIO from under the PHI Act to the OA, it has not been proposed that the operation of the provision relating to the conduct of compulsory mediation change.

For the information of the Committee, under the current PHIO Rules, the Ombudsman is to have regard to a report of a mediator, appointed by the PHIO to conduct the mediation, before concluding that a matter cannot be settled by mediation.

Additionally, the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to Parliamentary scrutiny and disallowance.

Committee Response

The committee thanks the Minister for this response.

The committee notes that proposed subsection 20ZA(3) replicates an existing provision of the *Private Health Insurance Act 2007*. This provision allows the PHIO Rules (i.e. delegated legislation) to prescribe matters to which the Private Health Insurance Ombudsman is to have regard before concluding that a matter cannot be settled by mediation.

The committee further notes that the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to disallowance by either House of the Parliament.

The committee leaves the question of whether this is an appropriate delegation of legislative power to the Senate as a whole.

Alert Digest No. 1 of 2015 - extract

Trespass on personal rights and liberties—information gathering power
Schedule 1, item 5, proposed subsection 20ZE(1)

Subsection 20ZE(1) provides that the Private Health Insurance Ombudsman may require the production of information or records, in certain defined circumstances 'before the end of the period specified in the notice [to produce]'. The *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) adopts the principle that a person should be given a minimum of 14 days to comply with a notice to produce information or documents. **Noting this, the committee seeks the Minister's advice as to the rationale for not providing an appropriate minimum timeframe to comply with a notice to produce in the bill.**

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

Minister's response - extract

Trespass on personal rights and liberties—information gathering power
Schedule 1, item 5, proposed subsection 20ZE(l)

The Committee has drawn attention to proposed subsection 20ZE(1) of the Bill. This subsection provides that if the PHIO believes that a person is capable of giving information or private health insurance records that are relevant to dealing with a complaint, investigation, mediation or evaluation of action proposed to be taken by the subject of a complaint, the PHIO may, by notice in writing, require the production of information or records by the person before the end of the period specified in the notice. The Committee has noted that this provision may be considered to trespass unduly on personal rights and liberties for not providing an appropriate minimum timeframe to comply with a notice to produce information or records.

The information gathering provisions of the Bill have been drafted taking into account both PHIO's current information gathering powers under Division 250 of the PHI Act and the information gathering powers of the Commonwealth Ombudsman and other industry ombudsmen which already fall under the remit of the Commonwealth Ombudsman. The intent of this was to provide a basis to streamline operations between the PHIO and the other industry ombudsmen under the [*Ombudsman Act 1976* (the OA)]. This includes

streamlining practices staff of the Commonwealth Ombudsman who might be assisting the PHIO.

Proposed section 20ZE of the Bill was drafted in light of the drafting of section 250-1 of the PHI Act and section 9 of the OA, neither of which provide for a minimum timeframe for compliance with a notice to produce information or records.

Committee Response

The committee thanks the Minister for this response and makes no further comment.

Alert Digest No. 1 of 2015 - extract

Trespass on personal rights and liberties—information gathering power
Schedule 1, item 5, proposed subsection 20ZE(3)

Proposed subsection 20ZE(3) provides that a person is not excused from giving information or a PHI record when required to do so under subsection 20ZE(1) on the ground that the information or record might tend to incriminate the person or expose the person to a penalty. This provision is qualified by section 20ZF which, among other things, provides for a use and derivative use immunity in relation to information or documents disclosed (except in relation to offences against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to the *Ombudsman Act 1976*). These exceptions from the immunity of use and derivative use reflect standard exceptions in relation to the provision of false or misleading information or documents and to the obstruction of a Commonwealth official performing public duties.

The statement of compatibility suggests that the use and derivative use immunity ensure that a person 'furnishing the Private Health Insurance Ombudsman with necessary information is not unfairly disadvantaged by doing so, including by having that information used against them in other proceedings' (at p. 8).

In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Minister's response - extract

Trespass on personal rights and liberties—information gathering power
Schedule 1, item 5, proposed subsection 20ZE(3)

The Committee has drawn attention to proposed subsection 20ZE(3). This subsection provides that a person is not excused from giving information, or a private health insurance record, when required to do so pursuant to a notice given under subsection 20ZE(l) of the Bill, on the grounds that the information or records might tend to incriminate the person or expose the person to a penalty. The Committee has noted that proposed subsection 20ZE(3) is qualified by subsection 20ZF of the Bill.

Proposed section 20ZF provides, among other things, that if a person gives information to the PHIO in compliance with a notice under section 20ZE, the person is not liable to any penalty of any provision of any other enactment, by reason of giving the information or record to the PHIO.

Proposed section 20ZF further provides that if in giving information or a record in compliance with a notice under section 20ZE an individual contravenes any other enactment, might tend to incriminate himself or herself, or make himself or herself liable to a penalty, discloses certain legal advice or privileged communication or otherwise acts contrary to public interest, then the following are not admissible against the individual in any proceedings, other than proceedings for an offence under sections 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to the [*Ombudsman Act 1976* (the OA)]:

(a) the giving of the information or record;

(b) the information or the record given; or

(c) any information, document or thing obtained as a direct or indirect consequence of the giving of the information or record.

