SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2015

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Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 2015

The committee presents its *Fifth 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:

Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process, whereby the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness to 31 March 2015

Bill	Portfolio	Correspondence	
		Due	Received
Appropriation Bill (No. 3) 2014-2015	Finance	26/03/15	23/03/15
Appropriation Bill (No. 4) 2014-2015	Finance	26/03/15	08/05/15
Australian Border Force Bill 2015	Immigration and Border Protection	02/04/15	14/04/15
Australian Citizenship and Other Legislation Amendment Bill 2014	Immigration and Border Protection		
Further response required		04/12/14	03/05/15
Australian River Co. Limited Bill 2015	Finance	02/04/15	07/05/15
Biosecurity Bill 2014	Agriculture	26/03/15	18/03/15
Health Minister's response		26/03/15	31/03/15
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015	Attorney-General	09/04/15	10/04/15
Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014	Defence	26/02/15	26/02/15
Defence Trade Controls Amendment Bill 2015	Defence	02/04/15	09/04/15

Bill	Portfolio	Correspondence	
		Due	Received
Enhancing Online Safety for Children Bill 2014	Communications	26/02/15	27/02/15
Further response required		26/03/15	24/03/15
Fair Word (Registered Organisations) Amendment Bill 2014 [No. 2]	Employment	09/04/15	10/04/15
Higher Education and Research Reform Bill 2014	Education and Training	26/02/15	26/02/15
Migration Amendment (Character and General Visa Cancellation) Bill 2014	Immigration and Border Protection		
Further response required		27/11/14	03/03/15
Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015	Immigration and Border Protection	02/04/15	14/04/15
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	Immigration and Border Protection	02/04/15	23/04/15
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014	Immigration and Border Protection		
Further response required		27/11/14	03/03/15
Private Health Insurance Amendment Bill (No. 2) 2014	Health	26/02/15	05/03/15
Quarantine Charges (Imposition-Customs) Amendment Bill 2014	Agriculture	26/03/15	18/03/15
Quarantine Charges (Imposition-Excise) Amendment Bill 2014	Agriculture	26/03/15	18/03/15
Quarantine Charges (Imposition-General) Amendment Bill 2014	Agriculture	26/03/15	18/03/15
Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014	Attorney-General	11/12/14	04/02/15
Further response required		26/02/15	26/02/15
Tribunals Amalgamation Bill 2014	Attorney-General	26/02/15	04/03/15

Members/Senators responsiveness to 31 March 2015

Bill	Member/Senator	Correspondence Received
Commonwealth Electoral Amendment (Donations Reform) Bill 2014	Senator Rhiannon	*
Criminal Code Amendment (Animal Protection) Bill 2015	Senator Back	*
Imported Food Warning Labels Bill 2015	Mr Katter	*

***** not yet received

Appropriation Bill (No. 4) 2014-2015

Introduced into the House of Representatives on 12 February 2015
Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2015*. The Minister responded to the committee's comments in a letter dated 8 May 2015. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2015 - extract

Background

This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2014-2015*.

Delegation of legislative power
Clause 14

Clause 14 of the bill deals with the Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 14 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, ACT, NT and local government may be made: clause 14(2)(a); and
- the amounts and timing of those payments: clause 14(2)(b).

Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum (at p. 12) states that this is:

> …because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) will simply determine how appropriations for State, ACT, NT and local government items will be paid. The determinations are issued when required. However, payments can be made without either determination.

While the explanatory memorandum states that these determinations do not alter the appropriations approved by the Parliament, it is not clear to the committee exactly what is contained in such determinations. In addition, it is not clear whether the determinations are published and made publicly available. As a result, it is not possible for the committee to accurately assess the nature and character of these Executive determinations. The committee notes that provisions similar to clause 14 have been a regular feature of previous appropriation bills. **However, noting the above comments and the terms of section 96 of the Constitution which provides that '...the Parliament may grant financial assistance to any State on such terms and conditions *as the Parliament thinks fit*' [emphasis added], the committee seeks the Minister's advice in relation to:**

- **the content of such determinations;**
- **whether the determinations are published and made publicly available;**
- **how any terms or conditions applying to payments made under these determinations are formulated;**
- **how 'payments can be made without either determination' (as indicated at p. 12 of the explanatory memorandum); and**
- **how grants made pursuant to these determinations fit into the wider scheme of making s 96 grants to the States, including, for example, grants of financial assistance to a State made under subparagraph 32B(1)(a)(ii) of the *Financial Framework (Supplementary Powers) Act 1997* (noting that regulations made under the Supplementary Powers Act are disallowable, while subclause 14(4) of this bill provides that determinations made under subclause 14(2) are not legislative instruments and are therefore not disallowable**).

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

Determinations under clause 14 of Bill No. 4 are rare. Terms and conditions are not required for payments to States, Territories and local government. Most payments to the States and Territories are governed and appropriated through the *Federal Financial Relations Act 2009.*

For the payments to States, Territories and local government in an even-numbered Appropriation Act, generally other legislative or agreed frameworks determine how the

payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. Many of these arrangements can be found on the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The relevant Minister specified under an Appropriation Act may make terms and conditions via a determination if the alternative framework does not adequately allow the Minister to manage the payment. Responsibility for making a determination (if any) rests with the Minister.

A recent example of a determination made (in part) under an equivalent provision in an Appropriation Act is the Natural Disaster Relief and Recovery Arrangements Determination 2012 (Determination). This can found on the Australian Government Disaster Assist website (http://www.disasterassist.gov.au). The Determination primarily operates under the Federal Financial Relations framework. For the State of Queensland, the Determination operates in parallel to an existing National Partnership Agreement (Agreement) between the Commonwealth and Queensland.

In this situation, the Agreement has overriding authority unless the parties agree otherwise. Consequently, only when the Agreement does not adequately provide terms and conditions for a payment and Queensland agrees, could the relevant Minister rely on the Determination to make terms and conditions via the Appropriation Act.

Thank you for bringing this matter to my attention.

Committee Response

The committee thanks the Minister for this response. The committee notes the Minister's advice that determinations made under provisions equivalent to clause 14 of Appropriation Bill (No. 4) 2014-2015 are rare and that most payments to the States and Territories are governed and appropriated through the *Federal Financial Relations Act 2009*. However, noting section 96 of the Constitution provides that '...the Parliament may grant financial assistance to any State on such terms and conditions *as the Parliament thinks fit*' [emphasis added], the committee remains concerned that it appears that these determinations are not subject to parliamentary scrutiny or disallowance and are not published in a systematic manner.

In order to assist the committee in further scrutinising this standard provision and the determinations made under it, the committee requests the Minister's further advice in relation to any other instances in which determinations have been made under these provisions in the past ten years. The committee also requests the Minister's advice as to whether the government would consider it appropriate to subject these determinations to the parliamentary disallowance process or, at least, to table such determinations in both Houses of Parliament to ensure that they are available for scrutiny by the Parliament.

Australian Border Force Bill 2015

Introduced into the House of Representatives on 25 February 2015
Portfolio: Immigration and Border Protection

Introduction

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

Alert Digest No. 3 of 2015 - extract

Background

This bill provides the legislative framework for the establishment of the Australian Border Force, including the role of the ABF Commission and support management, from 1 July 2015.

Broad discretionary power
Availability of review
Clauses 25 and 54

Pursuant to subclause 25(1) the Australian Border Force Commissioner may delegate his or her functions or powers under a law of the Commonwealth, including to Immigration and Border Protection (IBP) workers who are private contractors or consultants. As such some workers exercising statutory powers may not be classified as 'officers of the Commonwealth'. As such it is currently unclear whether the decisions of these workers will be reviewable under the constitutional regime for judicial review deriving from s 75(v) of the Constitution. This is because the High Court has not had to definitively decide whether the definition of 'officer of the Commonwealth' would include private contractors and consultants. Although there is an argument that all IBP workers, including contractors, should be considered to be officers of the Commonwealth (given that they are subject to the Commissioner's directions under clause 26) the committee is concerned that the bill does not make clear whether judicial review would be available.

In light of this situation, the committee is interested to understand whether it is intended that both ADJR Act *and* subsection 75(v) Constitutional review (available also through section 39B of the Judiciary Act) will be available for all decisions that might be made by contractors and consultants. While it is expected that the ADJR Act would presumptively apply so long as the exercise of power is considered to have a statutory source, and there is a strong argument (albeit no certainty) about judicial review under s75(v), the explanatory memorandum does not confirm this.

The committee notes the inclusion of subsection 25(7) which allows a function or power to be taken to have been performed or exercised by the ABF Commissioner. However, the explanatory memorandum does not indicate whether this is designed to address the review situation outlined above. In addition, it seems possible that subsection 25(7), which currently applies only to delegations under subsection (4), should also apply to delegations made directly to an IBP worker directly from the Australian Border Force Commissioner under subsection 25(1).

Clause 54 is effectively an identical provision dealing with delegation by the Comptroller-General of Customs, which gives rise to the same issues.

The committee seeks the Minister's advice about the availability of review in relation to both of these clauses, and whether:

- **subsection 25(7) should also apply to subsection 25(1); and**
- **subsection 54(6) should also apply to subsection 54(1).**

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

Minister's response - extract

The High Court and the Federal Court will have jurisdiction to review all decisions that might be made by contractors and consultants in their capacity as delegates of the ABF Commissioner and the Comptroller-General of Customs. This is because subsections 25(1) and 54(1) (read with paragraph 34AB(l)(c) of the *Acts Interpretation Act 1901)* will have the effect that functions or powers exercised or performed by the relevant delegate (including a contractor or consultant) are taken to have been performed or exercised by the ABF Commissioner and the Comptroller-General of Customs respectively. The decisions will therefore be reviewable as the decisions of the ABF Commissioner or the Comptroller-General, each of whom is an officer of the Commonwealth.

It is not necessary that the Bill provide that subsection 25(7) should apply to subsection 25(1), and subsection 54(6) should apply to subsection 54(1). This is because paragraph 34AB(l)(c) of the *Acts Interpretation Act 1901* has the effect that delegated functions, powers or duties are deemed to have been performed or exercised by the authority that is granted the power in the relevant authorising legislation, in this case the ABF Bill. Subsections 25(7) and 54(6) have been included to provide clarity that this is also the case for sub-delegation by the Secretary.

Committee Response

The committee thanks the Minister for this response, which addresses the committee's concerns.

Alert Digest No. 3 of 2015 - extract

Trespass on personal rights and liberties—privilege against self-incrimination
Subclauses 26(8) and 55(10)

Subclause 26(8) provides that if a direction that relates to the reporting of serious misconduct or criminal activity where that affects, or is likely to affect the operations, responsibilities or reputation of the Department (see subclause 26(4)) requires a person to give information, answer a question or produce a document, they will not be excused from doing so on the basis of the privilege against self-incrimination. The explanatory memorandum (at p. 30) states that it 'is important that the Department is able to act on and undertake further investigations in relation to information obtained under these powers'.

It should, however, be noted that there is a 'use' immunity in relation to information and documents obtained under these powers which means that the material cannot be used in evidence against the IBP worker in any proceedings (see subclause 26(9)), but can be used to investigate unlawful conduct by that person and third parties.

The committee's long-standing approach to the abrogation of the privilege against self-incrimination is that it is only justified in relation to serious offences and situations where it is considered absolutely necessary. The underlying purposes of removing the privilege appear to be to limit the risk of corruption within the ABF and to enhance government and public confidence in IBP workers.

The explanatory materials do not describe why it is not possible to include a derivative use immunity along with the use immunity. A derivative use immunity means that the self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person, but can be used to investigate third parties. The inclusion of a derivative use immunity thus further minimises the consequences of the loss of liberty associated with the abrogation of the privilege.

The same issue arises under subclause 55(10).

While the question of whether the purposes underlying the abrogation of the privilege against self-incrimination are appropriate may be left to the Senate as a whole, **the committee seeks the Minister's advice as to whether a derivative use immunity can also be included.**

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

Minister's response - extract

The intention of the power of the Secretary and the ABF Commissioner to impose mandatory reporting requirements is to promote full disclosure by Immigration and Border Protection workers of serious misconduct, corrupt conduct and criminal activity which they observe or are involved in, so that action can be taken against workers involved in corruption. It is important that the department is able to act on and undertake further investigations in relation to information obtained under these powers.

The Government does not consider it appropriate that the 'use' immunity be extended to include a 'derivative use' immunity. The effect of a derivative use immunity would be to ensure that any information derived by the department, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure.

Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct and it may be difficult to obtain evidence other than that derived from further investigations undertaken based on the person's admissions. If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that this derived information can be used to support action taken against the person. In the Government's opinion, the public benefit of not including a derivative use immunity outweighs the loss of personal liberty of the person to whom the information relates.

Committee Response

The committee thanks the Minister for this response and notes the justification provided for the exclusion of a derivative use immunity. **The committee remains concerned about circumstances in which the privilege against self-incrimination is abrogated, but in the circumstances draws this matter 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. 3 of 2015 - extract

Delegation of legislative power—important matters in rules
Clauses 38 and 39

Clause 38 provides for drug and alcohol tests and the provision of blood and body samples to be conducted in accordance with the 'rules'. Clause 39 provides that the rules may make provision in relation to a number of matters relating to alcohol and drug testing pursuant to clauses 34, 35 and 36 of the Bill.

The matters listed in clause 39, about which rules may be made, are of considerable significance. For example, the confidentiality and disclosure of test results and the keeping and destruction of records, are of considerable importance given that the rules for addressing these matters will clearly have an impact on privacy interests. In relation to some of the listed matters it is not obvious why it is impractical to deal with them in the primary legislation. **The committee therefore seeks the Minister's advice as to why it is appropriate for each of the matters to be dealt with in rules rather than incorporating these significant matters in the primary legislation.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they 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

It is appropriate for the matters listed in clause 39 to be dealt with by legislative instrument rather than incorporating them in the primary legislation. There are many aspects of this type of testing framework that require greater flexibility than can be achieved by including them in primary legislation. Technology available for conducting drug and alcohol testing

and storing and analysing results is evolving rapidly and prescribing current methods in primary legislation would unduly limit flexibility. Flexibility is also needed in relation to confidentiality and disclosure of test results and keeping and destruction of records to ensure that these procedures are in line with the most current standards and expectations.

The drug and alcohol testing regime is substantively based on the existing power of the Chief Executive Officer of Customs under sections l6B-l6F of the *Customs Administration Act 1985.* The regime was introduced in 2012 as part of a series of measures designed to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to agencies to respond to suspected corruption. At this time the Committee scrutinised this provision and was satisfied that the inclusion of the matters relating to the conduct of drug and alcohol testing in delegated legislation was an appropriate delegation of legislative power. The *Australian Federal Police Act 1979,* which contains similar provisions for a drug and alcohol testing framework, also includes these matters to the Regulations.

As the rules will be legislative instruments, Parliament will ultimately have oversight of and may disallow rules made under the proposed section 58, including rules made under clauses 38 and 39.

Committee Response

The committee thanks the Minister for this response. In 2012 the committee sought the Minister's advice about a similar scheme proposed in the Law Enforcement Integrity Legislation Amendment Bill 2012. Advice was received and the committee requested that key information be included in the explanatory memorandum. While the committee did not raise further concerns about the approach, it does not consider that it expressed a concluded view that it was satisfied with the proposed scheme. **Similarly, on this occasion the committee would prefer that either guidelines or key matters be included in primary legislation, draws its view to the attention of Senators and leaves the matter to the Senate as a whole for consideration.**

Alert Digest No. 3 of 2015 - extract

Trespass on personal rights and liberties—privacy
Delegation of legislative power—important matters in rules
Broad delegation
Paragraph 44(4)(f)

This paragraph provides that protected information, which may include personal information, can be disclosed to any person or body (in addition to those listed in paragraphs 44(4)(a)-(e)) prescribed in the rules. The explanatory memorandum emphasises that subclause 44(6) enables such disclosure to be subject to conditions imposed by the Secretary, but it does not explain *why* disclosure of protected personal information to persons or bodies, which may include non-government bodies such as advisory committees, peak bodies, industry representatives, commercial entities or community groups or community groups may be necessary. **The committee therefore seeks the Minister's justification for the proposed approach, and if there is a sound justification for it, whether consideration can be given to providing legislative guidance or structure for the exercise of the power (such as relevant considerations, parameters etc).**

> *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 and to delegate legislative powers inappropriately; and make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers*
> *in breach of principles 1(a)(i), 1(a)(ii) and 1(a)(iv) of the committee's terms of reference.*

Minister's response - extract

There are instances where it may be necessary or appropriate for the department to provide personal information to other bodies or persons, including non-government bodies. The department publishes a wide range of information including research-related information, such as commissioned and internally produced written reports and analyses, information about surveys and various statistics on its website. In addition, from time to time the department receives requests for information from researchers, media outlets and the general public, including requests for research reports, policy analyses or specific data. This information can sometimes contain information that could lead to the identification of individuals.

The provision of this type of information to non-government bodies and the public has long been acknowledged as one of the public goods produced by government agencies and there is a responsibility to contribute to public discussion and debate by providing information. For example, the Australian Public Service Commissioner's *APS values and code of conduct in practice: A guide to official conduct for APS employees and agency heads* issued in December 2013 states:

> Openness is at the core of Australia's modern system of government. It is essential in a healthy democracy that members of the public have the opportunity to contribute to policy development and decision-making, and that there is public scrutiny and accountability of government. Public access to information in the possession of government agencies helps to make this possible.

For this reason, it may be necessary to specify other bodies and persons, including nongovernment bodies, which are able to receive departmental information.

These provisions provide various safeguards to ensure the specific disclosure of information is necessary and appropriate and in accordance with any conditions on disclosure imposed by the Secretary. In particular, every disclosure of information to these persons or bodies will need to be made in accordance with subclauses 44(1) and 44(2). Further, all disclosure of personal information must be for one or more of the purposes listed in clause 46.

The provisions in the Bill will enable the department to strike a balance by enabling specified persons and bodies to receive departmental information with safeguards where appropriate, and to otherwise protect information where there is an overriding interest in maintaining confidentiality.

Committee Response

The committee thanks the Minister for this response and notes the justification provided for the proposed approach. The committee requests that the key information outlined above be included in the explanatory memorandum. **The committee remains concerned about the breadth of the power to provide personal information to other bodies or persons and draws this matter to the attention of Senators. The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Australian Citizenship and Other Legislation Amendment Bill 2014

Introduced into the House of Representatives on 23 October 2014
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No.15 of 2014*. The Deputy Secretary of the Department of Immigration and Border Protection responded on behalf of the Minister to the committee's comments in a letter dated 28 November 2014. The committee sought further advice and the Minister responded in a letter dated 3 May 2015. A copy of the letter is attached to this report.

Alert Digest No. 15 of 2014 - extract

Background

This bill amends the *Australian Citizenship Act 2007* to:

- extend good character requirements;
- clarify residency requirements and related matters;
- clarify the circumstances in which a person's approval as an Australian citizen may or must be cancelled;
- clarify the circumstances in which the minister may defer a person making the pledge of commitment to become an Australian citizen;
- clarify the circumstances in which a person's Australian citizenship may be revoked;
- enable the minister to specify certain matters in a legislative instrument;
- enable the use and disclosure of personal information obtained under the *Migration Act 1958* or the migration regulations; and
- make minor technical amendments.

The bill also amends the *Migration Act 1958* to enable the use and disclosure of personal information obtained under the *Australian Citizenship Act 2007* or the citizenship regulations.

Delegation of legislative power
Item 76, new subsection 54(2)

This item will provide that 'subsection 54(2) of the Act provides that without limiting subsection 54(1), the Citizenship Regulations may confer on the Minister the power to make legislative instruments' (explanatory memorandum, p. 66).

The explanatory memorandum, at page 66, states that the purpose of the amendment is to:

> …enable the Minister to specify instruments in writing under the Citizenship Regulations. This will enable the Minister to make legislative instruments under the Citizenship Regulations that include (but will not be limited to) the payment of citizenship application fees in foreign currencies and foreign countries.

While the use of delegated legislation in technical and established circumstances (such as the payment of fees) is not controversial, it appears unusual for primary legislation to provide for the making of a regulation which, in turn, provides a minister with a wide power to make further delegated legislation for unspecified purposes. **The committee therefore seeks the Minister's advice as to why an appropriately described power, or powers, to make delegated legislation cannot be included in the primary act. The committee is also interested in whether this type of power exists in other legislation.**

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

Deputy Secretary's initial response - extract

Item 76, proposed section 54(2): Providing that the Citizenship Regulations may confer on the Minister the power to make legislative instruments

28. The Committee asked for "the Minister's advice as to why an appropriately described power, or powers, to make delegated legislation cannot be included in the primary act. The committee is also interested in whether this type of power exists in other legislation."

29. It is appropriate for this instrument making power to be in the regulations because it is the regulations which set the fees to accompany citizenship applications (see regulations 12 to 13 of the *Australian Citizenship Regulations 2007).* Parliamentary scrutiny is maintained because the legislative instrument will be disallowable.

30. This provision is consistent with section 504(2) of the Migration Act, which impliedly authorises regulations allowing the Minister to make instruments in writing specifying matters that affect the operation of such regulations. The key legislative purpose of that subsection is that the regulations may prescribe matters to be specified by the Minister in an instrument in writing. The proposal to allow the Citizenship Regulations to empower the making of legislative instruments will likewise give effect to the purpose and objects of the legislative scheme in the Citizenship Act.

Committee's initial response

The committee thanks the Deputy Secretary for this response. The response indicates that it 'is appropriate for this instrument making power to be in the regulations because it is the regulations which set the fees to accompany citizenship applications'. However, on its face, proposed subsection 54(2) does not appear to limit the minister's power to make further delegated legislation to matters relating to the setting of fees. **The committee therefore seeks the minister's further advice as to whether the minister's power to make further delegated legislation can be limited in the legislation. If it is considered that this is not possible, the committee seeks the minister's further advice as to why such a broad power to make further delegated legislation is considered necessary.**

Minister's further response - extract

The Committee sought advice as to whether the proposed power for the Minister for Immigration and Border Protection to make delegated legislation under the Australian Citizenship Regulations 2007 (the Regulations) can be limited in the legislation.

While it would be possible to limit the Minister's power to make further delegated legislation to specified matters in the *Australian Citizenship Act 2007* (the Act), the Government considers that it is unnecessary to do so as section 13 of the *Legislative Instruments Act 2003* provides that if enabling legislation confers on a rule-maker the power to make a legislative instrument, that legislative instrument is read subject to the enabling legislation as in force from time to time and so as not to exceed the power of the rule-maker. This means any future instrument made under the Regulations would be read so as not to exceed the authorising powers in the Act and the Regulations.

Thank you for raising this matter.

Committee's further response

The committee thanks the Minister for this further response. The committee is aware of the content of s 13 of the *Legislative Instruments Act 2003*, however, is of the view that **it is appropriate to constrain a power to the purposes for which it is directly intended, rather than leaving it to be assessed against the broader scope of the bill in general. The committee draws this issue to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Australian River Co. Limited Bill 2015

Introduced into the House of Representatives on 26 February 2015
This bill received the Royal Assent on 1 April 2015
Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2015*. The Minister for Agriculture responded to the committee's comments in a letter dated 7 May 2015. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2015 - extract

Background

This bill provides for the transfer of the assets and any outstanding liabilities of the Australian River Co. to the Commonwealth in preparation for its voluntary deregistration under the *Corporations Act 2001*.

Trespass on personal rights and liberties—retrospectivity
Delegation of legislative power—Henry VIII clause
Clause 15

Clause 15 is a rule making power which includes a Henry VIII clause (in which delegated legislation can override the terms of the primary act) and also provides that the rules may take effect from a date before the rules are registered under the *Legislative Instruments Act* (despite subsection 12(2) of that Act).

The explanatory memorandum contains a detailed rationale for the Henry VIII clause (at pp 7 and 8). However, the explanatory memorandum does not confirm whether any rules that would take effect retrospectively would adversely affect rights and obligations of affected persons. Given the nature of the bill it appears that retrospective rules are unlikely to have adverse consequences on rights and obligations, but the matter is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's advice about this matter.**

> *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

As set out in the Explanatory Memorandum, Clause 15 of Schedule 1 to the Bill was included to allow rules to be made to facilitate the smooth and effective transfer of all Australian River Co. Limited (ARCo) matters to the Commonwealth.

The intent of the Bill was to provide, as much as legally possible, for all parties who have, or may have, or may in the future have, any dealings with ARCo to continue to be in the same position that they would have been, if ARCo had continued in existence and operation. It was anticipated that rules under Clause 15 would only be made to address any unforseen complications that produce an unworkable or otherwise inappropriate result from the transfer of ARCo's business to the Commonwealth. Essentially, it was anticipated that rules would be made if necessary to protect all parties who may have had dealings with ARCo and to preserve the rights and obligations of any affected persons. Moreover, there is no policy intention to make rules which would adversely affect the rights and obligation of affected persons.

Therefore, I do not consider that Clause 15 of the Bill trespasses unduly on personal rights and liberties.

Committee Response

The committee thanks the Minister for this response.

The committee notes the Minister's advice that rules would be made if it is necessary to protect all parties who may have had dealings with Australian River Co. Limited and to preserve the rights and obligations of any affected persons. The committee further notes that there is no policy intention to make rules which would adversely affect the rights and obligation of affected persons.

The committee notes that it would have been useful had this information been included in the explanatory memorandum. However, as the bill has already passed both Houses of the Parliament the committee makes no further comment in relation to this matter.

Biosecurity Bill 2014

Introduced into the House of Representatives on 27 November 2014
This bill was read a third time in the Senate on 13 May 2015
Portfolio: Agriculture

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2015*. The Minister for Agriculture responded to the committee's comments in a letter dated 18 March 2015. At the time the Minister advised that as the Biosecurity Bill 2014 and related bills are co-administered, the Minister for Health would provide a separate response in relation to her portfolio responsibilities.

The Minister for Health has provided a response dated 31 March 2015 and the committee now reports on aspects of the bill in relation to her portfolio responsibilities. A copy of the letter is attached to this report.

The Minister for Agriculture also provided a further response dated 21 April 2015. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2015 - extract

Background

This bill provides a regulatory framework to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health.

This bill is substantially similar to the bill that was introduced into the House of Representatives on 28 November 2012. This Alert Digest includes the committee's previous comments to the extent that they are applicable to this bill.

Trespass on personal rights and liberties
Clauses 32 and 34
Subclause 447(1)

These clauses outline a list of factors of which relevant biosecurity officials must be satisfied before exercising powers specified in the bill. These factors, broadly speaking, require decision-makers to be satisfied that measures taken will be effective and proportionate responses to particular risks. However, there is no additional requirement that there be reasonable grounds to justify the decision-maker's satisfaction of the relevant matters. It may be noted that exercise of the specified powers under the bill are apt to significantly restrict individual rights and liberties.

The same issue also arises in relation to the matters the Minister must be satisfied of in subclause 447(1).

The committee therefore seeks the Minister's advice as to whether consideration has been given to amending the bill to require the decision-maker to be satisfied on reasonable grounds that the various criteria for the exercise of power are met.

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

Minister for Health response - extract

Clause 34 - Trespass on personal rights and liberties

The Committee is seeking advice on the inclusion of an additional requirement for decision makers to be satisfied of various factors on reasonable grounds. The principles of general protection at clause 34 apply in relation to exercising powers or imposing measures under Chapter 2 of the Bill. These powers may only be exercised or imposed by specially appointed officers. Clause 82 specifies that personally restrictive and invasive powers may only be exercised by Human Biosecurity Officers or Chief Human Biosecurity Officers. These officers must have medical qualifications or appropriate clinical expertise, and these officers will therefore be using that particular knowledge or expertise when exercising powers or imposing measures.

Consequently, I consider the more general requirement for the decision maker to be satisfied on reasonable grounds is not appropriate to Chapter 2 of the Bill.