The Committee has noted that the proposed approach as a whole may be considered to trespass unduly on personal rights and liberties.

Although the Committee has not asked for a response to these concerns, it is important to note that arrangements outlined in proposed subsections 20ZE(3) and 20ZF of the Bill are based on current provisions in the PHI Act (subsection 250-1(6)) and the OA (subsection 9(4)). It is further noted that because material produced under Division 6 of the Bill cannot be used in proceedings against the person (subsection 20ZF(5) of the Bill), other than in relation to the giving of false and misleading information or documents or obstruction of Commonwealth officials in relation to the OA, appropriate provisions are in place to protect individuals' rights.

Committee Response

The committee thanks the Minister for taking the opportunity to provide this additional information.

Tribunals Amalgamation Bill 2014

Introduced into the Senate on 3 December 2014
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 1 of 2015*. The Attorney-General responded to the committee's comments in a letter dated 4 March 2015. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2015 - extract

Background

This bill amends a range of Commonwealth Acts to provide for the amalgamation of the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Migration Review Tribunal and Refugee Review Tribunal.

Merits review—termination of appointment of AAT member
Schedule 1, item 26, proposed new section 13

The current provision in relation to the termination of appointment of an AAT member provides for termination through a procedure involving an address from each House of Parliament on the ground of proved misbehaviour or incapacity. Proposed new section 13 replaces these rules with termination provisions closely based on the standard Commonwealth model for termination provisions, i.e. the Governor-General may terminate an appointment on a number of listed grounds. The provision, however, would not apply to members who are judges.

The explanatory memorandum (at p. 28) states that the new provision balances the need to ensure members have sufficient tenure in their offices to be able to act independently of government, and the need to ensure that officers who behave inappropriately, have irreconcilable conflicts of interests or who are unable to perform their duties can have their appointments terminated.

This amendment appears to diminish the level of AAT members' independence. Given the apparent success of the current termination provisions it is not clear to the committee that the need to alter the current provisions has been established. **The committee therefore seeks further advice from the Attorney-General as to the rationale for this proposed approach which may represent a significant reduction in the level of independence afforded to AAT members.**

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

Attorney-General's response - extract

Merits review—termination of appointment of AAT member
Schedule 1, item 26, proposed new section 13

The Committee seeks my further advice as to the rationale for the proposed approach to termination of AAT members.

As noted in the Explanatory Memorandum, the underlying policy rationale of the termination provisions is to balance considerations of independence and probity of Tribunal members. Independence is important to maintain public confidence in the Tribunal as a forum of review of Government decision-making, much as it is important to the functions of many other independent statutory officers. Similar termination provisions to those proposed by the Bill apply to a wide range of key statutory offices including, amongst others:

- the Commonwealth Director of Public Prosecutions
- the Inspector-General of Intelligence and Security
- the Integrity Commissioner of the Australian Commission for Law Enforcement Integrity
- the President and Commissioners of the Australian Law Reform Commission, and
- Members of the Australian Securities and Investments Commission.

As noted in the Committee's Alert Digest, the proposed approach to termination of Tribunal members in the Tribunals Amalgamation Bill reflects the standard approach for a wide range of independent Commonwealth statutory officers. It also reflects the existing provisions that apply to the approximately 260 MRT, RRT and SSAT members who will become AAT members at the time of the amalgamation. I do not consider that those provisions have diminished the independence of those or any other statutory officers across the Commonwealth. Terminations of MRT, RRT and SSAT members have been very rare.

The infrequent nature of terminations under the standard Commonwealth provisions supports the conclusion that they provide for very specific and limited grounds for dismissal. It is not possible under these provisions for the Governor-General to terminate an officer merely because the Government disagrees with decisions they have made or

views they have expressed. It is necessary to be satisfied that a specific limited ground for dismissal applies. The decision to terminate is also subject to judicial review, and it would be unwise for the Government to recommend a termination to the Governor-General without a very firm basis.

I note that there are some disadvantages for members in the current AAT termination provisions. Unlike the standard termination provisions, the requirement for an address from both Houses of Parliament necessarily produces significant publicity for any termination. It can be imagined that termination for incapacity (for example) through this process would be very distressing to an affected member.

Accordingly, it is the Government's view that the proposed termination provisions appropriately safeguard Tribunal independence, while providing a clear and well-tested approach to termination in the very rare cases in which this would be necessary.

Finally, to avoid retrospectivity, Item 12 of Schedule 9 to the Bill preserves existing removal from office provisions as they apply to AAT, MRT-RRT and SSAT members for the term of their current appointment. This avoids any potential perceived disadvantage to existing members from these changes. Similarly, as the Committee notes, AAT members who are also serving Judges would continue to be covered by the constitutional arrangements for removal of a judge from office, rather than the relevant provisions of the AAT Act.

Committee Response

The committee thanks the Attorney-General for this response and notes the points articulated. However, in the committee's view there are reasons why the maintenance of the independence of the AAT, both in actuality and in appearance, is of heightened significance relative to general statutory office holders.

Although the AAT is part of executive (as a matter of its formal constitutional location) the AAT forms an important part of a federal system of independent adjudication (along with federal courts). Concerns about independence are of particular relevance where the function of a statutory decision-maker is to adjudicate disputes between citizen and government. In this context, termination provisions are an important part of the suite of statutory and other techniques to maintain tribunal independence.

continued

In this regard, the committee notes that the termination provisions applying to other independent office holders (such as the Auditor-General, the Commonwealth Ombudsman and the Parliamentary Budget Officer) align with those currently applying to AAT members. However, under the proposed changes the termination provisions for AAT members will be less stringent than those for these other independent office-holders.

The committee draws its concerns about the proposed changes to the provisions for the termination of members of the AAT to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 1 of 2015 - extract

Compliance with administrative law requirements in exercising power Schedule 1, item 27, proposed new subsection 18B(2)

Proposed subsection 18B(1) provides, inter alia, that the AAT President may give written directions in relation to the operations and procedure of the tribunal, and the conduct of reviews. Subsection 18B(2) provides that a failure by the Tribunal to comply with a direction does not invalidate anything done by the Tribunal.

The explanatory memorandum states that new subsection 18B(2) is 'intended to prevent Tribunal decisions being overturned due to minor non-compliance with practice directions' but that the Tribunal would 'nevertheless be required to comply with the provisions of the Act and the requirements of administrative law' (at p. 35). Given this intention, **the committee seeks the Attorney-General's advice as to why this provision should not be limited to minor departures from practice directions. More generally the committee also seeks advice about whether such a provision is common in relation to practice directions of other adjudicative bodies.**

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

Attorney-General's response - extract

Compliance with administrative law requirements in exercising power
Schedule 1, item 27, proposed new subsection 18B(2)

The Committee seeks my advice as to whether such a provision is common in relation to practice directions of other adjudicative bodies, and why this provision should not be limited to minor departures from practice directions.

New subsection 18B(2) reflects the policy of existing subsections 353A(3) and 420A(3) of the *Migration Act 1958.* These subsections were introduced on 1 June 1999 to provide that the Tribunal should, so far as practicable, comply with directions of the Principal Member of the Migration Review Tribunal and the Refugee Review Tribunal. Whilst non-compliance with a practice direction by a member does not make the decision invalid, it is expected that members will comply with lawful directions. Failure by a member to comply with directions under sections 353A and 420A could result in the Tribunal being reconstituted for the purposes of a particular review pursuant to section 355A of the Migration Act before a decision is made.

The clear intent of existing subsections 353A(3) and 420A(3) is to ensure non-compliance with directions does not lead to invalidity, in order to provide finality to the review process. These subsections provide certainty around when decisions by the Tribunal are taken to be finalised. A presumption of regularity for decisions is particularly important in the migration and refugee jurisdiction. It has significant implications for the cessation of bridging visas and consequently the lawfulness of an applicant's immigration detention.

New subsection 18B(2) also reflects the (recently passed) subsection 473FB(3) of the Migration Act, which provides that the Immigration Assessment Authority, an independent statutory agency within the Refugee Review Tribunal (which will become an independent office in the Migration and Refugee Division under the Bill), must, as far as practicable, comply with the directions of the Principal Member. However, non-compliance with any direction does not mean the Authority's decision on a review is an invalid decision.

It is desirable for there to be a single practice direction power for the amalgamated Tribunal across all Divisions to promote simplification and harmonisation. However, it is also desirable that the power respond to the requirements of each jurisdiction. As the power in section 18B will apply to the Migration and Refugee Division, the policy of subsections 353A(3) and 420A(3) would be preserved by the Bill as essential to maintaining fair and efficient review in the migration and refugee jurisdiction. Removing subsection 18B(2) would be a departure from existing migration policy and procedure.

Limiting subsection 18B(2) to minor non-compliance would introduce a new threshold issue to be considered on judicial review of a Tribunal decision. Whether an instance of non-compliance is minor is uncertain and would be difficult to objectively assess. Such a test would invite litigation and would undermine the purpose of the provision in providing finality to the review process.

Committee Response

The committee thanks the Attorney-General for this detailed response **and requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 1 of 2015 - extract

Compliance with administrative law requirements in exercising power Schedule 1, item 27, proposed new subsection 18B(3)

Proposed new subsection 18B(3) provides that 'if the Tribunal deals with a proceeding in a way that complies with a direction, the Tribunal is not required to take any other action in dealing with the proceeding'.