Committee Response

The committee thanks the Minister for this response and notes that a decision-maker must have medical qualifications or appropriate clinical expertise. **However, the committee remains of the view that it is appropriate for the decision-maker to apply this knowledge and expertise *on reasonable grounds* when deciding that the various criteria for the exercise of power are met. As the bill has already passed the Senate the committee makes no further comment on this occasion.**

Alert Digest No. 2 of 2015 - extract

Trespass on personal rights and liberties—strict liability
Clause 58

This provision makes it an offence of strict liability for a person who is required under Chapter 2, Part 2, Division 6 of the bill to answer a question or provide written information to fail to answer the question or provide the information. The information that may be requested must relate to determining the level of risk to human health associated with the individual (subclause 55(2)). In relation to the power under clause 56 to require questions and answers from 'any individual' the requirement to provide answers or written information must be for the purpose of preventing a listed human disease from entering, or emerging, establishing itself or spreading in Australia, preventing such a disease from spreading to another country or determining the level of risk to human health associated with the relevant individual. The explanatory memorandum addresses the justification for the strict liability offences in the bill in a general sense however, no mention is made of clause 58 (see pp 14–15).

The committee notes that strict liability offences are appropriate in certain circumstances including 'for reasons such as public safety and the public interest in ensuring that regulatory schemes are observed'. It is further noted where the application of strict liability to certain offences in the bill has departed from the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the explanatory memorandum states that these departures have been approved by the Attorney-General. In addition, the committee notes that the penalty of 60 penalty units is consistent with the maximum penalties recommended in the Guide.

However, as it is possible that persons subject to requirements to answer questions may have recently arrived in Australia and may also be suffering from an illness, there may be instances where they are not reasonably able to comply with a request to answer questions or provide information as required. **The committee therefore seeks a fuller justification of the application of strict liability in this instance.**

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

Minister for Health response - extract

Clause 58 - Trespass on personal rights and liberties - Strict Liability

The Committee is seeking further justification on the application of a strict liability offence in this particular instance. The Bill requires information to be provided by any individual who an officer is satisfied has been exposed to a Listed Human Disease; or exposed to another individual who has signs or symptoms of a Listed Human Disease.

In all cases, this information may be uniquely known to the individual, and each individual may be able to provide important details about the epidemiology of the disease, the source of the disease, and the potential exposure of themselves and other individuals to the disease. This information is vital to address public health risk, and it is essential that as much information is collected as quickly as possible. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community, and potentially spread the disease to family and friends.

Alternative powers, such as monitoring and investigation powers, or enforcement, are not appropriate as the information being sought must be collected as soon as possible, to allow the Commonwealth to develop a picture of the disease needing to be managed, and the number of individuals potentially infected and in need of intervention.

Wherever possible, the Commonwealth will rely on voluntary disclosure; however, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

Clause 37 provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person must not be subject to a requirement of Chapter 2 without the special protections afforded by clause 37, and any urgent or life threatening medical needs must be met (clause 35).

Committee Response

The committee thanks the Minister for this response and notes the justification provided for the use of strict liability. **The committee remains concerned generally about the application of strict liability, but in the circumstances notes that the bill has already passed the Senate and makes no further comment.**

Alert Digest No. 2 of 2015 - extract

Delegation of legislative power
Subclause 91(3)

Subclause 91(2) provides that an individual who has undergone an examination pursuant to clause 90 'may be required…to provide…specified body samples for the purpose of determining the presence in the individual of' specified human diseases. Subclause 91(3) provides that the 'regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided under subsection (2)'. The Note to this provision states that the regulations may prescribe offences and civil penalties in relation to these requirements concerning body samples. The explanatory memorandum does not indicate why these important and sensitive issues cannot be appropriately dealt with in the primary legislation. It is important that safeguards in relation to these matters should be put in place and it is not clear why these should be dealt with in delegated legislation. **The committee therefore seeks advice from the Minister as to why these issues should not be dealt with expressly in the bill.**

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

Minister for Health response - extract

Clause 91 (3) - Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the taking, labelling, transportation and storage of body samples should not be dealt with expressly in the Bill. Whilst the substantive powers relating to body samples are specified in the Bill; clause 91(3) allows for the making of regulations in relation to the taking labelling, transporting, storage, and use of body samples.

Clause 91(2) of the Bill specifies that body samples may only be required if an individual is subject to a Human Biosecurity Control Order, has undergone an examination at a specified medical facility, and may only be required for diagnosis of a Listed Human Disease. Before requiring an individual to provide body samples, clause 34 also requires that officers must be satisfied that this is an appropriate and adapted measure, and that it is the least intrusive and invasive measure that may be applied to address the disease risk in the circumstances. Finally, clause 94 requires that appropriate medical and professional

standards be used, and clause 95 specifies that force must not be used to oblige an individual to comply with a requirement to provide body samples.

The regulations are therefore intended to prescribe requirements relating to administrative matters only, for example, specifying that samples must be stored according to national standards applicable to laboratories where diagnostic testing is carried out.

Thank you for bringing these issues to my attention and I trust this information will address the concerns of the Committee.

Committee Response

The committee thanks the Minister for this response and **notes that it would have been useful had the key points above be included in the explanatory memorandum, including the fact that the regulations are intended to prescribe requirements relating to administrative matters only and relevant examples.**

As the bill has already passed the Senate the committee makes no further comment on this occasion.

Minister for Agriculture further response - extract

I thank the Committee for its recommendation that key information be included in the explanatory memorandums and enclose my addendums. I believe that the addendums provide the required amount of key information, clarity and assist with the interpretation of the legislation.

I have sent a copy of this letter to the Hon. Sussan Ley MP, Minister for Health.

Thank you again for your consideration of this important legislation and I trust this information is of assistance.

Committee Response

The committee thanks the Minister for this further response and notes that the addendums were tabled in the Senate on 11 May 2015. **The committee thanks the Minister for tabling these addendums, which contain key information that the committee had recommended be included in the explanatory memoranda.**

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Introduced into the House of Representatives on 19 March 2015
Portfolio: Attorney-General

Introduction

The committee dealt with this bill in *Alert Digest No. 4 of 2015*. The Minister responded to the committee's comments in a letter dated 10 April 2015. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2015 - extract

Background

This bill amends various Commonwealth Acts to:

- amend the operation of serious drug and precursor offences in the *Criminal Code Act 1995* (Criminal Code);
- clarify the scope and application of the war crime offence of outrages upon personal dignity in non-international armed conflict;
- expand the definition of forced marriage and increase penalties for forced marriages in the Criminal Code;
- amend the Criminal Code to insert 'knowingly concerned' as an additional form of secondary criminal liability;
- introduce mandatory minimum sentences of five years imprisonment for firearm trafficking;
- make technical amendments to the *Crimes Act 1914* (Crimes Act) in relation to sentencing, imprisonment and release of federal offenders;
- allow the interstate transfer of federal prisoners to occur at a location other than a prison;
- facilitate information sharing about federal offenders between the Attorney-General's Department and relevant third party agencies;
- amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to clarify internal operations and procedures of the Australian Transaction Reports and Analysis Centre;

- amend the *Law Enforcement Integrity Commissioner Act 2006* by clarifying the Integrity Commissioner functions and duties;
- amend the definition of 'eligible person' and clarify an examiner's power to return 'returnable items' during an examination under the *Australian Crime Commission Act 2002*;
- amend the *Proceeds of Crime Act 2002* (POC Act) to increase penalties for failing to comply with a production order or with a notice to a financial institution in proceeds of crime investigations;
- make minor and technical amendments to the POC Act;
- allow ICAC SA the ability to access information from Commonwealth agencies that relates to its investigations;
- update existing references to the Queensland Crime and Misconduct Commission to reflect its new name;
- amend the Crimes Act to clarify the operation of the controlled operations provisions in Part IAB; and
- make technical corrections to the *Classification (Publications, Films and Computer Games) Act 1995*.

Undue trespass on personal rights and liberties—reversal of burden of proof Schedule 4, item 3

The purpose of the amendments in schedule 4 'is to increase protections against forced marriage of children and persons with a disability who do not have the capacity to provide free and full consent to marriage' and to increase penalties for forced marriage offences to 'reflect the seriousness of forced marriage as a slavery-like practice'(statement of compatibility, p. 20).

Item 3 has the effect of creating 'a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony'. The result is that a defendant bears a legal burden of proof to establish the contrary on the balance of probabilities.

The **presumption of innocence** is a fundamental principle of the common law. In light of its significance, the committee has long taken the view that imposing a **legal burden** of proof on a defendant should be kept to a minimum. The committee also routinely raises concerns even about the imposition of an evidential burden on a defendant, though such provisions are easier to justify as the defendant need only adduce or point to evidence that suggests a reasonable possibility that the matter either does exist or does not exist and is thus easier to discharge. If the defendant discharges an evidential burden, the prosecution must then disprove the relevant matters beyond reasonable doubt.

The committee therefore expects any proposed imposition of a legal burden on defendants to be thoroughly justified and to address the relevant principles contained in the *Guide to*

Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the *Guide*).

As a general proposition, it may be easier to justify imposing a burden of proof on the defendant where 'a matter is peculiarly within the defendant's knowledge and not available to the prosecution' (*Guide*, at p. 50). The *Guide* (at p. 50) also suggests that 'creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.'

In some cases, the *Guide* further notes that it has been argued that reversal of the onus of proof may be justified where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.

The statement of compatibility and explanatory memorandum both provide some justification for the imposition of a legal burden on defendants. However, no attempt is made in the explanatory materials to justify the proposed approach on the basis that matter is peculiarly within the defendant's knowledge and not available to the prosecution.

The offence also carries very substantial penalties and the capacity of a person to consent to marriage is central to the question of culpability for the offence. The explanation offered does, however, refer to difficulties which may arise if only an evidential burden was imposed and to the gravity of the offences and the importance for the protection of the rights of children and persons with a disability that effective prosecution of the offences occur. The explanatory memorandum argues as follows (at p. 59):

> The imposition of a legal burden rather than an evidential burden is appropriate in this context. If an evidential burden applied, consistent with subsection 13.3(6) of the Criminal Code the defence would need only adduce or point to evidence that suggested the child was capable of understanding the nature and effect of a marriage ceremony. This low threshold might easily be discharged if the defendant adduced evidence that, for example, the child had been sexually active in the past or was otherwise mature for his or her age.
>
> Under Part II of the *Marriage Act 1961* (Cth), the marriageable age, or age at which a person can consent to marriage, is 18 years old. While there is an exception for a person between 16 and 18 years of age to marry a person over the age of 18, this relies on required consent (usually parental) and that an Australian court order is in force from a judge or magistrate authorising a marriage. Depending on the jurisdiction, the age at which a person is considered capable of consenting to sexual intercourse is generally 16 or 17 years old.
>
> In this context, it is reasonable and proportionate to place a legal burden on the defendant to prove, on the balance of probabilities, that a person under the age of 16 was capable of understanding the nature and effect of the marriage ceremony.

> The application of a legal burden is consistent with similar offences in the Criminal Code, including slavery and child sex offences outside Australia.

The statement of compatibility argues (at pp 22–23) that:

> The amendments also engage with the right to a fair trial, protected by Article 14 of the ICCPR. The amendments place a legal burden on the defendant to prove, on the balance of probabilities, that a person under the age of 16 was capable of understanding the nature and effect of a marriage ceremony. Laws which shift the burden of proof to the defendant can be considered a limitation on the presumption of innocence under Article 14(2) of the ICCPR, but will not violate that right so long as they are within reasonable limits which take into account the importance of the objective and maintain the rights of defence.
>
> The increase in the penalties for forced marriage may also be considered a limitation on the presumption of innocence under Article 14(2) of the ICCPR, as it imposes a more serious penalty for an offence where the burden of proof has been shifted to the defendant. The increase in the penalties for the forced marriage offences reflects the seriousness of forced marriage as a slavery-like practice, a form of gender-based violence and an abuse of human rights which puts people at risk of emotional and physical abuse, loss of autonomy and loss of access to education. It also ensures that the penalties for forced marriage align with the penalties for the most serious slavery-related facilitation offence of deceptive recruiting for labour or services, while keeping them lower on the continuum of seriousness than forced labour, which involves the ongoing exploitation of the victim. However, as noted above, in this context it is justified as it is necessary, reasonable and proportionate.
>
> While there is an exception under the Marriage Act for a person between 16 and 18 years of age to marry a person over the age of 18, this relies on required consent (usually parental) and that an Australian court order is in force from a judge or magistrate authorising a marriage. Depending on the jurisdiction, the age at which a person is considered capable of consenting to sexual intercourse is generally 16 or 17 years old. While the imposition of a legal burden may be considered a limitation on the presumption of innocence, in this context it is justified as it is necessary, reasonable and proportionate.

In light of these justifications the committee leaves the *general question* of whether the creation of a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony is appropriate to the Senate as a whole. However, the committee also emphasises its continuing view that applying a legal burden to displace a presumption should only be imposed in rare instances.

While the committee is aware of the significance of the conduct this provision is intended to address, the committee seeks the minister's more detailed explanation as to why an evidential burden is considered insufficient. The only justification provided is that this lower threshold 'might easily be discharged if the defendant adduced evidence that, for example, the child had been sexually active in the past or was otherwise mature for his or her age'. The committee is interested in whether this has

actually occurred and in any other considerations relevant to the imposition of a legal burden.

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

Minister's response - extract

In my view, the proposed imposition of a legal burden on the defendant in forced marriage matters involving children under the age of 16 is appropriate and in accordance with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

While there are limited exceptions available under the *Marriage Act 1961* (Cth) for a person aged between 16 and 18 years, in general child marriage is considered unacceptable in Australia. The forced marriage offences in the *Criminal Code Act 1995* (Cth) (Criminal Code) are intended to capture marriages to which a person does not freely and fully consent. Forced marriage is a slavery-like practice, a form of gender-based violence and an abuse of human rights which puts people at risk of emotional and physical abuse, loss of autonomy and loss of access to education. The marriage of a child who cannot freely and fully consent because he or she did not understand the nature and effect of a marriage ceremony should rightly be considered a forced marriage, and a danger not only to the health and safety of the victim but also to public health and safety standards.

The proposed amendments do not place a legal burden on the defendant to disprove that the child was married, but rather to prove that the child was capable of understanding the nature and effect of a marriage ceremony. Operational evidence has shown that forced marriage matters are likely to involve not only the spouse but also the family and community of the alleged victim, who would have peculiar knowledge of the child's relative maturity, personality, education and understanding. If only an evidential burden were imposed, the defendant or defendants would need only to point to evidence which *suggested a reasonable possibility* that the child was *capable* of understanding the nature and effect of a marriage ceremony, in order to discharge the burden. Evidence of the child's apparent maturity would be readily and easily available to the defendant or defendants.

Once an evidential burden was discharged, the burden would then shift back to the prosecution to rebut the evidence beyond reasonable doubt. Where the child's family and community were involved, and the child purported to have consented, the prosecution would not have a witness with personal knowledge of the child, making it extremely difficult to prove, beyond reasonable doubt, that the child was incapable of understanding the nature and effect of a marriage ceremony. The prosecution would need to rely on

expert opinion evidence, which would be expensive and may not be admissible. Even if increased by the proposed amendments, the penalties for forced marriage are at the lower end of those for the other human trafficking, slavery and slavery-like offences set out in Division 270 and 271 of the Criminal Code. The imposition of a legal burden is also consistent with other child marriage provisions in the Criminal Code relating to offences with higher penalties. Section 272.17 of the Criminal Code imposes a legal burden on a defendant to prove that, at the time of sexual activity between the defendant and a child outside of Australia, there existed a valid and genuine marriage between the parties. The offences to which section 272.17 relate carry penalties of up to 20 years imprisonment.

The importance of these amendments is illustrated by a recent matter investigated by the Australian Federal Police and referred to the Commonwealth Director of Public Prosecutions (COPP) for consideration. The matter involved a 12 year old girl who swore on oath that she fully consented to her marriage to a 26 year old man, which had been arranged by her family. The girl presented as articulate, confident and well-educated, and was adamant that she entered into the marriage of her own volition notwithstanding her age. The COPP was unable to find anyone from within the girl's family or community prepared to attest to the ceremony, and ultimately determined not to prosecute the matter for forced marriage offences as there were no reasonable prospects of success.

With a presumption that conferred only an evidential burden, in this case example the girl's 'husband' and relatives could have easily pointed to evidence of her apparent maturity. With the evidential burden discharged and without a witness that knew the girl, it would be extremely difficult for the COPP to prove beyond reasonable doubt that she was not capable of understanding the nature and effect of a marriage ceremony.

For the reasons set out above, I consider that imposing a legal burden on the defendant to prove on the balance of probabilities that a child under the age of 16 was capable of understanding the nature and effect of a marriage ceremony is reasonable, proportionate, and necessary to give proper operation to the proposed amendment.

Committee Response

The committee thanks the Minister for this response and notes the further justification provided for the proposed approach. **The committee requests that the key information above be included in the explanatory memorandum.**

The committee remains concerned generally about the application of a legal burden, but in the circumstances draws this matter 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. 4 of 2015 - extract

Trespass on personal rights and liberties—'knowingly concerned' measure Schedule 5

This measure reintroduces a form of secondary criminal liability into section 11.2, which will mean that 'where persons are knowingly and intentionally involved in the commission of an offence, they will be liable for the offence'. The explanatory memorandum argues (at p. 61) that:

> This measure will supplement existing forms of secondary liability, such as the aiding, abetting, counselling or procuring of an offence. This additional form of secondary criminal liability will enable the Commonwealth Director of Public Prosecutions (CDPP) to more effectively prosecute federal criminal offences, including offences regarding illegal substances (such as importation and trade in drugs), fraud, corruption and insider trading, which traditionally rely on the involvement of secondary persons. This form of secondary criminal liability previously existed in the *Crimes Act 1914* (Crimes Act). The CDPP has advised that the absence of this prosecuting option is a significant impediment, and has rendered certain prosecutions more complex and less certain. This form of secondary criminal liability previously existed in the *Crimes Act 1914* and will ensure that criminal liability can be effectively established for an accused's knowing involvement in the commission of an offence.

A decision was previously taken not to include this approach as part of the Model Criminal Code on account of its uncertainty and open-ended nature. The explanatory memorandum acknowledges this, but outlines a case for reintroduction (at pp 61–63), including that:

> This concept was not included in the drafting of the Criminal Code. Members of the Model Criminal Code Officers Committee (MCCOC) did not consider the concept necessary, finding that it added little in substance to the other forms of derivative liability, and was too open ended and uncertain than was appropriate for a general provision in a model code.[1]
>
> However, the absence of a 'knowingly concerned' form of criminal liability in Commonwealth legislation has since attracted judicial comment. In particular, Justice Weinberg of the New South Wales Court of Criminal Appeal stated in *Campbell v R* [2008] NSWCCA 214 that:

[1] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility* (Final Report, December 1992), i.

> 'the decision to omit the phrase 'knowingly concerned' from the various forms of complicity available under federal criminal law…appears to me to have left a lacuna in the law that was certainly never intended.'[2]

The committee notes the reasons why this approach was not originally included in the Model Criminal Code (outlined above and further in the explanatory memorandum). However, the justification for now reintroducing this form of secondary criminal liability into the Commonwealth Criminal Code does not give a detailed response to the view that this form of derivative liability is too open ended and uncertain. **While there is some discussion in paragraph 367 of the explanatory memorandum relating to the scope of the measure, given that uncertainty in the application of criminal offences means that the limits of liberty are not known with clarity, the committee seeks the Minister's more detailed advice about the scope, application and justification for the proposed approach.**

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

Minister's response - extract

Background

The concept of' knowingly concerned' was first included in the *Crimes Act 1914* when it was first enacted in 1914 and in the *Customs Act 1901* in 1910. The concept required proving that the acts shown to have been done by the defendant 'in truth implicate or involve him in the offence, whether it does show a practical connexion between him and the offence'.[3]

The Model Criminal Code Officers Committee (MCCOC) was established to agree to a framework for a Model Code that could be adopted by all jurisdictions. In 1992, MCCOC gave detailed consideration to including knowingly concerned in the Model Code.

MCCOC ultimately determined that the expression was less certain than was appropriate for a general provision defining the ambit of criminal responsibility for a new Code, and that the extended form of derivative liability was unnecessary as it added little in substance to the alternative formulation of 'aids, abets, counsels or procures.'

[2] *Campbell v R* [2008] NSWCCA 214, 173.

[3] *Ashbury v Reid* [1961J WAR 49 at 51.

MCCOC's findings were in contrast to those of the Review of Commonwealth Criminal Law Committee, chaired by Sir Henry Gibbs, (the Gibbs Committee), which found in 1987 that the concept had independent utility and merit and captured circumstances not amounting to participation as a principal offender, or an aider, abetter, counsellor or procurer.

Absence of knowingly concerned from the Criminal Code

The proposed reintroduction of knowingly concerned is in direct response to the operational constraints identified during prosecutions since the introduction of the Code in 1995. The COPP has advised that the absence of knowingly concerned is a significant impediment to the effective investigation and prosecution of key individuals involved in serious criminal activity, especially those who have organised their participation so as to be disconnected from the most immediate physical aspects of the offence. This creates particular difficulties for prosecuting persons involved in federal offences such as drug importation, money laundering and insider trading, where an accused's particular pattern of involvement is not neatly captured by an existing form of liability, because, for example, they have strategically distanced themselves from the crime. These difficulties have been exacerbated by changing technologies, which have enabled persons to involve themselves in crimes in ways that are increasingly remote and disconnected from the immediate aspects of the offence (for example, by engaging with co-offenders or conducting offences online), which may require proof of a particular pattern of involvement that is not neatly captured by an existing form of liability. These difficulties have been exacerbated by changing technologies, which have enabled persons to involve themselves in crimes in ways that are increasingly remote and disconnected from the immediate aspects of the offence (for example, by engaging with co-offenders or conducting offences online).

The Commonwealth Criminal Code (which is based on MCCOC's Model Code) came into effect in 1995. MCCOC's preferred formulation was included at section 11.2, which applies across the Commonwealth criminal law to extend criminal responsibility to persons who aid, abet, counsel or procure the commission of an offence. These existing forms of derivative liability capture criminal involvement at particular stages of an offence-generally, counsel and procure serve to criminalise conduct prior to the commission of offence, and aid and abet criminalise the conduct of persons present during the commission of the offence. A charge of joint commission (section 11.2A) or conspiracy (section 11.5) requires prosecutors to demonstrate that two or more offenders made an agreement prior to the commission of the offence, and that the accused committed an overt act pursuant to that agreement.

Charges of aiding, abetting, counselling or procuring an offence require complex, technical instructions to a jury and frequently result in more complex, lengthy and costly trials. In contrast, knowingly concerned captures intentional involvement in an offence, which requires prosecutors to demonstrate objective involvement in or connection to the offence, whether at a specific point in time or on an ongoing basis. A charge of knowingly concerned encourages the court to focus on the facts and evidence of precisely what

individuals have done in relation to the commission of an offence, thereby avoiding the need to, for example:

- establish a relationship between the accused and a principal offender to prove that the accused jointly commissioned an offence with, conspired with, aided, abetted, counselled or procured the principal offender

- prove that the conduct occurred at a particular point in time, that is, *prior* to the commission of the offence for counsel and procure, or *during* it for aid and abet, and/or

- adduce and rely upon evidence of co-offenders.

The absence of knowingly concerned has resulted in the CDPP regularly prosecuting persons who can be characterized as 'ringleaders' with charges of aiding, abetting, counselling or procuring (in effect, on the basis of accessorial liability). This has resulted in defendants effectively being charged with offences which do not accurately reflect their true criminality, possibly also affecting the sentences imposed upon ultimate conviction. The CDPP has further advised that accused persons are less likely to plead guilty to 'accessorial' charges than a charge that reflects their discrete individual responsibility, such as knowingly concerned.

The absence of 'knowingly concerned' as a form of criminal liability in Commonwealth matters has also attracted judicial comment. In particular, Justice Weinberg of the New South Wales Court of Criminal Appeal stated in *R v Campbell* [2008] NSWCCA 214 (2008) 73 NSWLR 272 that:

> the decision to omit the phrase 'knowingly concerned' from the various forms of complicity available under federal criminal law…appears to me to have left a lacuna in the law that was certainly never intended.

Scope and application

MCCOC's view that the provision was not appropriate for inclusion in the Model Code should not be equated with a finding that knowingly concerned is not capable of clear definition as a legal concept. The concept of knowingly concerned has a significant history in case and statute law. In addition to existing previously in the *Crimes Act 1914* (the Crimes Act) and the *Customs Act 1901* (the Customs Act), the formulation currently appears in the *Competition and Consumer Act 2010*, the *Corporations Act 2001* and the Australian Capital Territory's *Criminal Code 2002.*

As noted above, knowingly concerned captures intentional involvement in an offence, which requires prosecutors to demonstrate objective involvement in or connection to the offence, whether at a specific point in time or on an ongoing basis.

The measure would be inserted into the existing section 11.2 of the Criminal Code as an additional ground to the existing charges of aids, abets, counsels and procures. Knowingly

concerned will apply in the same manner as these forms of liability, to all Commonwealth offences, unless otherwise exempted (subsection 2.2(1) of the Criminal Code).

As is the case with the existing measures in section 11 .2 of the Criminal Code, there is no requirement that the principal offender be prosecuted or found guilty for the accused to be found guilty of being knowingly concerned.

To prove objective involvement in or connection to an offence, the prosecution will need to prove that an accused intentionally concerned themselves with the essential elements or facts of a criminal offence. Mere knowledge or concern *about* the offence is insufficient to make out a charge of knowingly concerned. For example, a person who learns that another person is making arrangements to import an illegal substance could not be found liable under this provision, as there is knowledge but no concern in the required sense of involvement.

The following additional examples, drawn from real cases, may serve to further illustrate the scope of knowingly concerned and the types of circumstances that it may apply to.

Example A - insider trading

The accused is one of two directors of a company. The second director has been convicted of insider trading and while he admits he was directed by the accused, he is unwilling to give evidence against him. There is evidence, however, that the second director and the accused had access to the same inside information at the same time and that, whilst the accused was not actively involved in the trades directly, the accused was aware the trades were occurring and was a recipient of a share of the proceeds from the insider trading activity deposited into a false name bank account which he had set up and over which he had control. Prosecutors are unable to rely on any evidence from the second director because his admissions are not legally admissible against the accused. Without the charge of knowingly concerned available, prosecutors will likely have to rely on the alternative charge of conspiracy. Conspiracy requires evidence that the accused made a specific agreement with the second director to commit insider trading offences, for which there may not be any or sufficient evidence . In addition, evidence of co-offenders is, as in this case, not always available. Where it is available it is often discounted by a jury and is more easily discredited by the defence. Equally, because the offending behaviour on the part of each director was made up of different acts it is difficult to make out a charge of joint commission.

If the charge of knowingly concerned were available, it would more appropriately reflect the accused's ongoing and intentional involvement in the insider trading offence.

Example B - corporate fraud

A company is charged with fraudulently using an official 'Australian Government certified' stamp on export documents for their products. It was common practice within the company to use the fake stamp. It is alleged that one of the company's CEOs had personally ordered the fake stamp and had commented to staff that producing the fraudulent documents was 'so easy, everyone should do it'.

Because the offending was a widespread corporate practice, charges have been laid against the company as the principal offender. Investigators are hoping to charge various company officers as agents in the fraud. In the absence of a charge of knowingly concerned, prosecutors may seek to pursue the company officers using 'secondary' charges of aiding and abetting the company (as the principal offender) to commit the fraud. This will require complex directions to the jury and may not appropriately capture the specific offending conduct on the part of the CEO, who intentionally and knowingly facilitated the fraud on an ongoing basis. In practice, at most a subset of the conduct will be able to be prosecuted without the availability of knowing concerned liability.

Committee Response

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

In the circumstances the committee draws this matter 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. 4 of 2015 - extract

Trespass on personal rights and liberties—retrospectivity
Schedule 14

This schedule makes what are described as a series of 'technical and procedural amendments' to the Proceeds of Crime Act '…to address ambiguity in the provisions, to streamline the appointment of proceeds of crime examiners and to support the administration of confiscated assets by the Official Trustee' (pp 7 and 8 of the statement of compatibility).