Given that practice directions may relate to the procedure of the tribunal and the conduct of reviews by the tribunal, it may be that directions intersect with requirements of administrative law, such as the rules of procedural fairness. In these circumstances, the meaning of subsection 18B(3)—which is set out above—could usefully be clarified. As the explanatory memorandum merely repeats the text of the provision, **the committee seeks further clarification from the Attorney-General as to the meaning and operation of proposed new subsection 18B(3).**

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

Attorney-General's response - extract

Compliance with administrative law requirements in exercising power
Schedule 1, item 27, proposed new subsection 18B(3)

The Committee has sought my further clarification as to the meaning and operation of proposed new subsection 18B(3).

New subsection 18B(3) reflects the policy of existing subsections 353A(4) and 420A(4) of the Migration Act. These subsections were introduced on 1 June 1999 to provide that, if the Tribunal complies with the directions of the Principal Member of the Migration Review Tribunal and the Refugee Review Tribunal, no other action is required for the conduct of the review, assuming other legislative requirements are met.

The intent of existing subsections 353A(4) and 420A(4) is to provide certainty of when decisions by a review Tribunal are taken to be finalised. In the context of decisions that are made under a legislative code of procedure, the provision operates to ensure that where the Tribunal complies with the code of procedure and any relevant directions, then the procedural pre-requisites to making a lawful decision have been satisfied. As indicated above in relation to new subsection 18B(2), this presumption of regularity has significant implications in the migration and refugee jurisdiction.

Further, it is clear that these provisions have not operated in practice to make rights, liberties or obligations unduly dependent upon non-reviewable decisions. For example, decisions made by the Migration Review Tribunal and the Refugee Review Tribunal are the subject of more litigation challenges than those of any other Commonwealth review body.

New subsection 18B(3) also reflects the policy of (recently passed) subsection 473FB(4) of the Migration Act, that if the Immigration Assessment Authority deals with a review of a decision in a way that complies with the directions, the Authority is not required to take any other action in dealing with the review.

As noted above, it is desirable for there to be a single practice direction power for the amalgamated Tribunal across all Divisions to promote simplification and harmonisation, and that the power responds to the requirements of each jurisdiction. As the practice direction power would apply in the Migration and Refugee Division, the Bill preserves the procedures that are essential to maintaining fair and efficient review in that jurisdiction. Removing subsection 18B(3) would represent a departure from existing migration policy and procedure, and may have a significant impact on the migration jurisdiction in light of the litigious nature of the migration caseload.

Committee Response

The committee thanks the Attorney-General for this response **and requests that the key information above be included in the explanatory memorandum.**

Alert Digest No. 1 of 2015 - extract

Adequacy of merits review
Schedule 1, items 64 and 65, section 34J

Under current arrangements affected persons may appeal from an internal review of a Centrelink decision to the SSAT. Such persons have a further right of appeal to the AAT. Where such a right of appeal currently exists, the bill preserves the right to second review of social services and child support matters within the AAT. Nevertheless, the bill provides for at least one significant procedural change to second reviews of such decisions.

The amendments made by items 64 and 65 will enable a second review of social services matters to, at the Tribunal's discretion, be conducted on the papers without the consent of the parties (where the Tribunal is satisfied that the review can be adequately determined in the absence of the parties). Section 34J of the AAT Act currently provides that the consent of the parties is required if a case is to be heard on the papers (i.e. if there is to be no oral hearing).

The explanatory memorandum states that this procedural change 'would assist the Tribunal to ensure second review is conducted efficiently', and further notes that the conduct of a review on the papers 'is clearly limited to those cases where it would be appropriate' (at p. 15, see also p. 54).

Unfortunately, the justification provided does not adequately explain why this procedural change, which may compromise a fair hearing, is required. There is a risk, for example, that a case may appear without merit merely because applicants (who are unlikely to be well resourced) have not been represented or well advised in the earlier stages of the review process. **The committee therefore seeks further information from the Attorney-General in relation to why this change is considered appropriate and examples of how the exercise of the Tribunal's discretion to proceed on the papers can be appropriately exercised in practice.**

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

Attorney-General's response - extract

Adequacy of merits review
Schedule 1, items 64 and 65, section 34J

The Committee seeks further information as to why changes to section 34J of the AAT Act are appropriate, and examples of how the exercise of the Tribunal's discretion to proceed on the papers can be appropriately exercised in practice.

The proposed retention of the right to seek a further review within the same Tribunal in family assistance, social security and certain other matters may result in more applications for second review being made than current applications to the AAT for review of decisions of the Social Security Appeals Tribunal.

The amendment would empower the Tribunal, in appropriate instances, to determine such second reviews on the papers without party consent. This will allow second reviews to be dealt with in the most effective and efficient manner consistent with the Tribunal's statutory objectives.

A range of legislative safeguards would ensure the use of the power to determine second reviews on the papers without party consent would be limited to circumstances where it is appropriate, including:

- a decision to determine a review on the papers can only be made by the Tribunal as constituted: that is, by one or more members (who are independent statutory officers)
- the Tribunal must be satisfied that the issues can be adequately determined in the absence of the parties and, if not, the application would listed for an oral hearing
- the parties must be afforded procedural fairness
- the Tribunal must give reasons for its decisions, and
- applicants have a right of appeal to the Federal Court of Australia.

It is expected that the President will make practice directions to provide guidance to members, staff and the public on applicable procedures in deciding which matters should be heard on the papers. The Tribunal will consult with stakeholders on practice directions in due course.

Thank you again for your consideration of the Tribunal Amalgamation Bill.

Committee Response

The committee thanks the Attorney-General for this response. The committee notes the advice, including that there may be more applications for second review being made to the AAT (under the proposed arrangements) than current applications to the AAT for review of decisions of the Social Security Appeals Tribunal. However, it appears to the committee that the extent of any practical problem and the reasons as to why this may be so have not been explained.

In addition, while the committee notes that parties will continue to be afforded procedural fairness, it seems that the rights of appellants will be diminished by the proposal to allow the determination of second reviews on the papers without party consent.

The committee therefore draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Senator Helen Polley
Chair

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-000576

Senator the Hon Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley Helen,

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014; and
Migration Amendment (Character and General Visa Cancellation) Bill 2014

Thank you for your letter of 20 November 2014 in relation to the Committee's comments in its Fifteenth Report of 2014 on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and the Migration Amendment (Character and General Visa Cancellation) Bill 2014. I note that both of these Bills have passed through both houses of parliament and have received the Royal Assent.

I understand that the Committee now seeks responses to certain comments from its Fifteenth Report of 2014 which were reiterated in an email from the Committee Secretariat dated 5 February 2015. I would like to provide the advice contained in the attachment to this letter in response to those comments.

Thank you for considering this advice. The contact officer in my Department is Greg Phillipson, Assistant Secretary, Legislation and Framework Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

PETER DUTTON 3/3/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

ATTACHMENT

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

Exclusion of review under the Administrative Decisions (Judicial Review Act 1977)
Item 31

The committee is unclear why it is more appropriate that judicial review be undertaken using a constitutional remedy. In order to properly assess this assertion, the committee seeks the Minister's detailed advice as to the rationale for this conclusion.

Noting that the Bill has since passed parliament and received the Royal Assent and that Schedule 1 commenced on the day after the Royal Assent on 16 December 2014, the Minister refers the Committee to the relevant response on page 6 of the letter to the Committee dated 14 November 2014 from the former Minister for Immigration and Border Protection.

As has been previously noted, the Government's position is that a ministerial direction made in the national interest is likely to relate to highly sensitive operational decisions and would be likely to raise complex and novel issues. Accordingly, it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the *Administrative Decisions (Judicial Review) Act 1977.*

Migration Amendment (Character and General Visa Cancellation) Bill 2014

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

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

The Bill does not change existing access to review of ASIO assessments. An application may be made to the Administrative Appeals Tribunal under section 54 of the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) for review of an adverse or qualified security assessment under section 37 of the ASIO Act.

If a non-citizen were to receive an adverse or qualified security assessment from ASIO and sought review of that assessment with the AAT, the Minister or delegate may postpone making a decision on whether to refuse to grant or to cancel the visa of the person under section 501 of the Migration Act (on the basis that the person does not pass the character test in paragraph 501(6)(g)) until such time as the merits review process is finalised.

In the event that a visa is cancelled before the person has an opportunity to seek merits review of the adverse or qualified security assessment with the AAT, and the application for merits review is made and is ultimately successful, the Minister could consider granting a visa to a person under section 195A of the Act (provided they were in immigration detention). Note that the person in this situation would not be prevented by section 501E of the Migration Act from making a further application for a visa provided the visa granted to the person under section 195A was a permanent visa (subsection 501E(3) of the Migration Act).

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC15-002255

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley Helen

Thank you for your Committee's correspondence of 12 February 2015 regarding issues identified in relation to the *Private Health Insurance Amendment Bill (No. 2) 2014* (the Bill).

Please find enclosed my response to the issues identified in the *Alert Digest No. 1 of 2015* in relation to the Bill.

I appreciate you bringing these issues to my attention and trust that the enclosed information is of assistance.

Yours sincerely

The Hon Sussan Ley MP

Encl

5 MAR 2015

RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

PRIVATE HEALTH INSURANCE AMENDMENT BILL (NO. 2) 2014

Background

- The *Private Health Insurance Amendment Bill (No. 2) 2014* (the Bill) amends the *Private Health Insurance Act 2007* (the PHI Act) and the *Ombudsman Act 1976* (OA) to:
    - Transfer the functions of the Private Health Insurance Ombudsman (PHIO) to the Office of the Commonwealth Ombudsman (OCO); and
    - Ensure that the provisions of the PHI Act relating to the calculation of the Australian Government Rebate on private health insurance, which were intended to be repealed by the *Private Health Insurance Legislation Amendment Act 2014,* will be taken to have never commenced.
- The transfer of functions from the PHIO to the OCO was intended to be managed in a way that minimised impacts upon the private health insurance industry in relation to the operation of the PHIO and to preserve existing arrangements wherever possible. This approach was conveyed to industry representatives at a consultation session held by the Department of Health in July 2014.