In relation to various provisions, such as those associated with the proposed change to the definition of 'related offence', the explanatory memorandum argues that while the amendments may apply retrospectively with respect to certain conduct, the provisions do not create retrospective criminal liability and therefore 'do not breach the prohibition in Article 15 of the *International Covenant on Civil and Political Rights*' (see pp 42 and 43, and also pp 107– 112, of the explanatory memorandum).

However, the Scrutiny of Bills Committee does not limit its assessment of retrospectivity to instances of criminal liability. The committee looks at whether provisions that have effect retrospectively might operate to the detriment of any person. (The committee also comments on provisions that are not technically retrospective, but nonetheless rely on antecedent facts in a way that might give rise to unfairness).

As the issues of detriment and any potential unfairness associated with retrospectivity outside the context of criminal liability are not addressed in the explanatory material, the committee seeks the Minister's advice about these matters in relation to all relevant provisions in schedule 14.

> *Pending the Minister's reply, the committee draws Senators' attention to the schedule, 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

Background

Schedule 14 makes a series of technical amendments to the POC Act and equivalent provisions in other Commonwealth Acts. I can advise the Committee that these amendments are partially retrospective in operation. The amendments:

- clarify that property only ceases to be the instrument or proceeds of an offence under paragraph 330(4)(e) of the POC Act if the property is successfully forfeited under an interstate forfeiture order (new paragraph 330(4)(e))

- clarify the definition of 'related offence' in the POC Act, the *Australian Federal Police Act 1979* (Cth) and the *Crimes (Superannuation Benefits) Act 1989* (Cth) and the definition of 'related foreign serious offence' in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to state that an offence is related to another offence if the offences form part of the same series of acts or omissions, or the physical elements of the two offences are substantially the same acts or omissions.

The Committee has sought advice on issues of detriment and potential unfairness associated with the retrospective operation of these provisions. My response to this request is set out below.

Paragraph 330(4)(e) (items 1 and 2 of Schedule 14)

Paragraph 330(4)(e) of the POC Act currently provides that property will cease to be the proceeds of an offence or an instrument of an offence for the purposes of the POC Act if an interstate restraining order or an interstate forfeiture order is satisfied in respect of the property. As stated in the Explanatory Memorandum, it was not intended, when paragraph 330(4)(e) was originally drafted, that an order issued under the POC Act should cease due to the existence of an *interim* State or Territory confiscation order on the property. New paragraph 330(4)(e) clarifies that property only ceases to be the instrument or proceeds of an offence if the property is successfully forfeited under the interstate order.

This measure is partially retrospective in operation because the amendment may apply to property that was subject to an interstate order made prior to the commencement of the provision. This simply ensures that a court can make an appropriate determination of whether property has ceased to be the proceeds or instrument of an offence for the purposes of the POC Act by considering all relevant State or Territory restraining orders, regardless of when those orders were made.

In my opinion, this retrospectivity does not result in any detriment or unfairness to a person whose property or assets are subject to the relevant orders made prior to the commencement of this provision. In these circumstances, proceeds of crime authorities in the relevant jurisdictions must have already satisfied a court that the property should be restrained, and of the basis on which this restraint should occur. The amendment does not affect the nature of these orders or allow for the making of any new confiscation order retrospectively.

Section 338 (definition of *related offence)* (items 3 and 4 of Schedule 14) in the POC Act and amendments in corresponding Commonwealth Acts

As noted in the Explanatory Memorandum, the purpose of the amendments in this schedule is to clarify the definition of 'related offence' in the POC Act, the *Australian Federal Police Act 1979* (Cth) and the *Crimes (Superannuation Benefits) Act 1989* (Cth) and the definition of 'related foreign serious offence' in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to state that an offence is related to another offence if the offences form part of the same series of acts or omissions, or the physical elements of the two offences are substantially the same acts or omissions.

The definition of 'related offence' is relevant to the question of whether a restraining order made under these Acts can continue to operate in appropriate circumstances where there are changes to the nature of the circumstances of the case against the offender. A drafting deficiency in the definition of 'related offence' has meant that it was possible that a

restraining order would cease despite a person being charged with multiple offences undertaken in a single series of criminal conduct, if these offences have different physical elements. The new definition of 'related offence' explicitly provides that an offence is 'related' to another offence not only if the physical elements of the two offences are substantially the same acts or omissions, but also if the physical elements of the two offences are acts or omissions in a single series of conduct.

This definition is considered partially retrospective because it may apply in relation to related offences that occurred prior to the commencement of the measures. This is to ensure that the court can appropriately determine the totality of a person's conduct, including acts or omissions that occurred before commencement, when considering the status of the restraining order following the commencement of Schedule 14.

I do not consider that the retrospective operation of this provision adversely affects the rights of a person subject to an existing restraining order. A restraining order under the POC Act and the corresponding Commonwealth Acts is an interim order that preserves property by restricting a person's ability to dispose of or otherwise deal with it, pending a final confiscation or forfeiture order step in the confiscation process. If the definition of 'related offence' did not apply retrospectively, a person would be able to frustrate the order by arguing about the precise point in time at which he or she is alleged to have engaged in the relevant course of conduct. In addition, there would be inconsistency in the way that the status of existing orders was considered by the court. Nothing in Schedule 14 affects these rights or the court's discretion under the POC Act, or the other relevant Commonwealth legislation to refuse to make either restraining orders or confiscation orders in certain circumstances. Nor does the measure affect any of the general appeal rights in the POC Act.

Committee Response

The committee thanks the Minister for this detailed response. The committee notes that in relation to items 1 and 2 the information provided satisfies the committee's inquiry. However, in relation to items 3 and 4, the committee does not agree that there is no adverse effect and is of the view that the ability for a person to dispose of or otherwise deal with restrained property could be retrospectively constrained. **The committee draws this matter to the attention of Senators and leaves consideration of whether the proposed approach is appropriate to the consideration of the Senate as whole.**

Defence Trade Controls Amendment Bill 2015

Introduced into the House of Representatives on 26 February 2015
Received Assent 2 April 2015
Portfolio: Defence

Introduction

The committee dealt with this bill in *Alert Digest No. 3 of 2015*. The Minister responded to the committee's comments in a letter dated 9 April 2015. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2015 - extract

Background

This bill amends the *Defence Trade Controls Act 2012* to:

- delay the commencement of offence provisions by 12 months to ensure that stakeholders have sufficient time to implement appropriate compliance and licensing measures;
- require approvals only for sensitive military publications and remove controls on dual-use publications;
- require permits only for brokering sensitive military items and remove controls on most dual-use brokering (subject to international obligations and national security interests); and
- provide for a review of the Act two years after the commencement of section 10 and for the Minister to table a copy of the review report in each House of Parliament.

Delegation of legislative power—important matters in regulations
Schedule 1, item 51, proposed section 25A

This item adds a new provision which requires the Minister, a delegate of the Minister, or the Secretary, when deciding whether an activity will prejudice the security, defence or international relations of Australia, to have regard to criteria prescribed by regulations. Proposed paragraph 25A(b) provides that regard may also be had to 'other matters that the Minister, delegate of the Minister or Secretary considers appropriate'.

The committee expects that important matters will be included in the primary legislation unless a strong justification is provided. **As the explanatory memorandum does not address this issue, the committee seeks the Minister's justification for specifying the criteria in regulations and not in the bill.**

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

The Committee sought further information on why the criteria for deciding whether an activity will prejudice Australia ·s security, defence or international relations are to be specified in regulations, rather than the primary legislation.

Australia's export controls operate to ensure that military and dual-use goods are exported, supplied, published and brokered responsibly and that Australia meets its obligations under the major arms and dual-use export control regimes of which Australia is a member.

Australia's legislative framework governing export controls provides mechanisms that apply a necessary degree of scrutiny to proposed export, supply, publication and brokering activities. This assists in ensuring that the defence, security and international relations of Australia are not compromised. Under clause 25A of the Bill, a decision whether to refuse or allow these activities will be made in accordance with the criteria set out in the regulations.

The policies and procedures underpinning Australia's export controls need to be flexible in order to consider changes in military and dual-use goods and technology, the use and delivery of those goods and technology, Australia's strategic priorities, and threats to regional and international security.

Due to the constantly changing nature of the export control environment, it would not be appropriate to include a set of fixed criteria in the Bill. The delegation of legislative power is appropriate in this instance as it allows the criteria be amended in a timely manner so they can remain relevant to the prevailing export control environment and risks. This will enhance national security while providing adequate flexibility to Government to respond to stakeholder feedback and meet our international obligations.

Committee Response

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum**.

Enhancing Online Safety for Children Bill 2014

Introduced into the House of Representatives on 3 December 2014
Portfolio: Communications

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 27 February 2015. The committee sought further information and the Minister responded in a letter dated 24 March 2015. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2015 - extract

Background

This bill:

- establishes the Children's e-Safety Commissioner and the Commissioner's functions and powers;
- provides for complaints systems for cyber-bullying material targeted at an Australian child to be removed quickly from large social media sites; and
- establishes a Children's Online Safety Special Account to fund the Commissioner's activities.

Delegation of legislative power
Paragraph 5(1)(c)

This paragraph provides that the legislative rules may add to the conditions which must be satisfied for material to constitute 'cyber-bullying material targeted at an Australian child'. Clearly the definition of what material constitutes cyber-bullying for the purposes of the bill is a matter of central significance to the operation of the regulatory scheme.

The explanatory memorandum (at p. 67) justifies the inclusion of this rule-making power by suggesting that it may be necessary to include other conditions in the test of what constitutes of cyber-bullying material 'should it become apparent during the course of administering the legislation, that further conditions should be specified'.

The committee notes that although rule-making may, in some contexts, be considered appropriate on account of the need to make frequent regulatory adjustments in consequence of conditions of uncertainty or rapid change, it is not immediately clear why frequent adjustments to the nature of the basic test for cyber-bullying set out in subclause 5(1) are likely to be necessary. In considering the necessity of this rule-making power, the

committee notes that paragraph 9(1)(b) provides that the legislative rules may specify an electronic service as a 'social media service' and paragraph 9(4)(b) provides that the legislative rules may specify that a service is an exempt service. It appears that these rule-making powers provide a mechanism for the regulatory scheme to be adjusted in response to the changing nature of social media.

Overall, it appears that the bill seeks to balance, on the one hand, freedom of expression and, on the other hand, rights protective of honour, reputation and privacy.

Noting the above, and the central importance of the test of 'cyber-bulling material targeted at an Australian child' (in clause 5) to the operation of the bill and the fact that this definition is relevant to any consideration of the appropriateness of the balance achieved between competing rights, **the committee seeks the Minister's advice as to why it is not considered more appropriate that any adjustments to this test be brought directly before the Parliament through proposals to amend the primary Act.**

> *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 first response - extract

1. Clause 5(1)(c) - Delegation of legislative power

The Committee sought advice as to why it is not considered more appropriate that any adjustments to the test of 'cyber-bullying material targeted at an Australian child' be brought directly before the Parliament through proposals to amend the primary Act rather than through legislative rules.

Clause 5 of the *Enhancing Online Safety for Children Bill 2014* (the Bill) sets out the test for when material is considered 'cyber-bullying material targeted at an Australian child'. Clause 5(1)(c) allows for inclusion of 'such other conditions (if any) as set out in the legislative rules'. The effect of 5(1)(c) is to enable exceptions to be made to certain types of material from being considered 'cyber-bullying material targeted at an Australian child'. There may be instances in which it would be warranted to exclude material which might otherwise be considered 'cyber-bullying material targeted at an Australian child'. One such example is the exception set out in clause 5(4), which relates to authority figures, such as parents, teachers and employers.

However, there is an enormous range of human behaviour exhibited in online communication, and it is not possible to envisage every type of exception to the definition that may be required. Clause 5(1)(c) has been included to allow flexibility in the definition

so that the scheme may be adapted quickly should the Commissioner receive large numbers of complaints about ‘cyber-bullying material targeted at an Australian child’ which ought not to be captured within the scheme. This will enable a quick response to circumstances that only become apparent during the course of administering the legislation.

I note the Committee’s comment that amendments to an Act is ideally preferred to subordinate legislation. However, given the lead times in developing and passing legislative amendments, the ability for legislative rules to set out any additional conditions that may be appropriate greatly increases the timeliness of any response to new trends.

Legislative rules would of course still be subject to Parliamentary scrutiny and disallowance.

Committee's first response

The committee thanks the Minister for this response and notes the explanation in relation to a possible need to respond quickly to exclude conduct 'which ought not to be captured within the scheme'. The committee also notes that the subordinate legislation can only exclude possible conduct rather than extend the scope of the scheme, and notes that any rules will be disallowable.

In light of the intention to rely on delegated legislation for this significant aspect of the scheme, and noting the 'enormous range of human behaviour exhibited in online behaviour' and that it is 'not possible to envisage every type of exception to the definition that may be required', it appears to the committee that the content of any relevant legislative instrument may involve complex and difficult drafting to ensure the exception itself is appropriately constructed. **The committee therefore seeks the Minister's further advice as to whether consideration has been given to ensuring that expert drafters will be involved in the preparation of any subordinate legislation created under paragraph 5(1)(c). In this context, the committee notes that requiring such instruments to be made as regulations (rather than rules) would ensure that these instruments are drafted by the Office of Parliamentary Counsel.**

Minister's further response - extract

The Committee sought further advice as to whether consideration has been given to ensuring that expert drafters will be involved in the preparation of any subordinate legislation created under paragraph 5(l)(c) of the Online Safety Bill.

Clause 5 of the Online Safety Bill sets out the test for when material is considered 'cyber-bullying material targeted at an Australian child'. Paragraph 5(1)(c) allows for inclusion of' such other conditions (if any) as set out in the legislative rules' .

I note the Committee's comment that the content of any relevant legislative instrument made under paragraph 5(l)(c) of the Online Safety Bill may involve complex and difficult drafting.

In keeping with standard practice, it is intended that relatively simple legislative instruments would be drafted by the Department of Communications' Office of the General Counsel. Specialist drafting expertise would be sought, as appropriate, for the drafting of any more complex instruments.

As mentioned previously, any legislative rules created under paragraph 5(1)(c) of the Online Safety Bill would be subject to Parliamentary scrutiny and disallowance.

Thank you for providing the opportunity to respond to this issue. I hope the information will be of assistance.

Committee Further Response

The committee thanks the Minister for this further response and notes the proposed approach to the drafting of legislative instruments, which will include specialist drafting expertise for more complex instruments. **The committee draws this matter to the attention of the Regulations and Ordinances Committee for information.**

Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]

Introduced into the House of Representatives on 19 March 2015
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 4 of 2015*. The Minister responded to the committee's comments in a letter dated 10 April 2015. A copy of the letter is attached to this report.

Alert Digest No. 4 of 2015 - extract

General comment

A version of this bill was first introduced into the House of Representatives on 14 November 2013 and the committee commented on it in *Alert Digest No. 9 of 2013.* The Minister's response to the committee's concerns was then published in its *Fourth Report of 2014.*

An identical bill was introduced into the Senate on 17 July 2014 and the committee commented on it in *Alert Digest No. 7 of 2014.* The Minister's response to the committee's concerns was then published in its *Ninth Report of 2014.*

This bill is also in identical terms to the bills mentioned above. As the committee's earlier comments are still relevant to this bill, the committee repeats relevant information from *Alert Digest No. 7 of 2014*. The committee also notes that in relation to some provisions it had requested that the Minister include additional information in the explanatory memorandum. **The committee notes its disappointment that the Minister did not take the opportunity to include this information in the explanatory memorandum before the current bill was introduced. In requesting that important information be included in an explanatory memorandum, the committee's intention is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.**

Background

This bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;

- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

Trespass on personal rights and liberties—penalties (new offence provisions)
Various

In the committee's consideration of the previous bill, the committee noted that the statement of compatibility lists the **new offence provisions** which the bill proposes to introduce into the RO Act (at page 8, under the heading 'Right to the presumption of innocence and other guarantees), but unfortunately the explanatory material provided little explanation of the specific proposals included in the bill. The committee therefore sought clarification from the Minister as to (1) the extent of similarities between these offences and offences under the Corporations Act, (2) whether the penalties are in any instance higher than in relation to offences under the Corporations Act; and (3) particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for 2 years, or both is higher than other similar offences and the justification for the proposed approach.

In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should 'generally be 6 months imprisonment and/or a fine of 30 penalty units'. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act 2002*. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level.

In response to the committee's request for clarification the Minister provided a table which sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. The Minister stated that the relevant provisions of the bill largely replicate the provisions of these Acts. The table is available on pages 26–32 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

The Minister also provided a table which compares the penalties for the proposed offences in the bill and corresponding offences under the Corporations Act and the ASIC Act. The Minister stated that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, the Minister noted that the penalties for

strict liability offences under item 223 (relating to the conduct of investigations) have not replicated imprisonment terms but have instead increased the maximum pecuniary penalty to 60 penalty units. The Minister also stated that the penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) is greater than the equivalent ASIC Act penalty (5 penalty units) to 'ensure consistency with other similar offences under the Bill'. The table is available on page 33 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

Finally, the Minister stated that the penalties for the offences proposed by item 228 (proposed subsection 337(1)) are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. The Minister stated that this 'approach is consistent with the Government's policy for the regulation of registered organisations, namely that the penalties and offences under the ASIC Act are appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers.'

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 131). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Trespass on personal rights and liberties—strict liability
Schedule 2, item 230, proposed section 337AA

Proposed subsections 337AA(1) and (2) provide that certain offences in relation to the conduct of an investigation are strict liability offences. These are offences for:

> (a) failure to comply with a requirement to take an oath or affirmation (subsection 335D(1));
> (b) contravention of a requirement that questioning take place in private (subsection 335E(2));
> (c) failure to comply with a requirement in relation to a record of a statement made during questioning (paragraph 335G(2)(a));

(d) contravention of conditions on the use of copies of records of statements made during questioning (section 335H); and
(e) failure to comply with a requirement to stop addressing an investigatory or questioning an attendee (subsection 335F(2)).

In justification of the use of strict liability, the statement of compatibility (at p. 9) argues that:

1. each offence relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation;
2. there is a defence of reasonable excuse (though the evidential burden of proving this is placed on the defendant), and
3. the offences are 'regulatory in nature' and not punishable by a term of imprisonment.

The maximum penalty (60 penalty units) is the maximum recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences.

Although the points made in the statement of compatibility are noted and the defence of reasonable excuse does ameliorate the severity of strict liability (point 2 above), the committee notes that the vagueness of this defence may make it difficult for a defendant to establish (this is also identified in the *Guide to Framing Commonwealth Offences*). In addition, given that the offences occur within the context of an investigator questioning a person (point 1 above) it is not clear why a requirement to prove fault would undermine the enforcement of the obligations (e.g. why strict liability is necessary).

In its consideration of the previous bill, the committee therefore sought a more detailed explanation from the Minister as to why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration had been given to placing a requirement (where relevant) on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The Minister stated in his response to the committee that the proposed strict liability offences replicate offences relating to enforcement of identical obligations under the ASIC Act (see item 230, proposed section 337AA of the Bill and sections 21, 22, 23, 24, 26 and 63 of the ASIC Act). The Minister noted that it is the government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the Registered Organisations Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing Commonwealth Offences* (p.24), the Minister stated that it is worthwhile to note that:

- the offence is not punishable by imprisonment and the fine does not exceed 60 penalty units; and

- taking into account the similarities between the regulation of the corporate governance of companies and registered organisations, strict liability is appropriate as it is necessary to ensure the integrity of the regulatory framework for registered organisations.

In relation to whether consideration had been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence the Minister stated that the manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, the Minister expects that the RO Commission will develop materials, such as guidelines, standard forms and educational material to deal with its approach to investigations, similar to the approach currently taken by ASIC.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the Minister's expectation that the RO Commission will develop materials, such as guidelines, standard forms and education materials to deal with its approach to investigations. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 133). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Trespass on personal rights and liberties—reversal of onus of proof
Schedule 2, items 229, proposed subsections 337(2) to (4) and 230, proposed subsection 337AB(2)

The proposed subsection provides for a 'reasonable excuse' defence in relation to 'obstructing a person' in the exercise of a number of powers of investigation. The use of a defence shifts the burden of proof from the prosecution to the defence, and as noted above, the vagueness of the 'reasonable excuse' defence may make it unclear what a person must prove to rely on this defence. The explanatory material does not include a justification for placing an evidential burden of proof.

Similarly, defences proposed by item 229 (proposed subsections 337(2)-(4)) which relate to offences for failing to adequately comply with a notice to produce or attend do not explain the justification for placing an evidential burden of proof on the defendant.

The committee therefore sought the Minister's advice as to the justification for reversing the onus of proof for these provisions. In the Minister's response he noted that proposed subsections 337(2)–(4) and 337AB(2) replicate subsections 63(5)–(8) of the ASIC Act and that this aligns with the government's policy for the regulation of registered organisations (which is to ensure that the defences to the offences are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof). In this respect the Minister noted that the *Guide to Framing Commonwealth Offences* (at p. 51) provides that an evidential burden of proof should generally apply to a defence.

The Minister stated that it is appropriate that the matters in proposed subsections 337(2)–(4) be included as offence-specific defences, rather than elements of the offence, as these matters are both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

Further, the Minister stated that it is important that the committee have regard to the fact that these new offences (including proposed section 337AC, addressed below) are central to the investigative framework of the RO Commission. In this regard the Minister suggested that:

> …recent investigations of the Fair Work Commission (FWC) into financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework is not sufficient. Having an investigatory body with powers to prevent unnecessary frustrations of its legitimate functions as an investigator is central to remedying the insufficient framework and restoring the confidence of members that the management of registered organisations is sufficiently accountable and transparent and that their membership contributions are being used for proper purposes.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 135). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Trespass on personal rights and liberties—reversal of onus of proof
Schedule 2, item 230, proposed subsection 337AC(2)

The subsection provides for a defence for a contravention of the offence of concealing documents relevant to an investigation if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. In addition to placing the burden onto the defendant, a justification for placing the higher standard of a *legal* burden of proof was not located in the explanatory material. The committee therefore sought the Minister's advice as to the justification for these matters.

The Minister noted in his response to the committee that, in accordance with the government's policy, section 337AC replicates section 67 of the ASIC Act, which provides for a defence in identical terms to subsection 337AC(2) and a legal burden of proof. The Minister stated that the offence in proposed subsection 337AC(1) is very important in terms of the integrity of the investigations framework under the bill, which is central to the bill's objectives and that the maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

The Minister further stated that it is appropriate that the matter referred to in proposed subsection 337AC(2) be included as an offence-specific defence with a legal burden of proof rather than an element of the offence as it is both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 136). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Trespass on personal rights and liberties—privilege against self-incrimination
Schedule 2, item 230, proposed section 337AD

Subsection 337AD(1) provides that for the purposes of powers conferred under Part 4, Chapter 11 (as proposed to be amended), it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record that doing so might tend to incriminate a person or make them liable to a penalty.

This abrogation of the important common law privilege against self-incrimination is justified on the basis that it pursues the objective of ensuring that offences under the RO Act can be properly investigated and that the limitation on the privilege is proportionate and reasonable to this objective because a *use* and *derivative use* immunity is provided for. It is noted however, that these immunities will only be applicable if a person 'claims that the information, producing the document, or signing the record might tend to incriminate the person or make the person liable to a penalty' (proposed subsection 337AD(2)).

This justification in the explanatory memorandum does little more than assert the importance of the objective of enforcing the legislation. The committee notes that it does not normally take the view that the inclusion of a *use* and *derivative use* immunity mean that no further justification for abrogation of the privilege is required. In addition, the requirement that a person 'claim' the privilege before responding to a request for information, a document or record is unusual and is not explained or justified in the explanatory memorandum or statement of compatibility. The committee therefore sought the Minister's further advice as to the justification for the proposed approach.

The Minister noted in his response to the committee that, in accordance with the government's policy, proposed new section 337AD closely follows the privilege against self-incrimination in section 68 of the ASIC Act. The Minister stated that the proposed abrogation is necessary in order to ensure the RO Commissioner has all available evidence to enforce obligations under the RO Act. If the RO Commissioner is constrained in their ability to collect evidence, the entire regulatory scheme may be undermined.

In relation to the inclusion of a use immunity but not a derivative use immunity in proposed section 337AD the Minister stated that:

> The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (ASC) (now ASIC) were amended to remove derivative use immunity. The explanatory memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 [at p. 1] provides that derivative use immunity placed:

> *…an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity…*

The Minister stated that the government believes that the absence of a derivative use immunity, in relation to the information-gathering powers of the RO Commission, is reasonable and necessary for the effective prosecution of matters under the RO Act.

In response to the committee's question about the requirement that a person 'claim' the privilege before responding to a request for information the Minister stated that:

> Following section 68 of the ASIC Act, the requirement to claim the privilege is procedurally important as it allows the RO Commissioner to obtain all information relevant to an investigation while still protecting the person the subject of the relevant notice against the 'admissibility' of the information provided pursuant to the notice in evidence in proceedings against the person under proposed subsection 337AD(3).
>
> Generally, concerns about the requirement to claim an immunity focus on the assertion that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. There are, however, important safeguards which limit this risk. Proposed new subsection 335(3) provides that a person required to attend the RO Commission for questioning must be provided with a notice prior to the giving of information that:
>
> - provides information about the 'general nature of the matters to which the investigation relates' (subsection 335(3)(a)); and
> - informs the person that they may be accompanied by another person who may, but does not have to be, a lawyer (subsection 335(3)(b)); and
> - sets out the 'effect of section 337AD' (subsection 335(3)(c)).
>
> As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will know that they have the right to claim use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the safeguards outlined by the Minister, but stated that it remains concerned about the requirement to claim the privilege or lose the ability to rely on it. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 139). **The committee notes that this information is not in the explanatory memorandum to the current bill and requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee draws this provision to the attention of Senators (particularly the requirement to claim the privilege or lose the ability to rely on it) and leaves the question of whether the proposed approach is appropriate to the consideration of 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.*

Trespass on personal rights and liberties—rules of evidence
Schedule 2, item 230, proposed section 337AF-337AK

These provisions establish rules relating to the admissibility of, and weight to be given, to specified evidence. The explanatory memorandum essentially restates the terms of the provisions and does not provide information as to the justification for the provisions or comparative information about their effect. In the committee's consideration of the previous bill the committee was particularly interested in whether the provisions are designed to broaden the scope of admissible evidence against a defendant and, if so, the rationale for the proposed approach. The committee therefore sought the Minister's advice as to the effect of, and rationale for, these provisions.

In response to the committee's request the Minister stated that these provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation (see *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301). The Minister further contended that, similar to the ASIC Act, it is not intended that these provisions will render evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding had proposed new Division 7 not been enacted (item 230, proposed section 337AL, which reflects section 83 of the ASIC Act).

The Minister's response explained that the proposed new sections 337AF and 337AG provide a means for the admissibility of statements made on oath or affirmation by an attendee in an examination pursuant to paragraph 335(2)(c) of the Act. These provisions are facilitative and supplement the means available to adduce evidence of statements made at an examination as original evidence to prove the fact contained in the statement or to prove another fact in issue in the proceedings.

In relation to proposed section 337AF, the Minister stated that the section provides for the admissibility in evidence of statements made by an attendee in an examination pursuant to paragraph 335(2)(c) where the proceedings are against the attendee. The response pointed out that the admissibility of the statement in evidence is subject to the limitations in proposed paragraphs 337AF(1)(a)–(d), which protect the attendee against:

- self-incrimination;

- irrelevance;
- the statement being misleading by virtue of associated evidence not having been tendered; and
- the statement disclosing a matter in respect of which the person could claim legal professional privilege.

With regard to proposed section 337AG, the Minister's response restated that the explanation in the explanatory memorandum that the proposed section provides that if evidence by a person (defined as the 'absent witness') of a matter would be admissible in a proceeding, a statement that the absent witness made in an examination during an investigation that tends to establish that matter is admissible if it appears that the absent witness is unable to attend as a witness for the reasons set out in proposed subparagraphs 337AG(1)(a)(i)–(iii). The Minister added that such evidence will not be admissible if the party seeking to tender the evidence of the statement fails to call the absent witness as required by another party and the court is not satisfied of one of the matters in proposed subparagraphs 337AG(1)(a)(i)–(iii).

The response to the committee's concerns over proposed sections 337AH-337AJ again restated the information provided in the explanatory memorandum. The Minister explained that the proposed section 337AH provides for the weight a court is to give to evidence of a statement admitted under proposed section 337AG, and proposed section 337AJ provides for a pre-trial procedure for determining objections to the admissibility of statements made on oath or affirmation during an investigation.

In relation to proposed section 337AK the Minister's expanded on the explanation provided in the explanatory memorandum by stating that the proposed section facilitates admission into evidence of copies or extracts from documents relating to the affairs of an organisation as if the copy was the original document or the extract was the relevant part of the original document. The response argued that the proposed provision, which is based on section 80 of the ASIC Act, is important as where it is convenient to copy and return or take extracts from documents produced pursuant to a request made under paragraph 335(2)(b) of the RO Act, this can be done without difficulties relating to the admissibility of the copy or extract. After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 141). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of 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

As the issues raised regarding the Bill have been thoroughly scrutinised by the Committee in relation to previous versions of the Bill introduced in 2013 and 2014, I rely on my earlier correspondence with the Committee on these issues.

Committee Response

The committee thanks the Minister for this response and repeats its view that it **is unclear why the Minister is not taking the opportunity to ensure that important information is included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (section 15AB of the *Acts Interpretation Act 1901*). The committee notes that amendments to explanatory memoranda are usually able to be implemented without affecting the timing of parliamentary consideration of the bill.**

Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015

Introduced into the House of Representatives on 25 February 2015
Portfolio: Immigration and Border Protection

Introduction

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

Alert Digest No. 3 of 2015 - extract

Background

This bill amends the *Migration Act 1958* to:

- provide a framework for the use of reasonable force in specified circumstances by authorised officers within immigration detention facilities; and
- establish a complaints mechanism relating to the exercise of power to use reasonable force.

Undue trespass on personal rights and liberties
Rights unduly dependent upon insufficiently defined administrative powers
Schedule 1, item 5, proposed Division 7B

The purpose of this bill is to empower an 'authorised officer' to use reasonable force in an immigration detention facility. The new powers are justified, in the explanatory memorandum, by reference to the need to provide safe and secure immigration detention facilities and a claimed increase in the number of 'high risk detainees' (p. 1).

Proposed subsection 197BA(1) provides that 'an authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to: (a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or (b) maintain the good order, peace or security of an immigration detention facility.' Proposed subsection 197BA(2) provides for a non-exhaustive list of examples of the circumstances in which reasonable force may be used, though as emphasised in the explanatory memorandum it is not intended that this limit the circumstances in which force is authorised pursuant to subsection 197BA(1).

In addition to the provisions authorising the use of reasonable force, the bill also provides that the Minister must determine, in writing, training and qualification requirements which

must be fulfilled prior to an officer being designated as an authorised officer (and thus an officer who may use reasonable force pursuant to section 197BA).

The bill also provides for a complaints mechanism in relation to the use of force under section 197BA. This mechanism allows for complaints to be made to the Secretary and requires that a complaint be in writing, signed by the complainant, and that the matter complained about be described (subsection 197BB(1) and (2)). The Secretary is required to provide appropriate assistance to a person who wishes to make a complaint (subsection 197BB(3)). The bill provides for the investigation of complaints (though the conduct of investigations is left to the Secretary's discretion). The Secretary may refer or transfer the complaint to the Ombudsman or transfer the complaint to the Commissioner of the AFP or the equivalent officer in a State or Territory police force (see sections 197BC and 197BE). The Secretary may decide not to investigate a complaint in a number of specified circumstances, including that the investigation or a further investigation is not justified in all the circumstances (see section 197BD). If the Secretary decides not to investigate the complaint or not to investigate it further, then written notice and reasons must be provided to the complainant (see subsection 197BD(2)). The complaints mechanism does 'not restrict a person from making a complaint directly to another agency, including the Ombudsman or a police force' (explanatory memorandum, p. 2).

The above provisions raise a number of issues which are of concern from a scrutiny perspective.

Undue trespass on personal rights and liberties

Clearly the use of force against persons is apt to limit a variety of important personal rights and liberties. In this respect it is noteworthy that the use of force is not limited to situations where such force is necessary to protect the life, health or safety of persons. In those situations, there is an argument that rights may need to be restricted by the use of force because important competing rights require protection. However, under the provisions of the bill use of force is also authorised to 'maintain the good order, peace or security of an immigration detention facility.'

The following two matters of concern may be raised about whether the trespass on personal rights authorised by subsection 197BA(1) may be considered undue. The matters can be stated independently, though the significance should be considered cumulatively. It should also be noted that concerns (see below) about aspects of the bill which may be considered to make the rights unduly dependent upon insufficiently defined administrative powers and to make rights and liberties unduly dependent on non-reviewable decisions, are also relevant to a general consideration of whether the police-like powers proposed by the bill may be considered to unduly trespass on personal rights and liberties.

Scope and extent of the powers

The powers are framed in very broad terms. As the explanatory memorandum (at p. 20) indicates, employees of Immigration Detention Services Providers currently rely on common law powers to contain any disturbances within immigration detention facilities. Under these powers, force will only be considered to have been exercised lawfully if the exercise of force is objectively reasonable in the circumstances. Under the power proposed in subsection 197BA(1) the legality of the use of force would turn, rather, on an authorised officer's subjective personal assessment of the situation and what the officer believed, on reasonable grounds, was necessary force to either (a) protect the life, health or safety of any person in an immigration detention facility *or* (b) maintain the good order, peace or security of an immigration detention facility.

This constitutes a very significant increase in powers to employees of Immigration Detention Services Providers who are authorised officers. Indeed, the scope and extent of these powers is acknowledged in the statement of compatibility, where they are described accurately as 'police-like powers' (at p. 25). The statement of compatibility states that it is undesirable to rely on common law powers as the scope and extent of those powers is unclear (p. 23). On the other hand, it may be that this approach may encourage a cautious approach to the use of force and that this is appropriate. Certainty about the scope and extent of increased powers to use force cannot be regarded as beneficial unless the underlying case for the conferral of those powers has been established.

Although the explanatory materials do offer a general justification for the extension of police-like powers to 'authorised officers', the committee notes that a justification to confer police-like powers on persons who are not sworn police officers should include a more detailed explanation and supporting arguments to establish the necessity and appropriateness of such powers. **The committee therefore seeks a more detailed justification for the necessity and appropriateness of these powers. In addition, the committee seeks the Minister's advice in relation to:**

- **whether there are other examples of administrative forms of detention where detaining officers are given police-like powers similar to those included in this bill; and**
- **how these powers compare to powers granted under legislation to use force to protect the life, health and safety of persons, and to maintain the order, peace or security of a prison.**

The committee emphasises that its overriding scrutiny concern is to understand the justification for these extraordinary powers, which has not yet been adequately established by the material available.

> *Pending the Minister's reply, the committee draws Senators' attention to this matter, 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

Rationale

Immigration detention facilities contain detainees who are in immigration detention for different reasons, including:

- illegal maritime arrivals (IMAs);
- people who have overstayed their visa; and
- people who have had their visas cancelled.

These people are not lawfully permitted to remain in the Australian community unless or until they hold a visa.

The demography of immigration detention facilities has changed. The immigration detention network holds a number of detainees who present behavioural challenges including:

- an increasing number of people subject to adverse security assessments;
- people who have been convicted of serious criminal offences; and
- others deemed to be of a high security risk, such as members of outlaw motor-cycle gangs.

Non-citizens who have had their visa cancelled because they have been convicted of serious crimes will be in immigration detention or serve their sentence in prison, depending on their individual circumstances. The presence of these high risk detainees jeopardises the safety of our immigration detention facilities and all persons within those facilities.

The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) amends the *Migration Act 1958* (Migration Act) to support the management of physical safety and good order in immigration detention facilities.

The Bill will clarify and strengthen the current arrangements under which officers exercise reasonable force when dealing with public order disturbances in an immigration detention facility.

The Bill and its associated procedures and training will provide staff in immigration detention facilities with certainty as to when use of reasonable force may be exercised to deal with public order disturbances and general management of the immigration detention environment.

It is these staff who are required to provide the first response to incidents that threaten physical safety or good order in an immigration detention facility. This is particularly an

issue in remote immigration detention facilities where police response times may be delayed due to distance.

Currently, the officers employed by the detention service provider have the same common law powers as private citizens to deal with public order disturbances. The common law recognises that any citizen can lawfully take reasonable steps to:

- prevent actual or apprehended breach of the peace;
- perform arrests of suspected offenders in certain circumstances; and
- use reasonable force where they have a reasonable belief that there is a direct threat to the physical safety of another.

Continued reliance on common law is undesirable as:

- the law may vary from jurisdiction to jurisdiction - particularly in relation to use of force in defence of property;
- it is only possible after the event to say whether the force used was reasonable in the circumstances. In practical terms, this means employees cannot in real time be sure their actions are within the law;
- in assessing whether an employee of the immigration detention services provider lawfully used force to contain a disturbance in an immigration detention facility, the courts would determine whether a private citizen (who just happened to be an immigration detention services provider) lawfully used force by looking at what was objectively reasonable in the circumstances. Employees in this work environment require greater protection from the law;
- the principles are problematic for managing large public order disturbances in an immigration detention facility, such as riots; and
- given the changed demography of an immigration detention facility, from a practical standpoint, the common law powers are not sufficient for the day to day management of an immigration detention environment (such as transporting a detainee within an immigration detention facility) and do not provide the certainty desirable for maintaining a safe and secure facility.

Uncertainty on behalf of the immigration detention services provider as to when it may act when confronted with public order disturbances was considered in the Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre (the Hawke-Williams Report), conducted by Dr Allan Hawke AC and Ms Helen Williams AO in 2011.

The Hawke-Williams Report recommended that there be clear articulation of the responsibility of public order management between the department, the detention service provider, the Australian Federal Police and other police forces who may attend an immigration detention facility.

The Bill provides clear and specific powers for the use of reasonable force in immigration detention facilities. These powers can also be used to:

- remove a detainee from a room or force entry to a room to prevent harm;
- isolate detainees to contain an incident;
- deter organised disruptions through separating detainees or cordoning off certain areas within a facility;
- move a high-risk detainee within an immigration detention facility to a place where they can be more closely supervised; and
- restrain a detainee to prevent escape.

The amendments in the Bill therefore clarify the current powers under the common law for dealing with public order disturbances and management of detainees in immigration detention facilities.

The key comparisons between the current common law powers and what would be conferred by the Bill are that the Bill would:

- provide certainty for the use of reasonable force in immigration detention facilities;
- provide certainty for the roles of authorised officers and relevant police forces; and
- allow the courts to focus on the authorised officer's personal assessment of the situation as well as examine objectively whether the force used by the officer was reasonable from the perspective of the authorised officer.

For the above reasons the Government is of the view that the amendments in the Bill are necessary and appropriate for the ongoing management of immigration detention facilities.

Examples of similar powers

Immigration detention facilities are unique in that they are the only large-scale Commonwealth facilities providing a detention environment.

Similar provisions to those in the Bill can however be found in some international immigration legislation.

The New Zealand *Immigration Act 2009* provides for similar powers for immigration officers for the management of detainees. In particular, section 328 of the Immigration Act gives additional powers relating to detention by immigration officers, including the use of such physical force as he/she has reasonable grounds to believe is reasonably necessary in order to:

- prevent the detainee from harming any person, damaging property, escaping or attempting to escape;
- re-capture a person who has fled.

Under section 328, reasonable force may also be used by an immigration officer to search a person and seize any items which may pose a threat to the safety of the officer or any other person.

The UK *Immigration and Asylum Act 1999* provides for a general power for immigration officers to use reasonable force when exercising powers under certain immigration Acts.

Similar provisions to those in the Bill can also be found in State legislation that governs other detention environments that deal with similar behavioural challenges as those faced in immigration detention facilities.

Section 143 of the *Corrective Services Act 2006* (QLD) relevantly provides that a corrective services officer may use force, other than lethal force, that is reasonably necessary to:

- compel compliance with an order given or applying to a prisoner; or
- restrain a prisoner who is attempting or preparing to commit an offence against an Act or a breach of discipline; or
- restrain a prisoner who is committing an offence against an Act or a breach of discipline; or
- compel any person who has been lawfully ordered to leave a corrective services facility, and who refuses to do so, to leave the facility; or
- restrain a prisoner who is–
    - attempting or preparing to harm himself or herself; or
    - harming himself or herself.

The corrective services officer may use the force only if the officer–

- reasonably believes the act or omission permitting the use of force cannot be stopped in another way; and
- gives a clear warning of the intention to use force if the act or omission does not stop; and
- gives sufficient time for the warning to be observed; and
- attempts to use the force in a way that is unlikely to cause death or grievous bodily harm.

Similarly, section 348 of the *Corrections Act 1997* (TAS) provides that a correctional officer may use force that is necessary and reasonable for this Act, including for any of the following:

- to compel compliance with a direction given in relation to a prisoner or detainee by the Director;
- to prevent or stop the commission of an offence or disciplinary breach;

- to prevent the escape of a prisoner or detainee;
- to prevent unlawful damage, destruction or interference with property;
- to defend the correctional officer or someone else;
- to prevent a prisoner or detainee from inflicting self-harm;
- any other thing prescribed by the regulations.

However, a correctional officer may use force only if the correctional officer believes, on reasonable grounds that the purpose for which force may be used cannot be achieved in another way.

Administrative forms of detention also contain similar provisions to those in the Bill.

The *Mental Health (Treatment and Care) Act 1994* (ACT) provides for powers in relation to the detention, restraint etc. for the treatment and care of a mentally ill person. In particular, subsections 35(2) and 36G(2) of the Act provide that the chief psychiatrist, or care coordinator (or a person authorised by the care coordinator) of the community care facility, may:

(a) take, or authorise someone else to take, the person to the premises and for that purpose–

  (i) use the force and assistance that is necessary and reasonable to apprehend the person and take the person to the premises; and

  (ii) if there are reasonable grounds for believing that the person is at particular premises- enter those premises using the force and assistance that is necessary and reasonable;

The Act also gives the chief psychiatrist and care coordinator the power to subject the person to the confinement or restraint that is necessary and reasonable (see paragraphs 35(2)(c) and 36G(2)(c) of the legislation).

The power to confine, seclude or restrain gives the service provider a graduated range of interventions for incidents, or significant risk of incidents, of harm to self or others.

The South Australian *Mental Health Act 2009* also provides powers to authorised officers to 'restrain the person and otherwise use force in relation to the person as reasonably required in the circumstances' (see paragraph 56(3)(c)). An authorised officer includes a:

- mental health clinician;
- ambulance officer;
- a person employed as a medical officer or flight nurse; or
- a person prescribed by the regulations. The regulations do not currently prescribe any such persons.

Other legislation of interest

The Victoria State Government employs Protective Service Officers (PSOs) based on the Victorian railway network and are deployed to support the community and make Victorian railways safer for all users. PSOs possess the necessary powers to reduce crime, violence and anti-social behaviour at train stations.

PSOs are not sworn members of the police force but are employed by Victoria Police and are armed with semi-automatic guns. PSOs are given a wide range of powers including:

- the ability to arrest and detain, including arrest for drunk and disorderly offences;
- the ability to search people and property and seize such items as weapons and alcohol;
- issue on the spot fines, including for graffiti offences; and
- issue a direction to 'move on' from the area.

There is no proposal for workers in immigration detention facilities to be armed.

[*Note*: *Relevant excerpts from the legislation are at* ***Attachment A****, which is located at the end of this report with the Minister's correspondence*.]

Committee Response

The committee thanks the Minister for this detailed response and notes the Minister's advice that the legislative purpose of the amendments is to clarify the current powers so that authorised officers have certainty as to when use of reasonable force may be exercised.

In the committee's view, however, the examples of 'similar' powers provided by the Minister illustrate the extraordinary breadth of the powers proposed in this bill. The identified 'similar' powers appear to be more tightly constrained by one or more of the following techniques: a narrower focus (by reference to the purposes for which they may be used), a requirement that the powers be triggered by assessment of the reasonableness of the use of force (as opposed to an officer's subjective assessment that the use of force is reasonable), and the inclusion of additional safeguards (such as requirement for warnings to be issued).

continued

The committee therefore remains concerned about the scope of these powers. In this context the committee notes that the bill contemplates that the use of force may be authorised in some circumstances even if it results in serious injury or death (see proposed subsection 197BA(5)). **Thus, in light of the other concerns the committee has raised (other aspects of the Minister's response are considered below), the committee considers that the broad and uncertain scope of these powers gives rise to a very significant risk that they may be used in a manner which constitutes an undue trespass unduly on personal rights and liberties. The committee draws its serious concerns to the attention of Senators and leaves the matter to the consideration of the Senate as a whole.**

Alert Digest No. 3 of 2015 - extract

Principles to guide the exercise of force are not included in the bill

Although subsection 197BA(2) provides a list of examples of circumstances in which reasonable force may be used by authorised officers, the list is non-exhaustive. Given the broad terms in which the primary power is conferred under subsection 197BA(1), the use of force may be authorised in a wide range of particular circumstances. Possibly in light of this, the explanatory memorandum emphasises that the Department of Immigration and Border Protection will 'have in place policies and procedures regarding the use of reasonable force in an immigration detention facility that provide safeguards to ensure:

- that use of reasonable force or restraint will be used only as a measure of last resort. Conflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable;
- reasonable force must only be used for the shortest amount of time possible;
- reasonable force must not include cruel, inhuman or degrading treatment; and
- reasonable force must not be used for the purposes of punishment (explanatory memorandum, p. 9).

The need for such policies and principles to guide the exercise of the reasonable force powers emphasises their breadth. Additionally, this need for the powers to be appropriately structured and confined by policies and procedures raises the question of why such principles should not be included in the legislation. **The committee therefore seeks the Minister's advice as to the rationale for leaving these important matters to policy, rather than including them in the bill itself.**

Pending the Minister's reply, the committee draws Senators' attention to this matter, 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

The Department will have in place detailed policies and procedures reflected in the IDSP contract on the use of reasonable force in an IDF. These safeguards will ensure that the use of force:

- will be used only as a measure of last resort;
- must only be used for the shortest amount of time possible;
- must not include cruel, inhuman or degrading treatment; and
- must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, deescalating through engagement and negotiation will be the first response to maintain operational safety.

Extensive guidance for authorised officers is contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system ('CDIS') and in the Department's publicly available online subscription database ('LEGEND'). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

The Bill provides that an authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, in the circumstances specified. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

The Bill confers specific and limited powers on authorised officers to use reasonable force to protect the life, health and safety of any person in an IDF. The Bill does not provide authorised officers with the same powers afforded police officers. Departmental instructions, policies and procedures will provide extensive guidance and examples of what is considered reasonable.

All planned use of reasonable force in an IDF must be authorised by the Department Regional Manager ('RM'), or in certain circumstances, by the Director, Detention Operations, within an IDF.

When unplanned use of reasonable force is necessary (an immediate response to an incident), the IDSP will notify the Department of the actions taken to resolve the incident and, consistent with contractual requirements, comply with all reporting and post incident review requirements.

The Bill provides that an authorised officer must not:

- use reasonable force to administer nourishment or fluids to a detainee in an IDF. The proposed amendment recognises that it is the role of qualified medical practitioners who can assess an individual's medical needs;
- subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances - this is to ensure that when an authorised officer uses force, it is not only reasonable, but also promotes respect for the inherent dignity of the individual; and
- do anything likely to cause a person grievous bodily harm unless the authorised officer reasonably believes that it is necessary to protect the life of, or to prevent serious injury to, another person (including themselves).

There are only very exceptional and extreme circumstances in which the use of force in an IDF should extend to the infliction of grievous bodily harm. For example, although it is unlikely, a situation could arise where a detainee is able to obtain a weapon and hold a hostage. In this situation an authorised officer may need to use sufficient reasonable force that causes, or is likely to cause, grievous bodily harm to the detainee should a physical confrontation be necessary.

Governance arrangements regarding the use of reasonable force in an IDF will be established through consultation with the Australian Federal Police ('AFP') and the Australian Border Force ('ABF') and will include:

- a review of existing policy instructions and administrative arrangements to ensure decisions to use reasonable force are appropriate;
- revising the protocols between the Department, the IDSP, the AFP and State/Territory police services, including memoranda of understanding to reflect the changes proposed in this Bill;
- monitoring specific capability and training standards to ensure that they continue to be the appropriate qualifications to enable authorised officers to use reasonable force within an IDF;
- the use of rigorous incident reporting mechanisms for reporting of all instances where reasonable force is used - all instances where use of reasonable force and/or restraint

are applied (including any follow-up action), must be reported to the Department and a post incident analysis must be undertaken;

- any planned use of reasonable force must involve a risk-management assessment undertaken in accordance with established procedures and approval processes. Following the risk assessment, consultation must occur with relevant health providers to ensure that there are no medical impediments to the planned use of reasonable force; and
- the detainee must be referred for medical review, as soon as practicable, following the use of reasonable force.

The Department considers that the balance between what is detailed in the Bill and what is addressed through policy and procedural documentation is appropriate and remains the subject of extensive internal and external scrutiny.

Committee Response

The committee thanks the Minister for this response and notes the justification for the use of policy and contract to provide guidance for the exercise of force and further safeguards rather than providing for these matters in the legislation. It is noted that the content of departmental policy and IDSP contracts is a contingent matter that is not subject to parliamentary oversight. Further, although contract may impose a legal obligation on an IDSP to comply with a policy or to implement a safeguard, a detainee is not a party to that contract and would not be in a position to obtain a legal remedy for its breach.

The committee's expectation is that both the powers authorising coercion or the use of force and the principles and safeguards associated with any broadly framed coercive power be contained in the primary legislation. The committee notes the Minister's advice that the safeguards in departmental policies and procedures and contracts with service providers are intended to ensure that the use of force:

- will be used only as a measure of last resort;
- must only be used for the shortest amount of time possible;
- must not include cruel, inhuman or degrading treatment; and
- must not be used for the purposes of punishment.

Although the Minister's response concludes that the 'Department considers that the balance between what is detailed in the Bill and what is addressed through policy and procedural documentation is appropriate and remains the subject of extensive internal and external scrutiny' the response does not explain why these and the other important safeguards identified by the Minister cannot be included in the primary legislation. **In light of the breadth of the authorisation to use force, the committee takes the view that these safeguards are of central importance to the balance struck between the objectives of the legislation and the rights of detainees and should therefore be included in the legislation.**

continued

The committee draws this matter 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. 3 of 2015 - extract

Rights unduly dependent upon insufficiently defined administrative powers—conferral of 'reasonable force' powers on non-government employees

An 'authorised officer', pursuant to section 197BA, is empowered to exercise reasonable force. Authorised officers need not, however, be police officers nor, indeed, employees of the Commonwealth (or a State or Territory) government. This raises an issue about which the committee routinely comments, namely, the appropriateness of the delegation of administrative powers. Inappropriately delegated powers—in particular where a delegation is overly broad—may be considered to make rights unduly dependent upon insufficiently defined administrative powers.

The committee has previously expressed its reticence about the conferral of coercive entry and search powers on non-government employees (see *Twelfth Report of 2006*, at p. 294). The *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011, at p. 74) explains that government employees are subject to a range of accountability mechanisms by virtue of their employment. Although the Ombudsman would have jurisdiction to investigate complaints about the use of force, not all accountability legislation would apply. For example the *Public Service Act 1999* would not be applicable, and the extent of any judicial review is unclear (this issue is discussed below).

The principle that coercive powers should generally only be conferred on government employees applies with even greater force to powers which authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information. The application of this basis for an exception to the general principle

that coercive powers be limited to government employees appears to be of no application to the use of force for the purposes outlined in the bill.

In this context, it is submitted that the burden of justification to establish the appropriateness of the conferral of police-like powers on officers who are not government-employees should be exacting. The explanatory materials emphasise that the Minister is required to determine training and qualification requirements for authorised officers (subsection 197BA(7)), and that reasonable force can only be exercised by officers who satisfy these requirements (see subsection 197BA(6)). The explanatory memorandum states (p. 11):

> It is expected that the standard of training and qualifications will be delivered by an accredited nationally registered training organisation. At this time, the qualification and training requirements that are likely to be determined by the Minister in writing for the purposes of new subsection 197BA(7) of the Migration Act include the Certificate Level II in Security Operations. This certificate course includes the units of competency, "CPPSEC2004B – *Respond to security risk situations*" and "CPPSEC2002A – *Follow workplace safety procedures in the security industry*". These units cover the full range of knowledge and skills required for an authorised officer to use reasonable force in an immigration detention facility, including:
>
> - identify security risk situation;
> - respond to security risk situation;
> - use negotiation techniques to defuse and resolve conflict;
> - identify and comply with applicable legal and procedural requirements.
>
> It is also intended that the authorised officer will be required to participate in a planned, structured, ongoing training and development programme and submit evidence of having completed this training to the Department of Immigration and Border Protection. (see also the statement of compatibility at p. 24)

Noting the above principle, the committee seeks further advice from the Minister about the sufficiency of these arrangements for ensuring that employees of a private company have adequate training and qualifications to exercise the police-like powers that will be conferred by this bill. In this respect, the committee notes the following issues:

- **the extent to which the standard of training and qualifications that will be required falls short of those required of a sworn police officer is unclear;**
- **the training and qualification requirements will not be subject to Parliamentary scrutiny. Subsection 197BA(8) provides that the Minister's determination of these requirements is not a legislative instrument. The explanatory memorandum states that this is not considered to be a substantive exemption from the *Legislative Instruments Act 2003*, though does not explain the basis for this**

conclusion. The explanatory memorandum also suggests that it would be inappropriate for these requirements to be included in the primary legislation or the regulations because 'the qualifications and training change over time, as does the content of the training' and it would therefore 'not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect these updated training requirements' (at p. 11). Even if these claims are accepted, the point remains that the training and qualification requirements for the exercise of police-like powers are determined by a Ministerial decision which is not subject to Parliamentary scrutiny. Given the justification for the conferral of use of force powers to non-government employees relies on the fact that such officers will be appropriately trained and qualified, the lack of parliamentary scrutiny of the training and qualification requirements is an issue of considerable concern to the committee (even if it is accepted that subsection 197BA(8) is not a substantive exemption from the *Legislative Instruments Act 2003*); and

- **although the Minister is responsible for determining appropriate training and qualification requirements and authorised officers will be required to apply departmental policy in decision-making about the use reasonable force, it is notable that these forms of control over the performance of authorised officers exist alongside the employment relationship between officers and Immigration Detention Services Providers. The statement of compatibility notes that 'clauses in the contract for the provision of detention services between the Commonwealth and the Immigration Detention Services Provider (IDSP) require the IDSP to apply rigorous governance mechanisms to all instances where reasonable force is used' (p. 18). However, issues may arise about the alignment of policy and contractual requirements, as policy may be unilaterally changed by the government whereas contractual obligations are based on agreement between the parties to the contract. At a more practical level authorised officers may experience a conflict between adhering to government policy and instructions from their employer ('private' imperatives based on the employment relationship may not accommodate the public values of decision-making embodied in government policy). Such conflicts are contingent (i.e. they will not necessarily arise), but the possibility they may arise is illustrative of the general concern about the conferral of coercive powers upon non-government employees.**

Pending the Minister's reply, the committee draws Senators' attention to these matters, as they may be considered to make rights, liberties or obligations

unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minister's response - extract

Adequacy of training and qualifications

The Minister and the Department have not abrogated their responsibilities or their duty of care towards detainees. Authorised officers will meet minimum standards in training and qualification requirements. A person cannot be an authorised officer for the purposes of section 197BA unless he or she satisfies the training and qualification requirements determined by the Minister in writing.