ISSUES IDENTIFIED AND MINISTER'S RESPONSE

Delegation of Legislative Power

Schedule 1, item 5, proposed subsection 20Y(2)

The Committee for the Scrutiny of Bills (the Committee) has drawn attention to proposed subsection 20Y(2) of the Bill. This subsection provides that the Private Health Insurance Ombudsman Rules (the PHIO Rules) may prescribe matters which the Private Health Insurance Ombudsman is to have regard to when deciding whether or not to give a direction pursuant to subsection 20Y(1), i.e. requiring participation in mediation. Directions may be given to a private health insurer, or health care provider, that is the subject to an investigation under proposed Division 4, or to a private health insurer, health care provider or private health insurance broker against whom a complaint has been made to the PHIO. The Committee has noted that this provision may be considered to delegate legislative powers inappropriately.

The proposed subsection 20Y(2) of the Bill replicates subsection 247-5(2) of the PHI Act, which similarly provides for PHIO Rules to specify matters to which the PHIO must have regard when deciding whether to give a direction for compulsory participation in mediation. In line with the intended approach to the transfer of functions of the PHIO from under the PHI Act to under the OA, it has not been proposed that the operation of provisions relating to participation in compulsory mediation change.

For the information of the Committee, the current PHIO Rules specify that for the purposes of subsection 247-5(2) of the PHI Act, the matters to which the PHIO is to have regard when deciding whether to give a direction for compulsory participation in mediation are:

(a) if an entity has already participated in mediation, whether that mediation was unsuccessful; and

(b) if there are avenues for dispute resolution contained in contractual arrangements, whether these avenues have been utilised.

Additionally, the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to Parliamentary scrutiny and disallowance.

Delegation of Legislative Power

Schedule 1, item 5, proposed subsection 20ZA(3)

The Committee has drawn attention to proposed subsection 20ZA(3) of the Bill. This subsection provides that the PHIO Rules may prescribe matters to which the PHIO is to have regard before concluding that a matter cannot be settled by mediation. The Committee has noted that this provision may be considered to delegate legislative powers inappropriately.

The proposed subsection 20ZA(3) of the Bill replicates subsection 247-15(3) of the PHI Act, which similarly provides for PHIO Rules to prescribe matters to which the PHIO is to have regard before concluding that a matter cannot be settled by mediation. In line with the intended approach to the transfer of functions of the PHIO from under the PHI Act to the OA, it has not been proposed that the operation of the provision relating to the conduct of compulsory mediation change.

For the information of the Committee, under the current PHIO Rules, the Ombudsman is to have regard to a report of a mediator, appointed by the PHIO to conduct the mediation, before concluding that a matter cannot be settled by mediation.

Additionally, the PHIO Rules are a legislative instrument and, therefore, any prescribed matters made under these Rules will be open to Parliamentary scrutiny and disallowance.

Trespass on personal rights and liberties—information gathering power

Schedule 1, item 5, proposed subsection 20ZE(1)

The Committee has drawn attention to proposed subsection 20ZE(1) of the Bill. This subsection provides that if the PHIO believes that a person is capable of giving information or private health insurance records that are relevant to dealing with a complaint, investigation, mediation or evaluation of action proposed to be taken by the subject of a complaint, the PHIO may, by notice in writing, require the production of information or records by the person before the end of the period specified in the notice. The Committee has noted that this provision may be considered to trespass unduly on personal rights and liberties for not providing an appropriate minimum timeframe to comply with a notice to produce information or records.

The information gathering provisions of the Bill have been drafted taking into account both PHIO's current information gathering powers under Division 250 of the PHI Act and the information gathering powers of the Commonwealth Ombudsman and other industry ombudsmen which already fall under the remit of the Commonwealth Ombudsman. The intent of this was to provide a basis to streamline operations between the PHIO and the other industry ombudsmen under the OA. This includes streamlining practices staff of the Commonwealth Ombudsman who might be assisting the PHIO.

Proposed section 20ZE of the Bill was drafted in light of the drafting of section 250-1 of the PHI Act and section 9 of the OA, neither of which provide for a minimum timeframe for compliance with a notice to produce information or records.

Trespass on personal rights and liberties—information gathering power

Schedule 1, item 5, proposed subsection 20ZE(3)

The Committee has drawn attention to proposed subsection 20ZE(3). This subsection provides that a person is not excused from giving information, or a private health insurance record, when required to do so pursuant to a notice given under subsection 20ZE(1) of the Bill, on the grounds that the information or records might tend to incriminate the person or expose the person to a penalty. The Committee has noted that proposed subsection 20ZE(3) is qualified by subsection 20ZF of the Bill.

Proposed section 20ZF provides, among other things, that if a person gives information to the PHIO in compliance with a notice under section 20ZE, the person is not liable to any penalty of any provision of any other enactment, by reason of giving the information or record to the PHIO.