The Department currently expects and has stipulated in the IDSP contract that all officers, who manage security at an IDF, will hold at least a Certificate Level IV in Security Operations or Technical Security or equivalent and will have acquired at least five years of experience in managing security.

For authorised officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent or obtain a Certificate Level II in Security Operations within six months of commencement. The Department requires that:

- the successful completion of the IDSP's mandatory induction training leads to staff being awarded the Certificate II in Security Operations; and
- no officer will be placed in an IDF without this essential qualification.

The Certificate II in Security Operations includes the competency based unit 'CPPSEC2004B - Respond to security risks situations', the curriculum of which covers the knowledge and skills required for an authorised officer to use reasonable force. Security accreditation must be provided by a Registered Training Organisation and be delivered by a Level IV accredited trainer. The current IDSP is a Registered Training Organisation.

Tier 1 and Tier 2 IDSP officers are also trained in 'CPPSEC2017A - Protect Self and Others using Basic Defensive Techniques', which is included as part of the required refresher training. Competency requires demonstration of ability to:

- apply basic defensive techniques in a security risk situation; and
- use basic lawful defensive techniques to protect the safety of the individual and others.

This training forms part of the licensing requirements for persons engaged in security operations in those States and Territories where these are regulated activities. This training, while not formally equivalent to police training, is similar to police and corrections training

in so far as it includes control holds and other defensive measures, but training in strikes or use of impact tools is not required nor provided.

The IDSP contract requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force. In addition, all authorised officers will attend regular refresher training on the use of reasonable force in IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Any individual who is appointed as an authorised officer for the purposes of the provisions of this Bill must satisfy the minimum training and qualification requirements that will be determined by the Minister. This will apply whether they are contracted staff, departmental staff, or any other person appointed as an authorised officer.

Currently, departmental officers, who are required to manage the IDSP contract, receive training to oversee the IDSP staff, including their use of reasonable force. Departmental officers must ensure any such use of force is applied strictly in accordance with established policy, procedures and contractual obligations.

The IDSP is contractually required to regularly report to the Department on the officers who are qualified and authorised to use reasonable force. A complete record of all staff having received training in the use of reasonable force, including the use of restraints, is maintained by the IDSP. The IDSP submits reports based on these records to the Department each quarter.

Will a conflict arise between adhering to government policy and instructions from the IDSP as employer?

Both Detention Services Contracts require Immigration Detention Service Providers to comply with all relevant government policy. In a circumstance where it was identified that an IDSP's employer directed them to undertake an action that contradicts government policy, this would constitute a breach of contract.

Furthermore, in the case of the Facilities and Detainee Services Provider (Serco), an officer directing their staff to deliver services in a manner inconsistent with government policy would constitute a breach of the code of conduct, most notably clause 2.3(i) which provides:

"[In carrying out its duties, the Service Provider, its Personnel and any Subcontractors are to:] comply with all applicable Australian Laws and also any Australian Government Policies notified to them from time to time;"

As an organisation, Serco is subject to financial abatement for any confirmed breaches of the code of conduct. Sustained poor performance may ultimately lead to the Department issuing a termination notice if issues remain unaddressed.

Committee Response

The committee thanks the Minister for this detailed response. The committee notes the following:

(i) given the breadth of the authorisation to use force, it is a matter of concern that the base level qualifications envisaged as being appropriate for authorised officers fall short of that associated with police training;

(ii) the Minister's response does not directly respond to the committee's concern that the adequacy of training requirements is not subject to parliamentary scrutiny; and

(iii) although it may be accepted that 'an action that contradicts government policy…would constitute a breach of contract' and that the provider is subject to 'financial abatement for any confirmed breaches of the code of conduct' (and ultimately the possibility of contract termination), the enforcement of the contract is limited to parties to the contract. As such, a detainee whose rights have been adversely affected in contravention of a policy or contractual requirement will not have a contractual remedy.

In light of these matters, the committee remains concerned about the conferral of police-like powers on non-government employees and the lack of Parliamentary scrutiny of training and qualification requirements. It is suggested that if such powers are conferred on officers who are not sworn police, then the qualification requirements should be subject to Parliamentary scrutiny and preferably included in the primary legislation. **The committee draws its concerns to the attention of Senators.**

Alert Digest No. 3 of 2015 - extract

Rights and liberties unduly dependent on non-reviewable decisions

The committee also raises two matters under principle 1(a)(iii) of the committee's terms of reference relating to the making of rights, liberties or obligations unduly dependent upon non-reviewable decisions.

The adequacy of the complaints mechanism

The explanatory materials emphasise the statutory complaints mechanism established under section 197BB. The existence of this mechanism is part of the general justification for the conferral of the police-like powers and their conferral on persons who are neither police officers nor government employees.

The extent to which the complaints mechanism operates to make the exercise of force adequately accountable, however, needs to be considered in the context of the outcomes which may flow from a complaint being upheld. The Secretary may refer a complaint to the Ombudsman or the Commissioner of a police force for further investigation, but otherwise the bill leaves the consequences arising from the investigation of a complaint unspecified (in terms of practical remedies for complainants and disciplinary consequences for authorised officers and Immigration Detention Services Providers). **In these circumstances, the committee expresses the view that it is not clear why the complaints mechanism is aptly characterised as 'an important accountability measure'** (statement of compatibility, p. 19).

Minister's response - extract

The complaints mechanism will allow a person to make a complaint to the Secretary about an authorised officer's exercise of power under the provisions of this Bill. The proposed new section 197BB of the Bill is predominantly a procedural measure for complaints to the Secretary about an authorised officer's exercise of power under section 197BA.

The Bill will require the Secretary to provide appropriate assistance to a person who wishes to make a complaint and requires assistance to formulate the complaint. Should a person not feel comfortable with this complaints process, they may choose to use an alternative complaint mechanism. For example, detainees can complain directly to the Australian Human Rights Commission, the Red Cross, the office of the Commonwealth Ombudsman, elected representatives, police, state welfare agencies, community groups and advocacy groups or ask that body to advocate on their behalf.

The complainant may also seek the assistance of the relevant police force if he or she considers that the use of force may have been unauthorised and, therefore, criminal.

The Department has a well-established recording, tracking and management process for feedback and complaints, based on the Australian standards for complaint management.

On receiving a complaint about the use of force in an IDF, the Secretary of the Department will either:

- investigate the complaint (subject to limited circumstances, the Secretary must generally investigate a complaint);
- decide not to investigate the complaint in certain circumstances;
- refer or transfer the complaint to the Commonwealth Ombudsman; or
- transfer the complaint to the Commissioner of the AFP, or the Commissioner or head of the police force of the relevant State or Territory.

If the Secretary decides to conduct an investigation into the complaint, it may be conducted in any way the Secretary thinks is appropriate. Subsection 496(2) of the Migration Act permits the Secretary to delegate to another person his power to undertake an investigation. The Secretary will expect such an investigation to be conducted to the highest administrative standards. Without pre-empting any decision of the Secretary, it is likely that such an investigation would be referred, in the first instance, to the Detention Assurance Team for appropriate action.

The Secretary may decide not to investigate or continue to investigate a complaint, but only if satisfied that:

- the same or substantially similar complaint has been made already - and it has been dealt with or is still being dealt with;
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- the complainant does not have sufficient interest in the subject matter of the complaint - it would be expected that in most cases the complainant is the person who was the subject of the use of force, or a witness; or
- the investigation, or further investigation, is not justified in all the circumstances.

The complainant will be advised in writing of the Secretary's reasons for the decision not to investigate a complaint. If the complainant is not happy with this outcome it is open to the complainant to use an alternate complaint mechanism (e.g. Ombudsman, Australian Human Rights Commission or Police).

After completing an investigation into a complaint the Secretary may consider it to be appropriate to refer the matter to the Ombudsman. This may in particular be relevant if there are additional or related issues that have been raised in the complaint, beyond the complainant's concern about the use of force.

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the Ombudsman, the matter may be transferred accordingly. The Ombudsman will then be able to investigate the complaint as if the complaint had been made directly to the Ombudsman. The complainant will be notified in writing if their complaint is referred or transferred.

The Department and the Ombudsman's Office will work closely to develop protocols for these arrangements.

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the relevant police force, the matter may be referred accordingly. The complainant will be notified in writing if their complaint it transferred.

The Department and the AFP will work closely to develop protocols for these arrangements.

Committee Response

The committee thanks the Minister for this response. However, the committee reiterates its comment that the bill leaves the consequences arising from the investigation of a complaint unspecified. While the relevant provisions formalise the avenue of making a complaint to the Department, it does not appear that the complaints mechanism will function as a significant additional 'accountability measure' because there is no indication that the complaints mechanism will result in the availability of any additional remedy that would not otherwise be available to detainees. **For this reason, the committee does not consider that the complaints mechanism is sufficient to ameliorate the various scrutiny concerns which have been identified in relation to this bill.**

Alert Digest No. 3 of 2015 - extract

The availability of remedies for wrongful use of force

(a) Immunity from civil and criminal action

Section 197BF provides that an authorised officer is immune from civil and criminal action if the power to use force was exercised in good faith. The statement of compatibility states that this provision 'ensures that excessive and inappropriate force is not condoned and that authorised officers, who act in bad faith in the exercise of the new powers, will face appropriate charges'. The statement of compatibility continues, 'in particular this would

not prevent the institution of criminal proceedings against an authorised officer for the use of force which is not authorised by proposed section 197BA and is not in good faith' (at pp 25–26).

Although it can be accepted that criminal and civil liability may attach to the unlawful exercise of force if it is exercised in bad faith, given the scope and extent of the powers conferred, the conferral of powers of officers who are not government employees, and the absence of any statutory remedies (as part of the complaints mechanism) for the wrongful use of force, it may be questioned whether immunity should be granted against prosecution and civil action merely on the basis of a requirement of 'good faith'. In the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. Bad faith, so considered, is a very difficult allegation to prove. It is doubtful that showing that use of force was disproportionate (even grossly disproportionate) would amount to bad faith.

The committee has considered the argument that police-like powers should be afforded the same protection against criminal or civil action that police officers have, however further justification is required as authorised officers are not sworn police officers who are subject to additional lines of legal and political accountability.

For the above reasons, the committee notes that there is doubt as to whether the statutory complaints mechanism ameliorates the effect of proposed section 197BF.

In light of the committee's comments above, the committee seeks a fuller explanation from the Minister as to the rationale for the proposed approach to the provision of immunity from civil and criminal action.

> *Pending the Minister's reply, the committee draws Senators' attention to these matters, 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

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth, in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith.

This does not, and is not intended to, bar all possible proceedings against the Commonwealth.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Similarly it is *always* the case that Federal, State or Territory police may institute a prosecution, for example for assault, notwithstanding this provision - it would be up to the Court to determine whether this provision has any application in the particular circumstances.

Proposed section 197BF of the Migration Act contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the powers are exercised in good faith.

As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- Was the action complained about an exercise of power under proposed section 197BA?
- Did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or

- maintain the good order, peace or security of an immigration detention facility, then it is not captured by the partial bar in proposed section 197BF.

Further, if a court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer.

Why is the bar necessary?

The policy intent of the partial bar in proposed section 197BF of the Bill is to provide assurance to authorised officers (such as employees of a detention services provider) that they will not be the subject of legal proceedings for undertaking their duties in accordance with law.

Without proposed section 197BF officers, may be reluctant to use reasonable force to protect a person or to contain a disturbance in an immigration detention facility. Given the occurrence of public order disturbances in immigration detention facilities there is a real risk that this could result in the death or serious harm to a person in an immigration detention facility or major destruction of the immigration detention facility itself.

In the event of a disturbance in an immigration detention facility, authorised officers may be required to exercise powers, including reasonable force, to protect the life, health or safety of people in the immigration detention facility.

This is particularly relevant to immigration detention facilities that are in remote locations, including Christmas Island, where response times from the State, Territory or Australian Federal police may be prolonged.

In these circumstances authorised officers will be required to provide the first response, including acting pro-actively to prevent or deter incidents, and undertaking more sustained management of incidents that threaten physical safety in an immigration detention facility.

It is the Government's view that this amendment strikes the balance between providing assurance to authorised officers that may be required to use reasonable force in certain circumstances in the exercise of their duties as an employee and the need to ensure that the use of force is reasonable, proportionate and appropriate.

Committee Response

The committee thanks the Minister for this response. However, the committee is not persuaded that 'this amendment strikes the balance between providing assurance to authorised officers that may be required to use reasonable force in certain circumstances in the exercise of their duties as an employee and the need to ensure that the use of force is reasonable, proportionate and appropriate'.

It may be accepted that the immunity from civil and criminal proceedings will not apply to the use of force which is not authorised by proposed section 197BA. (In this respect, it is noted that an officer who did not act in good faith could not validly form a reasonable belief that the use of reasonable force was necessary. The formation of a reasonable belief in bad faith would not be authorised pursuant to section 197BA. For this reason, it is possible that the express limitation of the application of the bar on legal proceedings to circumstances where the exercise of power was in good faith is otiose. In any event, bad faith is difficult to prove.)

continued

However, given that the statutory authority for the use of force is conditioned on an authorised officer's subjective reasonable belief that such force is necessary, it is possible that the force used will be authorised, but applied negligently, recklessly or disproportionately. It is possible that a statutory decision-maker may come under a common law duty of care in relation to the exercise of his or her powers and functions. For example it may be possible that detainees against whom force has been applied will require immediate medical assistance and that common law obligations may arise in those circumstances. **For these reasons, and in light of the breadth of the power and the concerns over the conferral of these powers on officers who are not sworn police, it remains unclear to the committee why the ordinary protections afforded by the law should not continue to apply. It may be noted this could partially be achieved by including an immunity for individual officers but providing that the Commonwealth remains liable for torts committed by authorised officers.**

The committee draws its concerns in relation to this issue to the attention of Senators.

Alert Digest No. 3 of 2015 - extract

(b) The availability of judicial review

Proposed section 197BF, which provides for immunity from proceedings, is not intended to affect the High Court's jurisdiction under section 75 of the Constitution. The existence of the constitutionally entrenched minimum provision of judicial review provided for by section 75(v) of the Constitution may be thought to ameliorate the immunity from civil and criminal proceedings for the good faith use of force. Indeed the statement of compatibility emphasises that proposed 'section 197BF 'would also not prevent judicial review by the High Court under section 75(v) of the Constitution' and that 'aggrieved persons could…seek judicial review by the High Court under section 75(v) of the Constitution'.

However, it may be doubted whether judicial review under section 75(v) of the Constitution would be of practical utility for two reasons.

First, the High Court's jurisdiction is conditioned on an application being made in relation to a matter where prohibition, mandamus or injunction is sought against an *officer of the Commonwealth*. The orthodox view is that an officer of the Commonwealth is a person appointed by the Commonwealth (to an identifiable office) who is paid by the Commonwealth for the performance of their functions and who is responsible to and removable by the Commonwealth from that office: *R v Murray and Cormie; ex parte the Commonwealth* (1916) 22 CLR 437 (for a recent application see *Broadbent v Medical*

Board of Queensland (2011) 195 FCR 438). Although the High Court has raised the question of whether independent contractors may be covered by s 75(v) 'in circumstances where some aspects of the exercise of statutory or executive authority of the Commonwealth has been 'contracted out'' (*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 345), this question has not been definitively decided. In these circumstances, the committee is unable to accept the assumption that the actions of an 'authorised officer' employed by an Immigration Detention Services Provider would necessarily be reviewable under section 75(v) of the Constitution.

Secondly, even if the High Court were to hold that its section 75(v) judicial review jurisdiction did cover the actions of these 'authorised officers', it is not clear in practical terms what the exercise of that jurisdiction would achieve for a victim of the use of force that exceeded an authorised officer's powers to exercise reasonable force. As noted above, that jurisdiction provides for the issue of three named remedies: prohibition, mandamus and injunction.

The committee therefore seeks further advice from the Minister:

- **about the availability of judicial review (including whether review is—and if not, should be—available under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), given doubts about the availability of review under s 75(v) of the Constitution); and**
- **what judicial review remedies (under s 75(v) of the Constitution or the ADJR Act) could conceivably be sought in relation to the exercise of the use of reasonable force powers proposed by this bill and what practical utility those remedies would have for persons affected for any use of force which is not authorised by the powers.**

Pending the Minister's reply, the committee draws Senators' attention to these matters, 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

Remedies available to aggrieved persons

The bar on proceedings in proposed section 197BF of the Bill is limited as described previously. The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Similarly it is always the case that Federal, State or Territory police may institute a criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding proposed section 197BF of the Bill - it would be up to the Court to determine whether this provision has any application in the particular circumstances.

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- whether or not the use of reasonable force was an exercise of power under section 97BA; and
- whether or not the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercised in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

ADJR Act

The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) specifies the range of Commonwealth decisions and actions that are reviewable under the Act (section 3), and the decisions excluded from review (subsection 3(1), Schedule 1 of the ADJR Act). In very basic terms for the ADJR Act to apply it must relate to a decision of an administrative character made under an enactment. The exercise of reasonable force does not appear to be a decision of an administrative character made under an enactment. On this basis the Department's view is that the ADJR Act would not apply to the use of reasonable force irrespective of the operation of proposed section 197BF of the Bill.

The Bill does provide limited circumstances where an administrative decision is required or permitted, see in particular proposed subsection 197B0(1) providing for a decision not to investigate a complaint and proposed subsection 197BE(1) providing for a decision to transfer a complaint. In general terms, section 3 and Schedule 1 of the ADJR Act provides that the ADJR Act does not apply to a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958* (the Migration Act), or a purported privative clause decision within the meaning of section SE of the Migration Act. Without going into extensive detail, the Department's view is that a decision under proposed sections 197BO and 197BE of the Bill may be a privative clause decision, or if the decision was affected by jurisdictional error, a purported privative clause decision. On this basis, the Department's view is that the ADJR Act would not apply to such decisions.

Committee Response

The committee thanks the Minister for this response. The Minister has indicated that ADJR Act review would not be available, but has not addressed the doubts as to whether review under section 75(v) would be available or whether the remedies available under that source of jurisdiction would have practical utility. **As such the committee restates its concerns in relation to:**

(a) the potential uncertainty as to whether s 75(v) review would be available in relation to the action of independent contracts; and

(b) the fact that even if the High Court were to hold that its s 75(v) judicial review jurisdiction did cover the actions of 'authorised' independent contractors, it is not clear in practical terms what the exercise of that jurisdiction would achieve for a victim of the use of force that exceeded an authorised officer's powers.

The committee draws its concerns in relation to this issue to the attention of Senators.

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Introduced into the House of Representatives on 5 March 2015
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 3 of 2015*. The Minister responded to the committee's comments in a letter dated 23 April 2015. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2015 - extract

Background

This bill amends the *Migration Act 1958* to:

- provide a single broad discretionary power to collect one or more personal identifiers from non-citizens and citizens at the border;
- enable flexibility as to the types of personal identifiers that may be required, the circumstances in which they may be collected, and the places where they may be collected;
- enable personal identifiers to be provided by an identification test or by another way specified by the minister or an officer;
- enable personal identifiers to be required either orally, in writing, or through an automated system;
- enable personal identifiers to be collected from minors and incapable persons without the need to obtain consent, or require the presence of a parent, guardian or independent person during the collection; and
- remove redundant provisions.

General comment
Broad discretionary power

The central purpose of this bill is to significantly broaden the powers of the 'the Minister or officer' of the department to collect personal identifiers. Personal identifiers are currently defined in the subsection 5A(1) of the *Migration Act 1958* as:

a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
b) a measurement of a person's height and weight;

c) a photograph or other image of a person's face and shoulders;
d) an audio or a video recording of a person (other than a video recording under section 261AJ);
e) an iris scan;
f) a person's signature; and
g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.

The collection of biometric personal identifiers is authorised under existing provision of the Migration Act:

a) s 40 – circumstances for granting visas (applies to non-citizens);
b) s 46 – valid visa application (applies to non-citizens);
c) s 166 – persons entering to present certain evidence of identity etc. (applies to citizens and non-citizens);
d) s 170 – certain persons to present evidence of identity (applies to citizens and non-citizens)
e) s 175 – departing person to present certain evidence etc. (applies to citizens and non-citizens);
f) s 188 – lawful non-citizen to give evidence of being so (applies to non-citizens and persons whom an officer reasonably suspects is a non-citizen);
g) s 192 – detention of visa holders whose visas liable to cancellation (applies to non-citizens); and
h) s 261AA – immigration detainees must provide personal identifiers (applies to non-citizens).

The key proposal in this bill, however, is to set the power for the collection of personal identifiers free from these specified circumstances and to introduce a broad discretionary power as the legal foundation for the collection of what is acknowledged to be sensitive personal information. Proposed subsection 257A(1) (item 34) provides that '[s]ubject to subsection (3), the Minister or an officer may, in writing or orally, require a person to provide one or more personal identifiers for the purposes of this Act or the regulations'.

Of concern, from a scrutiny perspective, is the enormous breadth of this discretionary power. Although proposed subsection 257A(2) does confirm that a number of specified purposes are included in the purposes referred to in subsection (1), it is clear by the terms of the provision that personal identifiers can be collected for any circumstance 'where a link to the purposes of the Migration Act or the Migration Regulations can be demonstrated' (statement of compatibility, p. 35). Given the voluminous content of the Migration Act and regulations, this approach (of not requiring collection to be linked to limited, specified legitimate purposes) represents a fundamental change in approach to the collection of this particularly sensitive category of personal information.

There are a number of issues relevant to considering the justifiability of this change in approach:

Breadth of discretion in this particular context

Concern about broad discretionary powers is acute when the powers are apt to adversely affect the rights and interests of individuals in significant ways. On one level, it is correct to say that a 'person cannot be compelled to provide personal identifiers' (statement of compatibility, p. 37). However, given that significant consequences (including visa refusal, refusal to enter Australia, and immigration detention) may flow from refusal to provide a personal identifier, it is suggested that in many situations individuals will, in a practical sense, not be able to refuse collection requests. The statement of compatibility suggests (at p. 41) that the gravity of the risks of terrorism and the importance of an orderly migration system justify the conclusion that the increased collection powers are 'proportionate to the legitimate purpose of protecting the Australian community and the integrity of the Migration programme, with an acknowledged negative impact on privacy in circumstances where a certain amount of identity verification is expected weighing favourably against the significant benefits'.

Although it may be accepted that the right to privacy is not absolute and the purposes identified in the statement of compatibility are legitimate, it is suggested that this rationale does not justify the means through which this bill proposes to balance legitimate purposes against the adverse effects on personal rights. Given the sensitive nature of personal identifiers and their collection it is suggested that the purposes for which these identifiers need to be collected should be clearly specified in legislation. This approach has a significant advantage from a scrutiny perspective because it enables the Parliament to consider and evaluate the appropriateness of limitations placed on personal rights in the context of identified purposes which are claimed to justify their limitation.

In addition, although the statement of compatibility concludes that new section 257A is 'compatible with Article 17 of the ICCPR' this conclusion must depend on how the discretionary powers are exercised. Indeed the statement of compatibility acknowledges that the overall case for compatibility will depend on the policy and practice through which the legislation is implemented (this point is made in the context of considering the specific power in paragraph 257A(5)(b), but applies generally in relation to the how discretionary powers are implemented). The conclusion therefore is that although it may be that policy and practice guidelines will be developed such that the proposed new powers are administered in a way which is compatible with Australia's international obligations, however, there is no guarantee that this will be so. This serves to emphasise the breadth of the power, especially in light of the voluminous Migration legislation and the sensitivity of the information being collected.

From a scrutiny perspective, the committee therefore expresses the view that it remains unpersuaded that the purposes underlying the bill could not be achieved without the introduction of an extremely broad discretionary power. If there are broader purposes for which it is considered necessary to collect personal identifiers, it is suggested that a better approach from a scrutiny perspective is for these to be identified and appropriate, targeted amendments introduced. In light of these

comments, the committee requests further advice from the Minister which gives more detailed consideration to the problem posed by the breadth of discretionary power in this context.

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

Minister's response - extract

In 2013-14 over 35 million passengers arrived and departed from Australia's border and nearly five million visas were granted. Passengers travelling in and out of Australia are estimated to rise to 50 million by 2020. Traveller volumes and the use of on line services are increasing and criminals are becoming increasingly sophisticated in their attempts to circumvent the law. The reforms in the Bill will strengthen border controls. The reforms proposed in the Bill support the Department's capacity to verify identity by providing the flexibility to respond on a case-by-case basis to higher risk individuals while allowing most people to move seamlessly and efficiently across the border.

The current legislative framework in the *Migration Act 1958* (the Migration Act) for the collection of personal identifiers was introduced more than ten years ago. While restricting the Department's authority to collect personal identifiers to specific circumstances may have been appropriate at that time, this is no longer the case. It is no longer practical or appropriate to respond to increasing risks from terrorism-related events in Australia and other countries using a legislative framework that was introduced at the start of the last decade.

Technological innovation now allows the Department to collect personal identifiers quickly, using non-intrusive scanners and other devices. Yet, the Department cannot utilise this new technology effectively because of limitations in legislation. It is a critical capability to identify people applying for a visa to travel to Australia, crossing Australia's border or remaining in the Australian community. The Bill will provide the Department with authority to collect personal identifiers quickly and efficiently with minimal disruption and intrusion for the majority of individuals. The Department's handling of personal identifiers collected from citizens and non-citizens will remain subject to legislative rules and public scrutiny, as is currently the case.

<u>Types of personal identifiers</u>

The Bill does not add new types of personal identifiers that the Department is authorised to collect.

Subsection 5A(l) of the Migration Act defines a personal identifier as:

a) fingerprints or hand prints of a person (including those taken using paper and ink or digital live-scanning technologies);

b) a measurement of a person's height and weight;

c) a photograph or other image of a person's face and shoulders;

d) an audio or a video recording of a person;

e) an iris scan;

f a person's signature; and

g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the Crimes Act 1914.

There are no personal identifiers prescribed for the purposes of paragraph SA(l)(g).

When personal identifiers can be collected

The powers to collect personal identifiers are currently contained in a number of provisions in the Migration Act. These powers:

- restrict the types of personal identifiers that can be collected to specific circumstances only;
- restrict the circumstances when personal identifiers can be collected;
- do not cover a number of circumstances where personal identifiers could assist to resolve concerns about the identity of a person or their immigration, criminal and/or security histories when determining a non-citizen's permission to enter, stay or depart Australia;
- prevent the collection of personal identifiers from minors and incapable persons where the consent and presence of a parent, guardian or an independent person is withheld in certain circumstances.

These restrictions are legislatively complex and inefficient, and limit the Department's capability to collect personal identifiers to strengthen border protection and ensure the integrity of Australia's permanent and temporary migration programmes.

The Bill addresses these current restrictions. For example, the Department is not authorised to collect fingerprints from persons departing Australia. This restricts the Department to using paper-based credentials to attempt to resolve identity or other security concerns as they arise, even though technology is now available to conduct a more accurate, faster and higher-integrity check using a fingerprint scan in less than one minute. The recent case of the convicted terrorist Khaled Sharrouf, who in December 2013 used his brother's passport to leave Australia to participate in terrorist-related activities, illustrates the need to expand the use of fingerprint-based checks to resolve concerns at the border.

While subsection 5A(3) of the Migration Act outlines more than a dozen purposes for which personal identifiers may be used, the Department is restricted in its authority to collect personal identifiers to the following specific circumstances:

Citizens:

- at Australia's border, facial images, signature and a type of identifier contained in a person's passport can be required on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175), and on entry a person can also be required to provide fingerprints or an iris scan (section 166).

The Bill does not expand the circumstances where Australian citizens can be required to provide personal identifiers. Australian citizens can, as is currently the case, only be required to provide one or more personal identifiers under the Bill when at Australia's border; both at arrival and departure, and when travelling, or appearing to intend to travel, on an overseas vessel from a port to another port.

Non-citizens:

- visa decision-making (sections 40 and 46);
- at Australia's border, on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175);
- evidencing that a non-citizen holds a lawful visa (section 188) and when a non-citizen is being detained on the basis that they hold a visa that is subject to cancellation on certain grounds (section 192); and
- immigration detention decision-making (section 261AA).

The progressive expansion of the Department's biometric programme over time has resulted in the collection of personal identifiers from some non-citizens, but not others, depending on the timing of their visa application or arrival in Australia. The Bill will close significant gaps in the Department's authority to collect personal identifiers from noncitizens living in the Australian community.

These gaps where the Department is currently restricted in its authority to collect personal identifiers include:

- non-citizens holding a valid visa who are subject of an investigation;
- non-citizens found to be in breach of their visa conditions (eg., working when their visa does not authorise them to do so);
- non-citizens whose identity, security, criminal history or immigration history become of concern after visa grant; and
- non-citizens who become of concern after arrival in Australia, who have not been subject to higher-integrity checks that are possible using personal identifiers compared to the current use of paper-based document checks.

Also, the Department collects a facial image only on the overwhelming majority of noncitizens who travel on a tourist visa, business, family or student visa. A one-to-one match of a person to a facial image in a passport or other travel document is generally sufficient to verify a person's identity. However, where this is not possible, the Department seeks authority to collect an additional personal identifier, such as a scan of fingers. Biometric-based checks provide a higher level of integrity than is possible using paper-based credentials, and enables security and other checks with Australian law enforcement and overseas partner agencies.

As stated in the Explanatory Memorandum to the Bill, the Department collected an additional personal identifier (ie., fingerprints) on less than two percent of people granted a visa in 2013/14. The Department is prevented from conducting more checks because of the Migration Act, which requires a time-consuming identification test.

Flexible, discretionary framework

The Committee has suggested that more targeted amendments could be introduced, rather than the discretionary power proposed in the Bill. It would be impractical to adequately specify separate legislative provisions to address all current gaps in the Migration Act. Nor would such an approach provide authority to collect personal identifiers in new circumstances that may arise in the future without further legislative amendments.

The flexible approach adopted in the Bill provides an appropriate balance between improving the effectiveness of checks to prevent identity fraud and detect non-citizens with undisclosed adverse histories from entering, departing or remaining in Australia. An alternative approach to that proposed in the Bill would be to follow the example of the United States and introduce a mandatory, universal biometric collection policy for noncitizens that involves a visa pre-approval process of providing a biometric facial image and ten fingerprints in person. Such a measure would be expensive and inconvenience hundreds of thousands of travellers. It is also unnecessary, given the overwhelming majority of travellers are legitimate, and need not be subject to additional measures that will negatively impact on the smooth transit of increasing numbers of travellers at Australia's border.

The Bill will establish a practical framework to authorise officers to determine from whom to collect personal identifiers based on individual circumstances and factors. The Bill provides the flexibility to require personal identifiers in some circumstances on a case-by-case basis. For example, at Australia's border, rather than potentially collecting an additional personal identifier from everyone, including persons of low risk, the Department seeks authority to collect personal identifiers from *any person* who is identified as higher risk.

The Department has developed a range of sophisticated and innovative tools and capabilities to analyse risk when making visa application decisions and when people are crossing Australia's border. These mathematical, statistical and machine-intelligence

techniques produce evidence-based data that can be used to detect persons of higher risk. Examples where these tools are used include where a person:

- 'fails' automated immigration clearance through Smartgate or a manual face-to-passport check, because their facial image does not 'match' the passport photo or the passport is listed as 'stolen';
- an alert is triggered against the Department's Central Movement Alert List; and
- matches a profile (eg., a person might match a profile for identity fraud, which may include combinations or patterns of a range of variables, such as age or where a ticket was purchased with cash).

The Department's biometric programme has demonstrated the effectiveness of using personal identifiers to combat identity fraud and to detect undisclosed adverse security, law enforcement and/or immigration information. More than 9,000 instances of fingerprint matches of non-citizens with Australian law enforcement agencies and partner countries (Canada, New Zealand, United Kingdom and United States) have revealed discrepancies between the biographic data provided to the Department and that provided to another agency as well as undisclosed security and criminal histories.

Committee Response

The committee thanks the Minister for this detailed response and notes the additional information provided. **The committee remains concerned about the proposed introduction of a broad discretionary power as the legal foundation for the collection of sensitive personal information, but in the circumstances draws the matter 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. 3 of 2015 - extract

Insufficient safeguards

Proposed paragraph 257A(5)(a) provides that if a person is required to provide a personal identifier under subsection 257A(1) that those identifiers must be 'provided by way of one or more identification tests carried out by an authorised officer or an authorised system'. The statement of compatibility explains that the Act currently provides for a 'series of safeguards which apply to the carrying out of an identification test,' which is a test 'carried out in order to obtain a personal identifier' and that these will continue in relation to personal information gathered pursuant to paragraph 257A(5)(a). However, as the statement of compatibility further explains, 'new paragraph 257(5)(b) provides a new power for the Minister or an officer to require that personal identifiers be provided in "another way" (at p. 37). The result is that this power 'will provide the Minister or an officer with flexibility about how a person is to provide personal identifiers when required to do so, allowing the system of safeguards and legislative instruments which currently govern the collection of personal identifiers to be bypassed where an officer or the Minister authorises a different method of collection' (p. 37). It is worth setting out the justification for this approach in full:

> One element of the policy intent for paragraph 257A(5)(b), as described above, is that this flexible new power will be used to implement the use of small, mobile, hand-held electronic scanners to collect an image of a person's fingers (maximum of four fingers), allowing quick checks against established databases of persons who have come into contact with authorities and provided fingerprints by another route, including under another provision under the Migration Act. This is a non-intrusive method, similar to methods used in several other countries around the world, yet effective in detecting imposters and persons who are of concern. Scanned finger images will be stored in the hand-held device, for only as long as is necessary to conduct the required checks, and return results to the hand-held device. Data will be transmitted via secure Commonwealth-endorsed standards. No data will be retained in the hand-held device, or in departmental systems following the scan.
>
> Where a match occurs, only minimal information will be displayed on the hand-held device to indicate a match/no match has occurred. A unique identifying number will be visible, which will enable departmental officers to obtain biographic and other relevant details from data holdings to determine the most appropriate course of action. Each match will be assessed on a case-by-case basis.
>
> In these minimally invasive circumstances, the bypassing of the safeguards that apply to more invasive methods of collection is reasonable. The benefits from this additional layer of checking are clear and in certain circumstances could be very significant, while the imposition on an individual's privacy is minimal. As such this measure is compatible with Article 17 of the ICCPR.

> The current policy intent is that the flexible new power in paragraph 257A(5)(b) will be used in these circumstances, which are compatible with Article 17 of the ICCPR. However, the power in paragraph 257A(5)(b) is extremely broad, but only those personal identifiers listed in subsection 5A(1) are authorised to be collected without further legislation. However, compliance with Australia's international obligations is to be measured by what Australia does *in toto* by way of legislation, policy and practice, and the Government's view is that this is the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future. (statement of compatibility, p. 42)

The committee makes no further comment on the general question of whether the proposed system and practices outlined for the collection of images of a person's fingers is appropriate and leaves this matter to the consideration of the Senate as a whole.

The difficulty from a scrutiny perspective, however, is that the system, policy and practice associated with this method for the collection of personal identifiers will be left entirely to departmental policy and practice, without any legislative oversight. As the statement of compatibility accepts, the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers, which are not subject to existing safeguards in the Act, is 'extremely broad' (p. 42). This power may be used to authorise other ways for the collection of personal identifiers which may raise different considerations and the appropriateness of which would not be subject to parliamentary scrutiny. Further, no reason is given for why it is necessary to, in effect, delegate these policy questions to the department or the Minister, other than that it is the government's view that this is 'the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future'.

In light of these issues, the claim in the statement of compatibility that the measure is compatible with the right to privacy needs to be understood in the context that the power authorises methods of collection which are not limited to that which is explained and justified in the explanatory material (see pp. 21, 37 and 42). **The committee therefore expresses reservations about the breadth of paragraph 257A(5)(b) and seeks further advice from the Minister as to the rationale for the proposed approach. In this regard, the committee particularly notes the lack of limits on the specification of further ways to collect personal identifiers, the lack of Parliamentary oversight of the important policy issues that the specification of further methods of collection may entail, and that the implementation of the use of 'hand-held electronic scanners to collect an image of a person's fingers' could be achieved through the use of a targeted amendment which included appropriate safeguards.**

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

Minister's response - extract

Developments in biometric technologies are at the forefront of the reforms in the Bill. The Bill supports collecting personal identifiers, such as fingerprints, by way of a mobile, nonintrusive scanning device. Safeguards that apply to current technology are not relevant to this new, quick scanning technology.

In addition to collecting personal identifiers by way of an identification test, the Department seeks legislative authority to collect personal identifiers in other ways. For example, it is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial image and 10 fingerprints may take 30-60 minutes to complete; and
- impractical and inefficient for the Department to delay large numbers of travellers to conduct the test.

Verification checks

The Bill supports collecting personal identifiers, specifically fingerprints, by way of a 'verification check'. The Department currently conducts verification checks on a consent basis at Perth and Melbourne airports. Currently, the verification check involves a scan of a single finger of a non-citizen who has previously provided their facial image and 10 fingerprints when lodging a visa application overseas in a higher-risk country. These checks take less than 60 seconds to complete and are conducted in public using a mobile, handheld device. More than 12,000 verification checks have been conducted at Perth and Melbourne airports since 2012 using the mobile scanner.

The Department intends to use an upgraded hand-held scanner using the new powers in the Bill:

- rather than a 'one-to-one' check directly against an individual's fingerprint data, the expanded 'verification check' will involve a 'one-to-many' check against existing data holdings. A one-to-many search involves seeking to match a single biometric against thousands of biometrics in a database. The Department's checks with partner countries are a current example of a 'one-to-many' search conducted by the Department.

- the verification check is efficient, quick and non-intrusive. Rather than taking 30 to 60 minutes to complete via an 'identification test', the check will take approximately 30 seconds to complete. This will allow the Department to strengthen Australia's border and conduct more checks than is possible currently.

- checks will be conducted in public; only two to four fingers will be scanned.

- results of checks will be available in real-time; results of an 'identification test' are usually available within 24 hours, which makes collecting personal identifiers by an identification test impractical at the border.

The approach to conducting verification checks in public is consistent with other checks conducted in public at airports, such as bag checks and the explosives residue check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's professional integrity framework. Administrative and criminal penalties may apply for breaches.

In addition to being used at Australia's border, a 'verification check' will support the Department to identify non-citizens in the Australian community who:

- are working in breach of their visa conditions;
- have remained in Australia beyond the date of their visa, and are therefore in Australia unlawfully; and
- have come to the attention of law enforcement while living in the Australian community.

Collecting personal identifiers by a means other than an identification test, provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient, quick and non-intrusive. Only those individuals identified as being of higher risk would be subject to a verification check.

The technological capability to conduct a verification check using a mobile, hand-held scanner device has only recently offered the opportunity to implement a relatively non-expensive, accurate and speedy additional tool to be able to effectively and efficiently resolve identity and other concerns. The Bill will provide the flexibility to collect personal identifiers in situations that require a fast and non-intrusive method of collection. This approach is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that are accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Committee Response

The committee thanks the Minister for this response.

The committee notes the Minister's advice as to the intended use of mobile hand-held scanner devices. However, the scope of the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers is significantly broader and there is no capacity for Parliamentary scrutiny of this and any future authorisation of procedures and processes under this provision. **While the committee prefers the inclusion of important matters in primary legislation, in the absence of such an approach the committee seeks the Minister's advice as to whether the bill can be amended to require legislative authority for future arrangements to be established by regulation.**

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

Alert Digest No. 3 of 2015 - extract

Broad discretionary power
Items 52 and 53

These items, in effect, remove certain limits that currently apply to the collection of personal identifiers from minors and incapable persons. These current limits include a requirement to obtain consent, and a requirement for a parent, guardian or independent person to be present during the collection of personal identifiers. The statement of compatibility includes a lengthy discussion on the reasons for doing so and the justifiability of the amendments. It is argued, among other things, that the policy intention is that only a small number of such persons would be required to provide personal identifiers and that this intention would be facilitated through giving officers 'clear policy guidance' (e.g., at p. 45) so that the general discretionary power of collection will be exercised appropriately. In relation to the rights of children it is also stated that the policy guidance will 'include provision for the careful engagement with children, taking into their vulnerability into account' (at p. 46).

The general concerns identified with the breadth of the discretionary power in new section 257A to collect personal identifiers are exacerbated in this context. If the proposed broad discretionary power is enacted, it is suggested that there is scope to include further legislative guidance as to the exercise of that power in the particular circumstances of minors and incapable persons. **The committee therefore seeks the Minister's advice as to whether consideration has been given to including more detail in the bill about what matters must be addressed and considered in exercising this power in the**

context of minors and incapable persons. In this regard, the committee notes that leaving such requirements to policy does not enable Parliament to assess whether the limitations on rights have been adequately justified.

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

Minister's response - extract

There are an increasing number of cases known, including some now reported in the media, where minors are implicated in violent extremism. In some instances this includes underage women travelling overseas to marry foreign fighters; an extreme case of our broader concerns about vulnerable children.

The Department is prohibited by law from collecting certain types of personal identifiers from minors[4] under the age of 15 and incapable persons[5]. In locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors or incapable persons. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor or an incapable person by refusing consent or refusing to be present with a minor or incapable person during collection of personal identifiers. This would undermine the purpose of the Bill by removing the Department's authority to collect personal identifiers. The results would be:

- reduced integrity of identity data by not definitively linking identity with associated security information;
- inconsistency with partner countries where fingerprints are collected based on operational policy. The United States requires fingerprints from minors who are more than 14 years old as a matter of policy. In New Zealand, the Immigration Act (2009) does not set an age limit for the collection of biometrics. The UK Immigration (Biometric Registration) Regulations (2008) extended the biometric requirement to provide both a digital photograph and fingerprints to minors aged six upwards, which aligns with EU Regulation;
- preventing the case-by-case collection of personal identifiers from individuals identified as of concern;
- less protection for children who have been, or who are at risk of being trafficked;

[4] A person under the age of 18 years.
[4] A person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier, such as a person with an intellectual disability.

- failure to address the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply. The Department is aware of cases where persons have claimed to be under 15 years of age to prevent collection of fingerprints. This circumvents the purpose of conducting fingerprint checks, which is to accurately identify individuals and detect persons of concern. Collecting fingerprints is the most reliable method to accurately ensure that the right person is subject to action, and not another person who is misidentified;
- failure to address the risk of radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere. The conflict in the Middle East has provided evidence of the involvement of children in extreme acts of violence. Where a minor is suspected of involvement in terrorist activity or serious criminal activity, fingerprints would enable searches of Australian law enforcement data holdings and partner country databases, such as the United States.

The Bill supports the approach increasingly adopted by international organisations such as the United Nations in using biometrics to protect vulnerable people. Since 2013, the UNHCR has been developing a new global Biometric Identity Management System (BIMS) that involves collecting a facial image, fingerprints and iris scans of refugees, including children, worldwide. According to the UNHCR's *Policy on Biometrics in Refugee Registration and Verification {2010},* biometrics provide stronger protections for refugees by preventing identity theft.

Consent to collect

The Bill will authorise personal identifiers to be collected from a minor or incapable person without the consent of a parent/guardian or independent person, which will align current provisions in the Migration Act with those that apply at Australia's border where consent is not required.

The Bill will align Australia with the mandatory biometric collection rules that currently operate in almost all other countries.

Presence of a parent/guardian or independent person

The Bill will also permit the Department to collect personal identifiers from minors and incapable persons without the presence of a parent/guardian or independent person. This measure is to ensure that the collection of personal identifiers is not prevented by a parent/guardian/independent person refusing to be present during collection of personal identifiers. Such a refusal would be as disruptive if a parent/guardian or independent person refused consent for personal identifiers to be collected.

Nothing in the Migration Act authorises the collection of personal identifiers in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person, including a minor or incapable person, with humanity and with respect for human dignity. Use of force or

other form of coercion to collect personal identifiers from any person would not be used under the new power in section 257A. Where an individual refuses to provide a personal identifier, including a parent/guardian/independent person who refuses on behalf of a minor or incapable person, the consequences will depend on the circumstances at the time. For example, in the context of a visa application, a minor's visa application may be refused, thereby preventing their travel to Australia.

Existing policy framework

The Department already exercises flexibility and discretion under provisions in the Migration Act when collecting personal identifiers. For example, currently:

- as a matter of policy, the Department does not collect facial images of a visa applicant in Australia who is aged 0 to 4 years. (No change under the Bill to this policy is proposed);
- as a matter of policy, the Department does collect a facial image of a minor aged 0 to 4 years at the time of visa application where the minor is offshore. (No change under the Bill to this policy is proposed);
- the Department collects only a facial image from 5 to 9 year olds who apply for a visa onshore. (No change under the Bill is proposed).

Primarily, collecting personal identifiers, particularly offshore, is an important tool to protect children who have been, or who are at risk of being trafficked. The full extent of child trafficking of minors into Australia is not known. Personal identifiers, particularly fingerprints, would make it easier to more accurately identify a child than is possible using a facial image, given the significant degree of change in facial features that occurs as children age.

The Bill will enable the Department to collect personal identifiers to respond to risks as they arise in its operational environment with less intrusion than is currently possible using non-biometric based methods.

Committee Response

The committee thanks the Minister for this detailed response and notes the additional information provided. **The committee remains of the view that it would be preferable to include more detail in the bill to guide the exercise of this broad power in the context of minors and incapable persons.** In particular, the committee is interested in the possibility of including a requirement for reasonable steps to be taken to ensure that a parent/guardian or independent person can be present with a minor or incapable person and in reporting requirements.

continued

Noting the vulnerability of minors and incapable persons, the importance of effective oversight of these broad powers, and the stated policy intention that only a small number of such persons would be required to provide personal identifiers, **the committee seeks the Minister's advice as to whether the bill could be amended to include:**

1. a requirement for the Department to take reasonable steps to ensure that a parent/guardian or independent person can be present with a minor or incapable person during a process in which the collection of personal identifiers is sought and completed (though once reasonable steps have been undertaken the process could proceed without such a person being present); and

2. a requirement that the Department:

(a) publicly report on the number of instances in which personal identifiers are collected from minors and incapable persons without consent or the presence of a parent, guardian or independent person; and

(b) provide periodic reports to the Ombudsman in relation to the use of the collection power in these circumstances.

Senator Helen Polley
Chair

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MS15-000658

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator Polley

Thank you for the letter of 5 March 2015, requesting information on two issues the Senate's Committee for the Scrutiny of Bills (the Committee) identified in *Alert Digest No. 2 of 2015* (the Digest). I responded to the first issue, relating to the classification of items in Appropriation Bills, in a letter dated 20 March 2015. This response relates to your query about delegation of legislative power under clause 14 in Appropriation Bill (No. 4) 2014-2015 (Bill No. 4).

Determinations under clause 14 of Bill No. 4 are rare. Terms and conditions are not required for payments to States, Territories and local government. Most payments to the States and Territories are governed and appropriated through the *Federal Financial Relations Act 2009*.

For the payments to States, Territories and local government in an even-numbered Appropriation Act, generally other legislative or agreed frameworks determine how the payments are made and when, such as the *Local Government (Financial Assistance) Act 1995* or a National Agreement. Many of these arrangements can be found on the Federal Financial Relations website (www.federalfinancialrelations.gov.au). The relevant Minister specified under an Appropriation Act may make terms and conditions via a determination if the alternative framework does not adequately allow the Minister to manage the payment. Responsibility for making a determination (if any) rests with the Minister.

A recent example of a determination made (in part) under an equivalent provision in an Appropriation Act is the Natural Disaster Relief and Recovery Arrangements Determination 2012 (Determination). This can found on the Australian Government Disaster Assist website (http://www.disasterassist.gov.au). The Determination primarily operates under the Federal Financial Relations framework. For the State of Queensland, the Determination operates in parallel to an existing National Partnership Agreement (Agreement) between the Commonwealth and Queensland.

In this situation, the Agreement has overriding authority unless the parties agree otherwise. Consequently, only when the Agreement does not adequately provide terms and conditions for a payment and Queensland agrees, could the relevant Minister rely on the Determination to make terms and conditions via the Appropriation Act.

Thank you for bringing this matter to my attention.

Kind regards

Mathias Cormann
Minister for Finance

May 2015

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-001292

Senator the Hon. Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your comments made in the Committee's Alert Digest No. 3 of 2015 concerning the Australian Border Force Bill 2015.

I would like to provide the advice at **Attachment A** to the Committee in response to the Committee's comments in the Alert Digest.

Thank you for considering this advice. The contact officer in my Department is Greg Phillipson who can be contacted on (02) 6264 2594.

Yours sincerely

PETER DUTTON

ATTACHMENT A

Broad discretionary power
Availability of review
Clauses 25 and 54

The committee seeks the Minister's advice about the availability of review in relation to both of these clauses, and whether:
• subsection 25(7) should also apply to subsection 25(1); and
• subsection 54(6) should also apply to subsection 54(1).

The High Court and the Federal Court will have jurisdiction to review all decisions that might be made by contractors and consultants in their capacity as delegates of the ABF Commissioner and the Comptroller-General of Customs. This is because subsections 25(1) and 54(1) (read with paragraph 34AB(1)(c) of the *Acts Interpretation Act 1901*) will have the effect that functions or powers exercised or performed by the relevant delegate (including a contractor or consultant) are taken to have been performed or exercised by the ABF Commissioner and the Comptroller-General of Customs respectively. The decisions will therefore be reviewable as the decisions of the ABF Commissioner or the Comptroller-General, each of whom is an officer of the Commonwealth.

It is not necessary that the Bill provide that subsection 25(7) should apply to subsection 25(1), and subsection 54(6) should apply to subsection 54(1). This is because paragraph 34AB(1)(c) of the *Acts Interpretation Act 1901* has the effect that delegated functions, powers or duties are deemed to have been performed or exercised by the authority that is granted the power in the relevant authorising legislation, in this case the ABF Bill. Subsections 25(7) and 54(6) have been included to provide clarity that this is also the case for sub-delegation by the Secretary.

Trespass on personal rights and liberties—privilege against self-incrimination
Subclauses 26(8) and 55(10)

The committee seeks the Minister's advice as to whether a derivative use immunity can also be included.

The intention of the power of the Secretary and the ABF Commissioner to impose mandatory reporting requirements is to promote full disclosure by Immigration and Border Protection workers of serious misconduct, corrupt conduct and criminal activity which they observe or are involved in, so that action can be taken against workers involved in corruption. It is important that the department is able to act on and undertake further investigations in relation to information obtained under these powers.

The Government does not consider it appropriate that the 'use' immunity be extended to include a 'derivative use' immunity. The effect of a derivative use immunity would be to ensure that any information derived by the department, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure.

Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct and it may be difficult to obtain evidence other than that derived from further investigations undertaken based on the person's admissions. If a

person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that this derived information can be used to support action taken against the person. In the Government's opinion, the public benefit of not including a derivative use immunity outweighs the loss of personal liberty of the person to whom the information relates.

Delegation of legislative power—important matters in rules
Clauses 38 and 39

The committee therefore seeks the Minister's advice as to why it is appropriate for each of the matters to be dealt with in rules rather than incorporating these significant matters in the primary legislation.

It is appropriate for the matters listed in clause 39 to be dealt with by legislative instrument rather than incorporating them in the primary legislation. There are many aspects of this type of testing framework that require greater flexibility than can be achieved by including them in primary legislation. Technology available for conducting drug and alcohol testing and storing and analysing results is evolving rapidly and prescribing current methods in primary legislation would unduly limit flexibility. Flexibility is also needed in relation to confidentiality and disclosure of test results and keeping and destruction of records to ensure that these procedures are in line with the most current standards and expectations.

The drug and alcohol testing regime is substantively based on the existing power of the Chief Executive Officer of Customs under sections 16B-16F of the *Customs Administration Act 1985*. The regime was introduced in 2012 as part of a series of measures designed to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to agencies to respond to suspected corruption. At this time the Committee scrutinised this provision and was satisfied that the inclusion of the matters relating to the conduct of drug and alcohol testing in delegated legislation was an appropriate delegation of legislative power. The *Australian Federal Police Act 1979*, which contains similar provisions for a drug and alcohol testing framework, also includes these matters to the Regulations.

As the rules will be legislative instruments, Parliament will ultimately have oversight of and may disallow rules made under the proposed section 58, including rules made under clauses 38 and 39.

Trespass on personal rights and liberties—privacy
Delegation of legislative power—important matters in rules
Broad delegation
Paragraph 44(4)(f)

The committee therefore seeks the Minister's justification for the proposed approach, and if there is a sound justification for it, whether consideration can be given to providing legislative guidance or structure for the exercise of the power (such as relevant considerations, parameters etc).

There are instances where it may be necessary or appropriate for the department to provide personal information to other bodies or persons, including non-government bodies. The department publishes a wide range of information including research-related information, such as commissioned and internally produced written reports and analyses, information about surveys and various statistics on its website. In addition, from time to time the department receives requests for information from researchers, media outlets and the general

public, including requests for research reports, policy analyses or specific data. This information can sometimes contain information that could lead to the identification of individuals.

The provision of this type of information to non-government bodies and the public has long been acknowledged as one of the public goods produced by government agencies and there is a responsibility to contribute to public discussion and debate by providing information. For example, the Australian Public Service Commissioner's *APS values and code of conduct in practice: A guide to official conduct for APS employees and agency heads* issued in December 2013 states:

> Openness is at the core of Australia's modern system of government. It is essential in a healthy democracy that members of the public have the opportunity to contribute to policy development and decision-making, and that there is public scrutiny and accountability of government. Public access to information in the possession of government agencies helps to make this possible.

For this reason, it may be necessary to specify other bodies and persons, including non-government bodies, which are able to receive departmental information.

These provisions provide various safeguards to ensure the specific disclosure of information is necessary and appropriate and in accordance with any conditions on disclosure imposed by the Secretary. In particular, every disclosure of information to these persons or bodies will need to be made in accordance with subclauses 44(1) and 44(2). Further, all disclosure of personal information must be for one or more of the purposes listed in clause 46.

The provisions in the Bill will enable the department to strike a balance by enabling specified persons and bodies to receive departmental information with safeguards where appropriate, and to otherwise protect information where there is an overriding interest in maintaining confidentiality.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-006285

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

Dear Senator

I refer to the Senate Standing Committee for the Scrutiny of Bills' letter of 4 December 2014 concerning its Seventeenth Report of 2014, which sought advice in relation to Item 76, proposed section 54(2) of the Australian Citizenship and Other Legislation Amendment Bill 2014. I apologise for the delay in responding.

The Committee sought advice as to whether the proposed power for the Minister for Immigration and Border Protection to make delegated legislation under the Australian Citizenship Regulations 2007 (the Regulations) can be limited in the legislation.

While it would be possible to limit the Minister's power to make further delegated legislation to specified matters in the *Australian Citizenship Act 2007* (the Act), the Government considers that it is unnecessary to do so as section 13 of the *Legislative Instruments Act 2003* provides that if enabling legislation confers on a rule-maker the power to make a legislative instrument, that legislative instrument is read subject to the enabling legislation as in force from time to time and so as not to exceed the power of the rule-maker. This means any future instrument made under the Regulations would be read so as not to exceed the authorising powers in the Act and the Regulations.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON 03/05/15

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

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MC15-001038

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

Dear Senator Polley

Thank you for your letter of 19 March 2015 regarding the *Australia River Co. Limited Bill 2015* (the Bill), which completed passage through both Houses of Parliament on 19 March 2015 and received Royal Assent on 1 April 2015. I apologise for the delay in responding.