Proposed section 20ZF further provides that if in giving information or a record in compliance with a notice under section 20ZE an individual contravenes any other enactment, might tend to incriminate himself or herself, or make himself or herself liable to a penalty, discloses certain legal advice or privileged communication or otherwise acts contrary to public interest, then the following are not admissible against the individual in any proceedings, other than proceedings for an offence under sections 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to the OA:

(a) the giving of the information or record;
(b) the information or the record given; or
(c) any information, document or thing obtained as a direct or indirect consequence of the giving of the information or record.

The Committee has noted that the proposed approach as a whole may be considered to trespass unduly on personal rights and liberties.

Although the Committee has not asked for a response to these concerns, it is important to note that arrangements outlined in proposed subsections 20ZE(3) and 20ZF of the Bill are based on current provisions in the PHI Act (subsection 250-1(6)) and the OA (subsection 9(4)). It is further noted that because material produced under Division 6 of the Bill cannot be used in proceedings against the person (subsection 20ZF(5) of the Bill), other than in relation to the giving of false and misleading information or documents or obstruction of Commonwealth officials in relation to the OA, appropriate provisions are in place to protect individuals' rights.

ATTORNEY-GENERAL

CANBERRA

MC15/01661

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the Senate Scrutiny of Bills *Alert Digest No. 1 of 2015* of 11 February 2015, which requested information regarding certain provisions of the Tribunals Amalgamation Bill 2014. I trust that the following information will be of use in the Committee's consideration of these provisions.

Merits review—termination of appointment of AAT member

Schedule 1, item 26, proposed new section 13

The Committee seeks my further advice as to the rationale for the proposed approach to termination of AAT members.

As noted in the Explanatory Memorandum, the underlying policy rationale of the termination provisions is to balance considerations of independence and probity of Tribunal members.

Independence is important to maintain public confidence in the Tribunal as a forum of review of Government decision-making, much as it is important to the functions of many other independent statutory officers. Similar termination provisions to those proposed by the Bill apply to a wide range of key statutory offices including, amongst others:

- the Commonwealth Director of Public Prosecutions
- the Inspector-General of Intelligence and Security
- the Integrity Commissioner of the Australian Commission for Law Enforcement Integrity
- the President and Commissioners of the Australian Law Reform Commission, and
- Members of the Australian Securities and Investments Commission.

As noted in the Committee's Alert Digest, the proposed approach to termination of Tribunal members in the Tribunals Amalgamation Bill reflects the standard approach for a wide range of independent Commonwealth statutory officers. It also reflects the existing provisions that apply to the approximately 260 MRT, RRT and SSAT members who will become AAT members at the time of the amalgamation. I do not consider that those provisions have diminished the independence of those or any other statutory officers across the

Commonwealth. Terminations of MRT, RRT and SSAT members have been very rare.

The infrequent nature of terminations under the standard Commonwealth provisions supports the conclusion that they provide for very specific and limited grounds for dismissal. It is not possible under these provisions for the Governor-General to terminate an officer merely because the Government disagrees with decisions they have made or views they have expressed. It is necessary to be satisfied that a specific limited ground for dismissal applies. The decision to terminate is also subject to judicial review, and it would be unwise for the Government to recommend a termination to the Governor-General without a very firm basis.

I note that there are some disadvantages for members in the current AAT termination provisions. Unlike the standard termination provisions, the requirement for an address from both Houses of Parliament necessarily produces significant publicity for any termination. It can be imagined that termination for incapacity (for example) through this process would be very distressing to an affected member.

Accordingly, it is the Government's view that the proposed termination provisions appropriately safeguard Tribunal independence, while providing a clear and well-tested approach to termination in the very rare cases in which this would be necessary.

Finally, to avoid retrospectivity, Item 12 of Schedule 9 to the Bill preserves existing removal from office provisions as they apply to AAT, MRT-RRT and SSAT members for the term of their current appointment. This avoids any potential perceived disadvantage to existing members from these changes. Similarly, as the Committee notes, AAT members who are also serving Judges would continue to be covered by the constitutional arrangements for removal of a judge from office, rather than the relevant provisions of the AAT Act.

Compliance with administrative law requirements in exercising power

Schedule 1, item 27, proposed new subsection 18B(2)

The Committee seeks my advice as to whether such a provision is common in relation to practice directions of other adjudicative bodies, and why this provision should not be limited to minor departures from practice directions.

New subsection 18B(2) reflects the policy of existing subsections 353A(3) and 420A(3) of the *Migration Act 1958*. These subsections were introduced on 1 June 1999 to provide that the Tribunal should, so far as practicable, comply with directions of the Principal Member of the Migration Review Tribunal and the Refugee Review Tribunal. Whilst non-compliance with a practice direction by a member does not make the decision invalid, it is expected that members will comply with lawful directions. Failure by a member to comply with directions under sections 353A and 420A could result in the Tribunal being reconstituted for the purposes of a particular review pursuant to section 355A of the Migration Act before a decision is made.