As set out in the Explanatory Memorandum, Clause 15 of Schedule 1 to the Bill was included to allow rules to be made to facilitate the smooth and effective transfer of all Australian River Co. Limited (ARCo) matters to the Commonwealth.

The intent of the Bill was to provide, as much as legally possible, for all parties who have, or may have, or may in the future have, any dealings with ARCo to continue to be in the same position that they would have been, if ARCo had continued in existence and operation. It was anticipated that rules under Clause 15 would only be made to address any unforseen complications that produce an unworkable or otherwise inappropriate result from the transfer of ARCo's business to the Commonwealth. Essentially, it was anticipated that rules would be made if necessary to protect all parties who may have had dealings with ARCo and to preserve the rights and obligations of any affected persons. Moreover, there is no policy intention to make rules which would adversely affect the rights and obligation of affected persons.

Therefore, I do not consider that Clause 15 of the Bill trespasses unduly on personal rights and liberties.

Kind regards

Mathias Cormann
Minister for Finance

7 May 2015

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MC15-002381

21 APR 2015

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

Dear Senator Polley Helen

I am writing in relation to correspondence sent to my office by Toni Dawes, Committee Secretary, on 26 March 2015, regarding the Scrutiny of Bills Committee's consideration of the Biosecurity Bill 2014 and related Bills (the Bills).

I thank the Committee for its recommendation that key information be included in the explanatory memorandums and enclose my addendums. I believe that the addendums provide the required amount of key information, clarity and assist with the interpretation of the legislation.

I have sent a copy of this letter to the Hon. Sussan Ley MP, Minister for Health.

Thank you again for your consideration of this important legislation and I trust this information is of assistance.

Yours sincerely

Barnaby Joyce MP

Enc

cc Hon. Sussan Ley MP, Minister for Health

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@maff.gov.au

2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BIOSECURITY BILL 2014

ADDENDUM TO THE
EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture,
the Honourable Barnaby Joyce MP)

BIOSECURITY BILL 2014

This addendum sets out additional information which will be added to the Revised Explanatory Memorandum, to address recommendations made by the Standing Committee for the Scrutiny of Bills in the *Fourth Report of 2015*.

Clause 530

At the end of the last paragraph, include the following text:

> Detailed information about how the department will apply the fit and proper person test will be contained in administrative guidelines. This will ensure that a consistent approach is taken when applying the test and that the test achieves the desired outcome. Appropriate administrative guidance will be published on the department's website to provide further public detail about the application of this test.

Clause 541

At the end of the fourth paragraph, include the following text:

> An example of an incidental or conducive action may include the production of administrative guidelines, including instructional material to detail how specific powers are to be exercised and what processes are to be followed in performing specific functions, in a manner that is consistent with the legislation. While administrative guidelines are not legal instruments, they are incidental to the exercise of power and provide the practical instructions required for officers to perform functions or exercise powers in a consistent and best practice manner.

2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

QUARANTINE CHARGES (IMPOSITION – GENERAL) AMENDMENT BILL 2014
QUARANTINE CHARGES (IMPOSITION – CUSTOMS) AMENDMENT BILL 2014
QUARANTINE CHARGES (IMPOSITION – EXCISE) AMENDMENT BILL 2014

ADDENDUM TO THE EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture,
the Honourable Barnaby Joyce MP)

QUARANTINE CHARGES (IMPOSITION – GENERAL) AMENDMENT BILL 2014
QUARANTINE CHARGES (IMPOSITION – CUSTOMS) AMENDMENT BILL 2014
QUARANTINE CHARGES (IMPOSITION – EXCISE) AMENDMENT BILL 2014

This addendum sets out additional information which will be added to the Revised Explanatory Memorandum, to address recommendations made by the Standing Committee for the Scrutiny of Bills in the *Fourth Report of 2015*.

General Outline

At the end of the fourth paragraph, include the following text:

> The Imposition Acts retain the safeguard that the Minister must be satisfied that the amount of the charge under each Act is set at a level that is designed to recover no more that the Commonwealth's likely costs in connection with the matter.

Quarantine Charges (Imposition-General) Amendment Bill 2014
Clause 3 , Item 5

> Replace all references to 'section 628' of the Biosecurity Act and replace with 'section 592'.

Quarantine Charges (Imposition-Customs) Amendment Bill 2014
Clause 3 , Item 5

> Replace all references to 'section 628' of the Biosecurity Act and replace with 'section 592'.

Quarantine Charges (Imposition-Excise) Amendment Bill 2014
Clause 3, Item 4

> Replace all references to 'section 628' of the Biosecurity Act and replace with 'section 592'.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

RECEIVED
- 2 APR 2015
Senate Standing C'ttee
for the Scrutiny
of Bills

Ref No: MC15-004701

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

Dear Senator Polley Helen

I refer to your letter of 5 March 2015 to the Minister for Agriculture, the Hon Barnaby Joyce MP, seeking advice or clarification on a number of issues identified in Alert Digest No. 2 of 2015 (4 March 2015) in relation to the Biosecurity Bill 2014 (the Bill). The Bill is jointly administered by the Agriculture portfolio and the Health portfolio. The matter of human health has been referred to me as the Minister for Health and Minister for Sport.

Clause 34 – Trespass on personal rights and liberties
The Committee is seeking advice on the inclusion of an additional requirement for decision makers to be satisfied of various factors on reasonable grounds. The principles of general protection at clause 34 apply in relation to exercising powers or imposing measures under Chapter 2 of the Bill. These powers may only be exercised or imposed by specially appointed officers. Clause 82 specifies that personally restrictive and invasive powers may only be exercised by Human Biosecurity Officers or Chief Human Biosecurity Officers. These officers must have medical qualifications or appropriate clinical expertise, and these officers will therefore be using that particular knowledge or expertise when exercising powers or imposing measures.

Consequently, I consider the more general requirement for the decision maker to be satisfied on reasonable grounds is not appropriate to Chapter 2 of the Bill.

Clause 58 – Trespass on personal rights and liberties - Strict Liability
The Committee is seeking further justification on the application of a strict liability offence in this particular instance. The Bill requires information to be provided by any individual who an officer is satisfied has been exposed to a Listed Human Disease; or exposed to another individual who has signs or symptoms of a Listed Human Disease.

In all cases, this information may be uniquely known to the individual, and each individual may be able to provide important details about the epidemiology of the disease, the source of the disease, and the potential exposure of themselves and other individuals to the disease. This information is vital to address public health risk, and it is essential that as much information is collected as quickly as possible. Ideally this would occur before exposed individuals have the opportunity to depart the airport and enter the community, and potentially spread the disease to family and friends.

Alternative powers, such as monitoring and investigation powers, or enforcement, are not appropriate as the information being sought must be collected as soon as possible, to allow the Commonwealth to develop a picture of the disease needing to be managed, and the number of individuals potentially infected and in need of intervention.

Wherever possible, the Commonwealth will rely on voluntary disclosure; however, in some circumstances, an individual may be unwilling to disclose information about their health status, potential exposure or travel history. In such cases, the need to address public risk justifies the application of the strict liability offence for failure to provide required information.

Clause 37 provides special protections for individuals who may be temporarily incapable of understanding requirements or complying with a measure due to illness. An incapable person must not be subject to a requirement of Chapter 2 without the special protections afforded by clause 37, and any urgent or life threatening medical needs must be met (clause 35).

Clause 91(3) – Delegation of legislative power

The Committee is seeking advice as to why provisions relating to the taking, labelling, transportation and storage of body samples should not be dealt with expressly in the Bill. Whilst the substantive powers relating to body samples are specified in the Bill; clause 91(3) allows for the making of regulations in relation to the taking labelling, transporting, storage, and use of body samples.

Clause 91(2) of the Bill specifies that body samples may only be required if an individual is subject to a Human Biosecurity Control Order, has undergone an examination at a specified medical facility, and may only be required for diagnosis of a Listed Human Disease. Before requiring an individual to provide body samples, clause 34 also requires that officers must be satisfied that this is an appropriate and adapted measure, and that it is the least intrusive and invasive measure that may be applied to address the disease risk in the circumstances. Finally, clause 94 requires that appropriate medical and professional standards be used, and clause 95 specifies that force must not be used to oblige an individual to comply with a requirement to provide body samples.

The regulations are therefore intended to prescribe requirements relating to administrative matters only, for example, specifying that samples must be stored according to national standards applicable to laboratories where diagnostic testing is carried out.

Thank you for bringing these issues to my attention and I trust this information will address the concerns of the Committee.

Yours sincerely

The Hon Sussan Ley MP

31 MAR 2015

THE HON MICHAEL KEENAN MP
Minister for Justice

RECEIVED
15 APR 2015
Senate Standing C'ttee
for the Scrutiny
of Bills

MC15/04936

10 APR 2015

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

Dear Senator Helen

Crimes Legislation Amendment (Powers, Offences and Other Measures Bill) 2015 (the Bill)

I refer to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No 4 of 2015, as tabled on 25 March 2015.

The Committee has sought additional information about matters raised by three Schedules in the Bill. These matters relate to:

- the reversal of the legal burden of proof in the proposed expanded definition of forced marriage in the *Criminal Code Act 1995* (Schedule 4 of the Bill)
- the scope, application and justification of the proposed measure to insert 'knowingly concerned' as an additional form of secondary criminal liability in the Criminal Code Act (Schedule 5), and
- retrospectivity in proposed technical amendments to the *Proceeds of Crime Act 2002* and to corresponding measures in other Commonwealth Acts (Schedule 14).

My responses to these questions are enclosed.

I trust this information is of assistance to the Committee.

Yours sincerely

Michael Keenan

Encl: Responses to requests for further information in Alert Digest No 4 of 2015.

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Reponses to the Senate Standing Committee for the Scrutiny of Bills
Alert Digest No 4 of 2015

Reversal of burden of proof in expanded definition of forced marriage—Item 3 of Schedule 4

Committee comment (page 7)

While the committee is aware of the significance of the conduct this provision is intended to address, the committee seeks the minister's more detailed explanation as to why an evidential burden is considered insufficient. The only justification provided is that this lower threshold 'might easily be discharged if the defendant adduced evidence that, for example, the child had been sexually active in the past or was otherwise mature for his or her age'. The committee is interested in whether this has actually occurred and in any other considerations relevant to the imposition of a legal burden.

In my view, the proposed imposition of a legal burden on the defendant in forced marriage matters involving children under the age of 16 is appropriate and in accordance with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

While there are limited exceptions available under the *Marriage Act 1961* (Cth) for a person aged between 16 and 18 years, in general child marriage is considered unacceptable in Australia. The forced marriage offences in the *Criminal Code Act 1995* (Cth) (Criminal Code) are intended to capture marriages to which a person does not freely and fully consent. Forced marriage is a slavery-like practice, a form of gender-based violence and an abuse of human rights which puts people at risk of emotional and physical abuse, loss of autonomy and loss of access to education. The marriage of a child who cannot freely and fully consent because he or she did not understand the nature and effect of a marriage ceremony should rightly be considered a forced marriage, and a danger not only to the health and safety of the victim but also to public health and safety standards.

The proposed amendments do not place a legal burden on the defendant to disprove that the child was married, but rather to prove that the child was capable of understanding the nature and effect of a marriage ceremony. Operational evidence has shown that forced marriage matters are likely to involve not only the spouse but also the family and community of the alleged victim, who would have peculiar knowledge of the child's relative maturity, personality, education and understanding. If only an evidential burden were imposed, the defendant or defendants would need only to point to evidence which *suggested a reasonable possibility* that the child was *capable* of understanding the nature and effect of a marriage ceremony, in order to discharge the burden. Evidence of the child's apparent maturity would be readily and easily available to the defendant or defendants.

Once an evidential burden was discharged, the burden would then shift back to the prosecution to rebut the evidence beyond reasonable doubt. Where the child's family and community were involved, and the child purported to have consented, the prosecution would not have a witness with personal knowledge of the child, making it extremely difficult to prove, beyond reasonable doubt, that the child was incapable of understanding the nature and effect of a marriage ceremony. The prosecution would need to rely on expert opinion evidence, which would be expensive and may not be admissible.
Even if increased by the proposed amendments, the penalties for forced marriage are at the

lower end of those for the other human trafficking, slavery and slavery-like offences set out in Division 270 and 271 of the Criminal Code. The imposition of a legal burden is also consistent with other child marriage provisions in the Criminal Code relating to offences with higher penalties. Section 272.17 of the Criminal Code imposes a legal burden on a defendant to prove that, at the time of sexual activity between the defendant and a child outside of Australia, there existed a valid and genuine marriage between the parties. The offences to which section 272.17 relate carry penalties of up to 20 years imprisonment.

The importance of these amendments is illustrated by a recent matter investigated by the Australian Federal Police and referred to the Commonwealth Director of Public Prosecutions (CDPP) for consideration. The matter involved a 12 year old girl who swore on oath that she fully consented to her marriage to a 26 year old man, which had been arranged by her family. The girl presented as articulate, confident and well-educated, and was adamant that she entered into the marriage of her own volition notwithstanding her age. The CDPP was unable to find anyone from within the girl's family or community prepared to attest to the ceremony, and ultimately determined not to prosecute the matter for forced marriage offences as there were no reasonable prospects of success.

With a presumption that conferred only an evidential burden, in this case example the girl's 'husband' and relatives could have easily pointed to evidence of her apparent maturity. With the evidential burden discharged and without a witness that knew the girl, it would be extremely difficult for the CDPP to prove beyond reasonable doubt that she was not capable of understanding the nature and effect of a marriage ceremony.

For the reasons set out above, I consider that imposing a legal burden on the defendant to prove on the balance of probabilities that a child under the age of 16 was capable of understanding the nature and effect of a marriage ceremony is reasonable, proportionate, and necessary to give proper operation to the proposed amendment.

Scope, application and justification of knowingly concerned measure—Schedule 5

Committee comment (page 13)

While there is some discussion in paragraph 367 of the explanatory memorandum relating to the scope of the measure, given that uncertainty in the application of criminal offences means that the limits of liberty are not known with clarity, the committee seeks the Minister's more detailed advice about the scope, application and justification for the proposed approach.

Background

The concept of 'knowingly concerned' was first included in the *Crimes Act 1914* when it was first enacted in 1914 and in the *Customs Act 1901* in 1910. The concept required proving that the acts shown to have been done by the defendant 'in truth implicate or involve him in the offence, whether it does show a practical connexion between him and the offence'.[1]

The Model Criminal Code Officers Committee (MCCOC) was established to agree to a framework for a Model Code that could be adopted by all jurisdictions. In 1992, MCCOC gave detailed consideration to including knowingly concerned in the Model Code.

MCCOC ultimately determined that the expression was less certain than was appropriate for

[1] *Ashbury v Reid* [1961] WAR 49 at 51.

a general provision defining the ambit of criminal responsibility for a new Code, and that the extended form of derivative liability was unnecessary as it added little in substance to the alternative formulation of 'aids, abets, counsels or procures.'

MCCOC's findings were in contrast to those of the Review of Commonwealth Criminal Law Committee, chaired by Sir Henry Gibbs, (the Gibbs Committee), which found in 1987 that the concept had independent utility and merit and captured circumstances not amounting to participation as a principal offender, or an aider, abetter, counsellor or procurer.

Absence of knowingly concerned from the Criminal Code

The proposed reintroduction of knowingly concerned is in direct response to the operational constraints identified during prosecutions since the introduction of the Code in 1995. The CDPP has advised that the absence of knowingly concerned is a significant impediment to the effective investigation and prosecution of key individuals involved in serious criminal activity, especially those who have organised their participation so as to be disconnected from the most immediate physical aspects of the offence. This creates particular difficulties for prosecuting persons involved in federal offences such as drug importation, money laundering and insider trading, where an accused's particular pattern of involvement is not neatly captured by an existing form of liability, because, for example, they have strategically distanced themselves from the crime. These difficulties have been exacerbated by changing technologies, which have enabled persons to involve themselves in crimes in ways that are increasingly remote and disconnected from the immediate aspects of the offence (for example, by engaging with co-offenders or conducting offences online), which may require proof of a particular pattern of involvement that is not neatly captured by an existing form of liability. These difficulties have been exacerbated by changing technologies, which have enabled persons to involve themselves in crimes in ways that are increasingly remote and disconnected from the immediate aspects of the offence (for example, by engaging with co-offenders or conducting offences online).

The Commonwealth Criminal Code (which is based on MCCOC's Model Code) came into effect in 1995. MCCOC's preferred formulation was included at section 11.2, which applies across the Commonwealth criminal law to extend criminal responsibility to persons who aid, abet, counsel or procure the commission of an offence. These existing forms of derivative liability capture criminal involvement at particular stages of an offence—generally, counsel and procure serve to criminalise conduct prior to the commission of offence, and aid and abet criminalise the conduct of persons present during the commission of the offence. A charge of joint commission (section 11.2A) or conspiracy (section 11.5) requires prosecutors to demonstrate that two or more offenders made an agreement prior to the commission of the offence, and that the accused committed an overt act pursuant to that agreement.

Charges of aiding, abeting, counseling or procuring an offence require complex, technical instructions to a jury and frequently result in more complex, lengthy and costly trials.
In contrast, knowingly concerned captures intentional involvement in an offence, which requires prosecutors to demonstrate objective involvement in or connection to the offence, whether at a specific point in time or on an ongoing basis. A charge of knowingly concerned encourages the court to focus on the facts and evidence of precisely what individuals have done in relation to the commission of an offence, thereby avoiding the need to, for example:

- establish a relationship between the accused and a principal offender to prove that the accused jointly commissioned an offence with, conspired with, aided, abetted, counselled or procured the principal offender
- prove that the conduct occurred at a particular point in time, that is, *prior* to the

commission of the offence for counsel and procure, or *during* it for aid and abet, and/or

- adduce and rely upon evidence of co-offenders.

The absence of knowingly concerned has resulted in the CDPP regularly prosecuting persons who can be characterized as 'ringleaders' with charges of aiding, abetting, counselling or procuring (in effect, on the basis of accessorial liability). This has resulted in defendants effectively being charged with offences which do not accurately reflect their true criminality, possibly also affecting the sentences imposed upon ultimate conviction. The CDPP has further advised that accused persons are less likely to plead guilty to 'accessorial' charges than a charge that reflects their discrete individual responsibility, such as knowingly concerned.

The absence of 'knowingly concerned' as a form of criminal liability in Commonwealth matters has also attracted judicial comment. In particular, Justice Weinberg of the New South Wales Court of Criminal Appeal stated in *R v Campbell* [2008] NSWCCA 214 (2008) 73 NSWLR 272 that:

> the decision to omit the phrase 'knowingly concerned' from the various forms of complicity available under federal criminal law…appears to me to have left a lacuna in the law that was certainly never intended.

Scope and application

MCCOC's view that the provision was not appropriate for inclusion in the Model Code should not be equated with a finding that knowingly concerned is not capable of clear definition as a legal concept. The concept of knowingly concerned has a significant history in case and statute law. In addition to existing previously in the *Crimes Act 1914* (the Crimes Act) and the *Customs Act 1901* (the Customs Act), the formulation currently appears in the *Competition and Consumer Act 2010*, the *Corporations Act 2001* and the Australian Capital Territory's *Criminal Code 2002*.

As noted above, knowingly concerned captures intentional involvement in an offence, which requires prosecutors to demonstrate objective involvement in or connection to the offence, whether at a specific point in time or on an ongoing basis.

The measure would be inserted into the existing section 11.2 of the Criminal Code as an additional ground to the existing charges of aids, abets, counsels and procures. Knowingly concerned will apply in the same manner as these forms of liability, to all Commonwealth offences, unless otherwise exempted (subsection 2.2(1) of the Criminal Code).

As is the case with the existing measures in section 11.2 of the Criminal Code, there is no requirement that the principal offender be prosecuted or found guilty for the accused to be found guilty of being knowingly concerned.

To prove objective involvement in or connection to an offence, the prosecution will need to prove that an accused intentionally concerned themselves with the essential elements or facts of a criminal offence. Mere knowledge or concern *about* the offence is insufficient to make out a charge of knowingly concerned. For example, a person who learns that another person is making arrangements to import an illegal substance could not be found liable under this provision, as there is knowledge but no concern in the required sense of involvement.

The following additional examples, drawn from real cases, may serve to further illustrate the

scope of knowingly concerned and the types of circumstances that it may apply to.

Example A—insider trading
The accused is one of two directors of a company. The second director has been convicted of insider trading and while he admits he was directed by the accused, he is unwilling to give evidence against him. There is evidence, however, that the second director and the accused had access to the same inside information at the same time and that, whilst the accused was not actively involved in the trades directly, the accused was aware the trades were occurring and was a recipient of a share of the proceeds from the insider trading activity deposited into a false name bank account which he had set up and over which he had control.
Prosecutors are unable to rely on any evidence from the second director because his admissions are not legally admissible against the accused. Without the charge of knowingly concerned available, prosecutors will likely have to rely on the alternative charge of conspiracy. Conspiracy requires evidence that the accused made a specific agreement with the second director to commit insider trading offences, for which there may not be any or sufficient evidence. In addition, evidence of co-offenders is, as in this case, not always available. Where it is available it is often discounted by a jury and is more easily discredited by the defence. Equally, because the offending behaviour on the part of each director was made up of different acts it is difficult to make out a charge of joint commission.

If the charge of knowingly concerned were available, it would more appropriately reflect the accused's ongoing and intentional involvement in the insider trading offence.

Example B—corporate fraud
A company is charged with fraudulently using an official 'Australian Government certified' stamp on export documents for their products. It was common practice within the company to use the fake stamp. It is alleged that one of the company's CEOs had personally ordered the fake stamp and had commented to staff that producing the fraudulent documents was 'so easy, everyone should do it'.

Because the offending was a widespread corporate practice, charges have been laid against the company as the principal offender. Investigators are hoping to charge various company officers as agents in the fraud. In the absence of a charge of knowingly concerned, prosecutors may seek to pursue the company officers using 'secondary' charges of aiding and abetting the company (as the principal offender) to commit the fraud. This will require complex directions to the jury and may not appropriately capture the specific offending conduct on the part of the CEO, who intentionally and knowingly facilitated the fraud on an ongoing basis. In practice, at most a subset of the conduct will be able to be prosecuted without the availability of knowing concerned liability.

Retrospectivity in proceeds of crime measures—Schedule 14

Retrospectivity – paragraph 330(4)(e) (items 1 and 2 of Schedule 14) of the *Proceeds of Crime Act 2002* (Cth) (POC Act)

Retrospectivity - section 338 (definition of related offence) (items 3 and 4 of Schedule 14) in the POC Act

Retrospectivity – section 42 (related offences) in the *Australian Federal Police Act 1979* (Cth) (items 5 and 6 of Schedule 14), section 3 (related offences) in

the *Crimes (Superannuation Benefits) Act 1989* (Cth) (items 7 and 8 of Schedule 14), and subsection 3(1) (definition of related foreign serious offence) in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (items 9 and 10 of Schedule 14).

Committee comment (page 26)

As the issues of detriment and any potential unfairness associated with retrospectivity outside the context of criminal liability are not addressed in the explanatory material, the committee seeks the Minister's advice about these matters in relation to all relevant provisions in Schedule 14.

Background

Schedule 14 makes a series of technical amendments to the POC Act and equivalent provisions in other Commonwealth Acts. I can advise the Committee that these amendments are partially retrospective in operation. The amendments:

- clarify that property only ceases to be the instrument or proceeds of an offence under paragraph 330(4)(e) of the POC Act if the property is successfully forfeited under an interstate forfeiture order (new paragraph 330(4)(e))

- clarify the definition of 'related offence' in the POC Act, the *Australian Federal Police Act 1979* (Cth) and the *Crimes (Superannuation Benefits) Act 1989* (Cth) and the definition of 'related foreign serious offence' in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to state that an offence is related to another offence if the offences form part of the same series of acts or omissions, or the physical elements of the two offences are substantially the same acts or omissions.

The Committee has sought advice on issues of detriment and potential unfairness associated with the retrospective operation of these provisions. My response to this request is set out below.

Paragraph 330(4)(e) (items 1 and 2 of Schedule 14)

Paragraph 330(4)(e) of the POC Act currently provides that property will cease to be the proceeds of an offence or an instrument of an offence for the purposes of the POC Act if an interstate restraining order or an interstate forfeiture order is satisfied in respect of the property. As stated in the Explanatory Memorandum, it was not intended, when paragraph 330(4)(e) was originally drafted, that an order issued under the POC Act should cease due to the existence of an *interim* State or Territory confiscation order on the property. New paragraph 330(4)(e) clarifies that property only ceases to be the instrument or proceeds of an offence if the property is successfully forfeited under the interstate order.

This measure is partially retrospective in operation because the amendment may apply to property that was subject to an interstate order made prior to the commencement of the provision. This simply ensures that a court can make an appropriate determination of whether property has ceased to be the proceeds or instrument of an offence for the purposes of the POC Act by considering all relevant State or Territory restraining orders, regardless of when those orders were made.

In my opinion, this retrospectivity does not result in any detriment or unfairness to a person whose property or assets are subject to the relevant orders made prior to the commencement of this provision. In these circumstances, proceeds of crime authorities in the relevant jurisdictions must have already satisfied a court that the property should be restrained, and of the basis on which this restraint should occur. The amendment does not affect the nature of these orders or allow for the making of any new confiscation order retrospectively.

Section 338 (definition of *related offence)* (items 3 and 4 of Schedule 14) in the POC Act and amendments in corresponding Commonwealth Acts

As noted in the Explanatory Memorandum, the purpose of the amendments in this schedule is to clarify the definition of 'related offence' in the POC Act, the *Australian Federal Police Act 1979* (Cth) and the *Crimes (Superannuation Benefits) Act 1989* (Cth) and the definition of 'related foreign serious offence' in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to state that an offence is related to another offence if the offences form part of the same series of acts or omissions, or the physical elements of the two offences are substantially the same acts or omissions.

The definition of 'related offence' is relevant to the question of whether a restraining order made under these Acts can continue to operate in appropriate circumstances where there are changes to the nature of the circumstances of the case against the offender. A drafting deficiency in the definition of 'related offence' has meant that it was possible that a restraining order would cease despite a person being charged with multiple offences undertaken in a single series of criminal conduct, if these offences have different physical elements. The new definition of 'related offence' explicitly provides that an offence is 'related' to another offence not only if the physical elements of the two offences are substantially the same acts or omissions, but also if the physical elements of the two offences are acts or omissions in a single series of conduct.

This definition is considered partially retrospective because it may apply in relation to related offences that occurred prior to the commencement of the measures. This is to ensure that the court can appropriately determine the totality of a person's conduct, including acts or omissions that occurred before commencement, when considering the status of the restraining order following the commencement of Schedule 14.

I do not consider that the retrospective operation of this provision adversely affects the rights of a person subject to an existing restraining order. A restraining order under the POC Act and the corresponding Commonwealth Acts is an interim order that preserves property by restricting a person's ability to dispose of or otherwise deal with it, pending a final confiscation or forfeiture order step in the confiscation process. If the definition of 'related offence' did not apply retrospectively, a person would be able to frustrate the order by arguing about the precise point in time at which he or she is alleged to have engaged in the relevant course of conduct. In addition, there would be inconsistency in the way that the status of existing orders was considered by the court. Nothing in Schedule 14 affects these rights or the court's discretion under the POC Act, or the other relevant Commonwealth legislation to refuse to make either restraining orders or confiscation orders in certain circumstances. Nor does the measure affect any of the general appeal rights in the POC Act.

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-000797

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

Dear Senator Polley Helen,

I write in response to a letter from the Committee Secretary on 19 March 2015 which requested information regarding an issue identified in the Alert Digest No. 3 of 2015 relating to the Defence Trade Controls Amendment Bill 2015 (the Bill).

The Committee sought further information on why the criteria for deciding whether an activity will prejudice Australia's security, defence or international relations are to be specified in regulations, rather than the primary legislation.

Australia's export controls operate to ensure that military and dual-use goods are exported, supplied, published and brokered responsibly and that Australia meets its obligations under the major arms and dual-use export control regimes of which Australia is a member.