The clear intent of existing subsections 353A(3) and 420A(3) is to ensure non-compliance with directions does not lead to invalidity, in order to provide finality to the review process. These subsections provide certainty around when decisions by the Tribunal are taken to be finalised. A presumption of regularity for decisions is particularly important in the migration and refugee jurisdiction. It has significant implications for the cessation of bridging visas and consequently the lawfulness of an applicant's immigration detention.

New subsection 18B(2) also reflects the (recently passed) subsection 473FB(3) of the Migration Act, which provides that the Immigration Assessment Authority, an independent statutory agency within the Refugee Review Tribunal (which will become an independent office in the Migration and Refugee Division under the Bill), must, as far as practicable, comply with the directions of the Principal Member. However, non-compliance with any direction does not mean the Authority's decision on a review is an invalid decision.

It is desirable for there to be a single practice direction power for the amalgamated Tribunal across all Divisions to promote simplification and harmonisation. However, it is also desirable that the power respond to the requirements of each jurisdiction. As the power in section 18B will apply to the Migration and Refugee Division, the policy of subsections 353A(3) and 420A(3) would be preserved by the Bill as essential to maintaining fair and efficient review in the migration and refugee jurisdiction. Removing subsection 18B(2) would be a departure from existing migration policy and procedure.

Limiting subsection 18B(2) to minor non-compliance would introduce a new threshold issue to be considered on judicial review of a Tribunal decision. Whether an instance of non-compliance is minor is uncertain and would be difficult to objectively assess. Such a test would invite litigation and would undermine the purpose of the provision in providing finality to the review process.

Compliance with administrative law requirements in exercising power

Schedule 1, item 27, proposed new subsection 18B(3)

The Committee has sought my further clarification as to the meaning and operation of proposed new subsection 18B(3).

New subsection 18B(3) reflects the policy of existing subsections 353A(4) and 420A(4) of the Migration Act. These subsections were introduced on 1 June 1999 to provide that, if the Tribunal complies with the directions of the Principal Member of the Migration Review Tribunal and the Refugee Review Tribunal, no other action is required for the conduct of the review, assuming other legislative requirements are met.

The intent of existing subsections 353A(4) and 420A(4) is to provide certainty of when decisions by a review Tribunal are taken to be finalised. In the context of decisions that are made under a legislative code of procedure, the provision operates to ensure that where the Tribunal complies with the code of procedure and any relevant directions, then the procedural pre-requisites to making a lawful decision have been satisfied. As indicated above in relation to new subsection 18B(2), this presumption of regularity has significant implications in the migration and refugee jurisdiction.

Further, it is clear that these provisions have not operated in practice to make rights, liberties or obligations unduly dependent upon non-reviewable decisions. For example, decisions made by the Migration Review Tribunal and the Refugee Review Tribunal are the subject of more litigation challenges than those of any other Commonwealth review body.

New subsection 18B(3) also reflects the policy of (recently passed) subsection 473FB(4) of the Migration Act, that if the Immigration Assessment Authority deals with a review of a decision in a way that complies with the directions, the Authority is not required to take any other action in dealing with the review.

As noted above, it is desirable for there to be a single practice direction power for the amalgamated Tribunal across all Divisions to promote simplification and harmonisation, and that the power responds to the requirements of each jurisdiction. As the practice direction power would apply in the Migration and Refugee Division, the Bill preserves the procedures that are essential to maintaining fair and efficient review in that jurisdiction. Removing subsection 18B(3) would represent a departure from existing migration policy and procedure, and may have a significant impact on the migration jurisdiction in light of the litigious nature of the migration caseload.

Adequacy of merits review

Schedule 1, items 64 and 65, section 34J

The Committee seeks further information as to why changes to section 34J of the AAT Act are appropriate, and examples of how the exercise of the Tribunal's discretion to proceed on the papers can be appropriately exercised in practice.

The proposed retention of the right to seek a further review within the same Tribunal in family assistance, social security and certain other matters may result in more applications for second review being made than current applications to the AAT for review of decisions of the Social Security Appeals Tribunal.

The amendment would empower the Tribunal, in appropriate instances, to determine such second reviews on the papers without party consent. This will allow second reviews to be dealt with in the most effective and efficient manner consistent with the Tribunal's statutory objectives.

A range of legislative safeguards would ensure the use of the power to determine second reviews on the papers without party consent would be limited to circumstances where it is appropriate, including:

- a decision to determine a review on the papers can only be made by the Tribunal as constituted: that is, by one or more members (who are independent statutory officers)
- the Tribunal must be satisfied that the issues can be adequately determined in the absence of the parties and, if not, the application would listed for an oral hearing
- the parties must be afforded procedural fairness
- the Tribunal must give reasons for its decisions, and
- applicants have a right of appeal to the Federal Court of Australia.

It is expected that the President will make practice directions to provide guidance to members, staff and the public on applicable procedures in deciding which matters should be heard on the papers. The Tribunal will consult with stakeholders on practice directions in due course.

Thank you again for your consideration of the Tribunal Amalgamation Bill.

Yours faithfully

(George Brandis)

04 MAR 2015