Australia's legislative framework governing export controls provides mechanisms that apply a necessary degree of scrutiny to proposed export, supply, publication and brokering activities. This assists in ensuring that the defence, security and international relations of Australia are not compromised. Under clause 25A of the Bill, a decision whether to refuse or allow these activities will be made in accordance with the criteria set out in the regulations.

The policies and procedures underpinning Australia's export controls need to be flexible in order to consider changes in military and dual-use goods and technology, the use and delivery of those goods and technology, Australia's strategic priorities, and threats to regional and international security.

Due to the constantly changing nature of the export control environment, it would not be appropriate to include a set of fixed criteria in the Bill. The delegation of legislative power is appropriate in this instance as it allows the criteria be amended in a timely manner so they can remain relevant to the prevailing export control environment and risks. This will enhance national security while providing adequate flexibility to Government to respond to stakeholder feedback and meet our international obligations.

Yours sincerely

KEVIN ANDREWS MP

- 9 APR 2015

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

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

24 MAR 2015

By email: scrutiny.sen@aph.gov.au

The Enhancing Online Safety for Children Bill 2014

Dear Senator Polley

I am writing to respond to the further issue raised by the Senate Scrutiny of Bills Committee in its letter to my Office dated 5 March 2015 in relation to the Enhancing Online Safety for Children Bill 2014 (the Online Safety Bill).

The Committee sought further advice as to whether consideration has been given to ensuring that expert drafters will be involved in the preparation of any subordinate legislation created under paragraph 5(1)(c) of the Online Safety Bill.

Clause 5 of the Online Safety Bill sets out the test for when material is considered 'cyber-bullying material targeted at an Australian child'. Paragraph 5(1)(c) allows for inclusion of 'such other conditions (if any) as set out in the legislative rules'.

I note the Committee's comment that the content of any relevant legislative instrument made under paragraph 5(1)(c) of the Online Safety Bill may involve complex and difficult drafting.

In keeping with standard practice, it is intended that relatively simple legislative instruments would be drafted by the Department of Communications' Office of the General Counsel. Specialist drafting expertise would be sought, as appropriate, for the drafting of any more complex instruments.

As mentioned previously, any legislative rules created under paragraph 5(1)(c) of the Online Safety Bill would be subject to Parliamentary scrutiny and disallowance.

Thank you for providing the opportunity to respond to this issue. I hope the information will be of assistance.

Yours sincerely

Malcolm Turnbull

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SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

10 APR 2015

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

Dear Senator Helen,

Thank you for the letter of 26 March 2015 seeking my response to issues raised in *Alert Digest No. 4 of 2015* regarding the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2].

As the issues raised regarding the Bill have been thoroughly scrutinised by the Committee in relation to previous versions of the Bill introduced in 2013 and 2014, I rely on my earlier correspondence with the Committee on these issues.

Please feel free to contact my office if you require further information. The contact officer in my office is Mr Josh Manuatu on (02) 6277 7320 or at josh.manuatu@employment.gov.au.

Yours sincerely

ERIC ABETZ

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THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001579

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

Dear Senator

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills of 19 March 2015 to my office regarding *Alert Digest No. 3 of 2015*.

In response to the Committee's request for further information regarding the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, I provide the attached.

The contact officer in my Department is Mr. Greg Phillipson, Assistant Secretary Legislation and Framework Branch who can be contacted on 02 6264 2594.

Yours sincerely

PETER DUTTON

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

Alert Digest No. 3 of 2015

Response in relation to Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015

The committee therefore seeks a more detailed justification for the necessity and appropriateness of these powers. In addition, the committee seeks the Minister's advice in relation to:

- ***whether there are other examples of administrative forms of detention where detaining officers are given police-like powers similar to those included in this bill; and***
- ***how these powers compare to powers granted under legislation to use force to protect the life, health and safety of persons, and to maintain the order, peace or security of a prison.***

The committee emphasises that its overriding scrutiny concern is to understand the justification for these extraordinary powers, which has not yet been adequately established by the material available.

Rationale

Immigration detention facilities contain detainees who are in immigration detention for different reasons, including:

- illegal maritime arrivals (IMAs);
- people who have overstayed their visa; and
- people who have had their visas cancelled.

These people are not lawfully permitted to remain in the Australian community unless or until they hold a visa.

The demography of immigration detention facilities has changed. The immigration detention network holds a number of detainees who present behavioural challenges including:

- an increasing number of people subject to adverse security assessments;
- people who have been convicted of serious criminal offences; and
- others deemed to be of a high security risk, such as members of outlaw motor-cycle gangs.

Non-citizens who have had their visa cancelled because they have been convicted of serious crimes will be in immigration detention or serve their sentence in prison, depending on their individual circumstances. The presence of these high risk detainees jeopardises the safety of our immigration detention facilities and all persons within those facilities.

The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) amends the *Migration Act 1958* (Migration Act) to support the management of physical safety and good order in immigration detention facilities.

The Bill will clarify and strengthen the current arrangements under which officers exercise reasonable force when dealing with public order disturbances in an immigration detention facility.

The Bill and its associated procedures and training will provide staff in immigration detention facilities with certainty as to when use of reasonable force may be exercised to deal with public order disturbances and general management of the immigration detention environment.

It is these staff who are required to provide the first response to incidents that threaten physical safety or good order in an immigration detention facility. This is particularly an issue in remote immigration detention facilities where police response times may be delayed due to distance.

Currently, the officers employed by the detention service provider have the same common law powers as private citizens to deal with public order disturbances. The common law recognises that any citizen can lawfully take reasonable steps to:

- prevent actual or apprehended breach of the peace;
- perform arrests of suspected offenders in certain circumstances; and
- use reasonable force where they have a reasonable belief that there is a direct threat to the physical safety of another.

Continued reliance on common law is undesirable as:

- the law may vary from jurisdiction to jurisdiction – particularly in relation to use of force in defence of property;
- it is only possible after the event to say whether the force used was reasonable in the circumstances. In practical terms, this means employees cannot in real time be sure their actions are within the law;
- in assessing whether an employee of the immigration detention services provider lawfully used force to contain a disturbance in an immigration detention facility, the courts would determine whether a private citizen (who just happened to be an immigration detention services provider) lawfully used force by looking at what was objectively reasonable in the circumstances. Employees in this work environment require greater protection from the law;
- the principles are problematic for managing large public order disturbances in an immigration detention facility, such as riots; and
- given the changed demography of an immigration detention facility, from a practical standpoint, the common law powers are not sufficient for the day to day management of an immigration detention environment (such as transporting a detainee within an immigration detention facility) and do not provide the certainty desirable for maintaining a safe and secure facility.

Uncertainty on behalf of the immigration detention services provider as to when it may act when confronted with public order disturbances was considered in the Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre (the Hawke-Williams Report), conducted by Dr Allan Hawke AC and Ms Helen Williams AO in 2011.

The Hawke-Williams Report recommended that there be clear articulation of the responsibility of public order management between the department, the detention service provider, the Australian Federal Police and other police forces who may attend an immigration detention facility.

The Bill provides clear and specific powers for the use of reasonable force in

immigration detention facilities. These powers can also be used to:

- remove a detainee from a room or force entry to a room to prevent harm;
- isolate detainees to contain an incident;
- deter organised disruptions through separating detainees or cordoning off certain areas within a facility;
- move a high-risk detainee within an immigration detention facility to a place where they can be more closely supervised; and
- restrain a detainee to prevent escape.

The amendments in the Bill therefore clarify the current powers under the common law for dealing with public order disturbances and management of detainees in immigration detention facilities.

The key comparisons between the current common law powers and what would be conferred by the Bill are that the Bill would:

- provide certainty for the use of reasonable force in immigration detention facilities;
- provide certainty for the roles of authorised officers and relevant police forces; and
- allow the courts to focus on the authorised officer's personal assessment of the situation as well as examine objectively whether the force used by the officer was reasonable from the perspective of the authorised officer.

For the above reasons the Government is of the view that the amendments in the Bill are necessary and appropriate for the ongoing management of immigration detention facilities.

Examples of similar powers

Immigration detention facilities are unique in that they are the only large-scale Commonwealth facilities providing a detention environment.

Similar provisions to those in the Bill can however be found in some international immigration legislation.

The New Zealand *Immigration Act 2009* provides for similar powers for immigration officers for the management of detainees. In particular, section 328 of the Immigration Act gives additional powers relating to detention by immigration officers, including the use of such physical force as he/she has reasonable grounds to believe is reasonably necessary in order to:

- prevent the detainee from harming any person, damaging property, escaping or attempting to escape;
- re-capture a person who has fled.

Under section 328, reasonable force may also be used by an immigration officer to search a person and seize any items which may pose a threat to the safety of the officer or any other person.

The UK *Immigration and Asylum Act 1999* provides for a general power for immigration officers to use reasonable force when exercising powers under certain immigration Acts.

Similar provisions to those in the Bill can also be found in State legislation that governs other detention environments that deal with similar behavioural challenges as those faced in immigration detention facilities.

Section 143 of the *Corrective Services Act 2006* (QLD) relevantly provides that a corrective services officer may use force, other than lethal force, that is reasonably necessary to:

- compel compliance with an order given or applying to a prisoner; or
- restrain a prisoner who is attempting or preparing to commit an offence against an Act or a breach of discipline; or
- restrain a prisoner who is committing an offence against an Act or a breach of discipline; or
- compel any person who has been lawfully ordered to leave a corrective services facility, and who refuses to do so, to leave the facility; or
- restrain a prisoner who is—
    - attempting or preparing to harm himself or herself; or
    - harming himself or herself.

The corrective services officer may use the force only if the officer—

- reasonably believes the act or omission permitting the use of force cannot be stopped in another way; and
- gives a clear warning of the intention to use force if the act or omission does not stop; and
- gives sufficient time for the warning to be observed; and
- attempts to use the force in a way that is unlikely to cause death or grievous bodily harm.

Similarly, section 34B of the *Corrections Act 1997* (TAS) provides that a correctional officer may use force that is necessary and reasonable for this Act, including for any of the following:

- to compel compliance with a direction given in relation to a prisoner or detainee by the Director;
- to prevent or stop the commission of an offence or disciplinary breach;
- to prevent the escape of a prisoner or detainee;
- to prevent unlawful damage, destruction or interference with property;
- to defend the correctional officer or someone else;
- to prevent a prisoner or detainee from inflicting self-harm;
- any other thing prescribed by the regulations.

However, a correctional officer may use force only if the correctional officer believes, on reasonable grounds that the purpose for which force may be used cannot be achieved in another way.

Administrative forms of detention also contain similar provisions to those in the Bill.

The *Mental Health (Treatment and Care) Act 1994* (ACT) provides for powers in relation to the detention, restraint etc. for the treatment and care of a mentally ill person. In particular, subsections 35(2) and 36G(2) of the Act provide that the chief

psychiatrist, or care coordinator (or a person authorised by the care coordinator) of the community care facility, may:

(a) take, or authorise someone else to take, the person to the premises and for that purpose—

(i) use the force and assistance that is necessary and reasonable to apprehend the person and take the person to the premises; and
(ii) if there are reasonable grounds for believing that the person is at particular premises- enter those premises using the force and assistance that is necessary and reasonable;

The Act also gives the chief psychiatrist and care coordinator the power to subject the person to the confinement or restraint that is necessary and reasonable (see paragraphs 35(2)(c) and 36G(2)(c) of the legislation).

The power to confine, seclude or restrain gives the service provider a graduated range of interventions for incidents, or significant risk of incidents, of harm to self or others.

The South Australian *Mental Health Act 2009* also provides powers to authorised officers to 'restrain the person and otherwise use force in relation to the person as reasonably required in the circumstances' (see paragraph 56(3)(c)). An authorised officer includes a:

- mental health clinician;
- ambulance officer;
- a person employed as a medical officer or flight nurse; or
- a person prescribed by the regulations. The regulations do not currently prescribe any such persons.

Other legislation of interest

The Victoria State Government employs Protective Service Officers (PSOs) based on the Victorian railway network and are deployed to support the community and make Victorian railways safer for all users. PSOs possess the necessary powers to reduce crime, violence and anti-social behaviour at train stations.

PSOs are not sworn members of the police force but are employed by Victoria Police and are armed with semi-automatic guns. PSOs are given a wide range of powers including:

- the ability to arrest and detain, including arrest for drunk and disorderly offences;
- the ability to search people and property and seize such items as weapons and alcohol;
- issue on the spot fines, including for graffiti offences; and
- issue a direction to 'move on' from the area.

There is no proposal for workers in immigration detention facilities to be armed.

Relevant excerpts from the legislation are at Attachment A.

The committee seeks the Minister's advice as to the rationale for leaving these important matters to policy, rather than including them in the bill itself.

The Department will have in place detailed policies and procedures reflected in the IDSP contract on the use of reasonable force in an IDF. These safeguards will ensure that the use of force:

- will be used only as a measure of last resort;
- must only be used for the shortest amount of time possible;
- must not include cruel, inhuman or degrading treatment; and
- must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, de-escalating through engagement and negotiation will be the first response to maintain operational safety.

Extensive guidance for authorised officers is contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system ('CDIS') and in the Department's publicly available online subscription database ('LEGEND'). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

The Bill provides that an authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, in the circumstances specified. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

The Bill confers specific and limited powers on authorised officers to use reasonable force to protect the life, health and safety of any person in an IDF. The Bill does not provide authorised officers with the same powers afforded police officers. Departmental instructions, policies and procedures will provide extensive guidance and examples of what is considered reasonable.

All planned use of reasonable force in an IDF must be authorised by the Department Regional Manager ('RM'), or in certain circumstances, by the Director, Detention Operations, within an IDF.

When unplanned use of reasonable force is necessary (an immediate response to an incident), the IDSP will notify the Department of the actions taken to resolve the incident and, consistent with contractual requirements, comply with all reporting and post incident review requirements.

The Bill provides that an authorised officer must not:

- use reasonable force to administer nourishment or fluids to a detainee in an IDF. The proposed amendment recognises that it is the role of qualified medical practitioners who can assess an individual's medical needs;
- subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances – this is to ensure that when an authorised officer uses force, it is not only reasonable, but also promotes respect for the inherent dignity of the individual; and
- do anything likely to cause a person grievous bodily harm unless the authorised officer reasonably believes that it is necessary to protect the life of, or to prevent serious injury to, another person (including themselves).

There are only very exceptional and extreme circumstances in which the use of force in an IDF should extend to the infliction of grievous bodily harm. For example, although it is unlikely, a situation could arise where a detainee is able to obtain a weapon and hold a hostage. In this situation an authorised officer may need to use sufficient reasonable force that causes, or is likely to cause, grievous bodily harm to the detainee should a physical confrontation be necessary.

Governance arrangements regarding the use of reasonable force in an IDF will be established through consultation with the Australian Federal Police ('AFP') and the Australian Border Force ('ABF') and will include:

- a review of existing policy instructions and administrative arrangements to ensure decisions to use reasonable force are appropriate;
- revising the protocols between the Department, the IDSP, the AFP and State/Territory police services, including memoranda of understanding to reflect the changes proposed in this Bill;
- monitoring specific capability and training standards to ensure that they continue to be the appropriate qualifications to enable authorised officers to use reasonable force within an IDF;
- the use of rigorous incident reporting mechanisms for reporting of all instances where reasonable force is used - all instances where use of reasonable force and/or restraint are applied (including any follow-up action), must be reported to the Department and a post incident analysis must be undertaken;
- any planned use of reasonable force must involve a risk-management assessment undertaken in accordance with established procedures and approval processes. Following the risk assessment, consultation must occur with relevant health providers to ensure that there are no medical impediments to the planned use of reasonable force; and
- the detainee must be referred for medical review, as soon as practicable, following the use of reasonable force.

The Department considers that the balance between what is detailed in the Bill and what is addressed through policy and procedural documentation is appropriate and remains the subject of extensive internal and external scrutiny.

The committee seeks further advice from the Minister about the sufficiency of these arrangements for ensuring that employees of a private company have adequate training and qualifications to exercise the police-like powers that will be conferred by this bill. In this respect, the committee notes the following issues:

- ***the extent to which the standard of training and qualifications that will be required falls short of those required of a sworn police officer is unclear;***
- ***the training and qualification requirements will not be subject to Parliamentary scrutiny. Subsection 197BA(8) provides that the Minister's determination of these requirements is not a legislative instrument. The explanatory memorandum states that this is not considered to be a substantive exemption from the Legislative Instruments Act 2003, though does not explain the basis for this conclusion. The explanatory memorandum also suggests that it would be inappropriate for these requirements to be included in the primary legislation or the regulations because 'the qualifications and training change over time, as does the content of the training' and it would therefore 'not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect these updated training requirements' (at p. 11). Even if these claims are accepted, the point remains that the training and qualification requirements for the exercise of police-like powers are determined by a Ministerial decision which is not subject to Parliamentary scrutiny. Given the justification for the conferral of use of force powers to non-government employees relies on the fact that such officers will be appropriately trained and qualified, the lack of parliamentary scrutiny of the training and qualification requirements is an issue of considerable concern to the committee (even if it is accepted that subsection 197BA(8) is not a substantive exemption from the Legislative Instruments Act 2003); and***
- ***although the Minister is responsible for determining appropriate training and qualification requirements and authorised officers will be required to apply departmental policy in decision-making about the use reasonable force, it is notable that these forms of control over the performance of authorised officers exist alongside the employment relationship between officers and Immigration Detention Services Providers. The statement of compatibility notes that 'clauses in the contract for the provision of detention services between the Commonwealth and the Immigration Detention Services Provider (IDSP) require the IDSP to apply rigorous governance mechanisms to all instances where reasonable force is used' (p. 18). However, issues may arise about the alignment of policy and contractual requirements, as policy may be unilaterally changed by the government whereas contractual obligations are based on agreement between the parties to the contract. At a more practical level authorised officers may experience a conflict between adhering to government policy and instructions from their employer ('private' imperatives based on the***

employment relationship may not accommodate the public values of decision-making embodied in government policy). Such conflicts are contingent (i.e. they will not necessarily arise), but the possibility the may arise is illustrative of the general concern about the conferral of coercive powers upon non-government employees.

Adequacy of training and qualifications

The Minister and the Department have not abrogated their responsibilities or their duty of care towards detainees. Authorised officers will meet minimum standards in training and qualification requirements. A person cannot be an authorised officer for the purposes of section 197BA unless he or she satisfies the training and qualification requirements determined by the Minister in writing.

The Department currently expects and has stipulated in the IDSP contract that all officers, who manage security at an IDF, will hold at least a Certificate Level IV in Security Operations or Technical Security or equivalent and will have acquired at least five years of experience in managing security.

For authorised officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent or obtain a Certificate Level II in Security Operations within six months of commencement. The Department requires that:

- the successful completion of the IDSP's mandatory induction training leads to staff being awarded the Certificate II in Security Operations; and
- no officer will be placed in an IDF without this essential qualification.

The Certificate II in Security Operations includes the competency based unit '**CPPSEC2004B – Respond to security risks situations**', the curriculum of which covers the knowledge and skills required for an authorised officer to use reasonable force. Security accreditation must be provided by a Registered Training Organisation and be delivered by a Level IV accredited trainer. The current IDSP is a Registered Training Organisation.

Tier 1 and Tier 2 IDSP officers are also trained in '**CPPSEC2017A – Protect Self and Others using Basic Defensive Techniques**', which is included as part of the required refresher training. Competency requires demonstration of ability to:

- apply basic defensive techniques in a security risk situation; and
- use basic lawful defensive techniques to protect the safety of the individual and others.

This training forms part of the licensing requirements for persons engaged in security operations in those States and Territories where these are regulated activities. This training, while not formally equivalent to police training, is similar to police and corrections training in so far as it includes control holds and other defensive measures, but training in strikes or use of impact tools is not required nor provided.

The IDSP contract requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force. In addition, all authorised officers will attend regular refresher training on the use of reasonable

force in IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Any individual who is appointed as an authorised officer for the purposes of the provisions of this Bill must satisfy the minimum training and qualification requirements that will be determined by the Minister. This will apply whether they are contracted staff, departmental staff, or any other person appointed as an authorised officer.

Currently, departmental officers, who are required to manage the IDSP contract, receive training to oversee the IDSP staff, including their use of reasonable force. Departmental officers must ensure any such use of force is applied strictly in accordance with established policy, procedures and contractual obligations.

The IDSP is contractually required to regularly report to the Department on the officers who are qualified and authorised to use reasonable force. A complete record of all staff having received training in the use of reasonable force, including the use of restraints, is maintained by the IDSP. The IDSP submits reports based on these records to the Department each quarter.

Will a conflict arise between adhering to government policy and instructions from the IDSP as employer?

Both Detention Services Contracts require Immigration Detention Service Providers to comply with all relevant government policy. In a circumstance where it was identified that an IDSP's employer directed them to undertake an action that contradicts government policy, this would constitute a breach of contract.

Furthermore, in the case of the Facilities and Detainee Services Provider (Serco), an officer directing their staff to deliver services in a manner inconsistent with government policy would constitute a breach of the code of conduct, most notably clause 2.3(i) which provides:

"[In carrying out its duties, the Service Provider, its Personnel and any Subcontractors are to:] comply with all applicable Australian Laws and also any Australian Government Policies notified to them from time to time;"

As an organisation, Serco is subject to financial abatement for any confirmed breaches of the code of conduct. Sustained poor performance may ultimately lead to the Department issuing a termination notice if issues remain unaddressed.

The committee expresses the view that it is not clear why the complaints mechanism is aptly characterised as 'an important accountability measure' (statement of compatibility, p. 19).

The complaints mechanism will allow a person to make a complaint to the Secretary about an authorised officer's exercise of power under the provisions of this Bill. The proposed new section 197BB of the Bill is predominantly a procedural measure for complaints to the Secretary about an authorised officer's exercise of power under section 197BA.

The Bill will require the Secretary to provide appropriate assistance to a person who wishes to make a complaint and requires assistance to formulate the complaint. Should a person not feel comfortable with this complaints process, they may choose to use an alternative complaint mechanism. For example, detainees can complain directly to the Australian Human Rights Commission, the Red Cross, the office of the Commonwealth Ombudsman, elected representatives, police, state welfare agencies, community groups and advocacy groups or ask that body to advocate on their behalf.

The complainant may also seek the assistance of the relevant police force if he or she considers that the use of force may have been unauthorised and, therefore, criminal.

The Department has a well-established recording, tracking and management process for feedback and complaints, based on the Australian standards for complaint management.

On receiving a complaint about the use of force in an IDF, the Secretary of the Department will either:

- investigate the complaint (subject to limited circumstances, the Secretary must generally investigate a complaint);
- decide not to investigate the complaint in certain circumstances;
- refer or transfer the complaint to the Commonwealth Ombudsman; or
- transfer the complaint to the Commissioner of the AFP, or the Commissioner or head of the police force of the relevant State or Territory.

If the Secretary decides to conduct an investigation into the complaint, it may be conducted in any way the Secretary thinks is appropriate. Subsection 496(2) of the Migration Act permits the Secretary to delegate to another person his power to undertake an investigation. The Secretary will expect such an investigation to be conducted to the highest administrative standards. Without pre-empting any decision of the Secretary, it is likely that such an investigation would be referred, in the first instance, to the Detention Assurance Team for appropriate action.

The Secretary may decide not to investigate or continue to investigate a complaint, but only if satisfied that:

- the same or substantially similar complaint has been made already – and it has been dealt with or is still being dealt with;
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;

- the complainant does not have sufficient interest in the subject matter of the complaint – it would be expected that in most cases the complainant is the person who was the subject of the use of force, or a witness; or
- the investigation, or further investigation, is not justified in all the circumstances.

The complainant will be advised in writing of the Secretary's reasons for the decision not to investigate a complaint. If the complainant is not happy with this outcome it is open to the complainant to use an alternate complaint mechanism (e.g. Ombudsman, Australian Human Rights Commission or Police).

After completing an investigation into a complaint the Secretary may consider it to be appropriate to refer the matter to the Ombudsman. This may in particular be relevant if there are additional or related issues that have been raised in the complaint, beyond the complainant's concern about the use of force.

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the Ombudsman, the matter may be transferred accordingly. The Ombudsman will then be able to investigate the complaint as if the complaint had been made directly to the Ombudsman. The complainant will be notified in writing if their complaint is referred or transferred.

The Department and the Ombudsman's Office will work closely to develop protocols for these arrangements.

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the relevant police force, the matter may be referred accordingly. The complainant will be notified in writing if their complaint it transferred.

The Department and the AFP will work closely to develop protocols for these arrangements.

In light of the committee's comments above, the committee seeks a fuller explanation from the Minister as to the rationale for the proposed approach to the provision of immunity from civil and criminal action.

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth, in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith.

This does not, and is not intended to, bar all possible proceedings against the Commonwealth.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Similarly it is *always* the case that Federal, State or Territory police may institute a prosecution, for example for assault, notwithstanding this provision – it would be up to the Court to determine whether this provision has any application in the particular circumstances.

Proposed section 197BF of the Migration Act contemplates that the Commonwealth

will only have protection from criminal and civil action in all courts except the High Court if the powers are exercised in good faith.

As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- Was the action complained about an exercise of power under proposed section 197BA?
- Did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- maintain the good order, peace or security of an immigration detention facility,

then it is not captured by the partial bar in proposed section 197BF.

Further, if a court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer.

Why is the bar necessary?

The policy intent of the partial bar in proposed section 197BF of the Bill is to provide assurance to authorised officers (such as employees of a detention services provider) that they will not be the subject of legal proceedings for undertaking their duties in accordance with law.

Without proposed section 197BF officers, may be reluctant to use reasonable force to protect a person or to contain a disturbance in an immigration detention facility. Given the occurrence of public order disturbances in immigration detention facilities there is a real risk that this could result in the death or serious harm to a person in an immigration detention facility or major destruction of the immigration detention facility itself.

In the event of a disturbance in an immigration detention facility, authorised officers may be required to exercise powers, including reasonable force, to protect the life, health or safety of people in the immigration detention facility.

This is particularly relevant to immigration detention facilities that are in remote locations, including Christmas Island, where response times from the State, Territory or Australian Federal police may be prolonged.

In these circumstances authorised officers will be required to provide the first response, including acting pro-actively to prevent or deter incidents, and undertaking more sustained management of incidents that threaten physical safety in an immigration detention facility.

It is the Government's view that this amendment strikes the balance between providing assurance to authorised officers that may be required to use reasonable

force in certain circumstances in the exercise of their duties as an employee and the need to ensure that the use of force is reasonable, proportionate and appropriate.

The committee therefore seeks further advice from the Minister:

- ***about the availability of judicial review (including whether review is—and if not, should be—available under the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act), given doubts about the availability of review under s 75(v) of the Constitution); and***
- ***what judicial review remedies (under s 75(v) of the Constitution or the ADJR Act) could conceivably be sought in relation to the exercise of the use of reasonable force powers proposed by this bill and what practical utility those remedies would have for persons affected for any use of force which is not authorised by the powers.***

Remedies available to aggrieved persons

The bar on proceedings in proposed section 197BF of the Bill is limited as described previously. The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Similarly it is always the case that Federal, State or Territory police may institute a criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding proposed section 197BF of the Bill - it would be up to the Court to determine whether this provision has any application in the particular circumstances.

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- whether or not the use of reasonable force was an exercise of power under section 197BA; and
- whether or not the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercise in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

ADJR Act

The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) specifies the range of Commonwealth decisions and actions that are reviewable under the Act (section 3), and the decisions excluded from review (subsection 3(1), Schedule 1 of the ADJR Act). In very basic terms for the ADJR Act to apply it must relate to a decision of an administrative character made under an enactment. The exercise of reasonable force does not appear to be a decision of an administrative character

made under an enactment. On this basis the Department's view is that the ADJR Act would not apply to the use of reasonable force irrespective of the operation of proposed section 197BF of the Bill.

The Bill does provide limited circumstances where an administrative decision is required or permitted, see in particular proposed subsection 197BD(1) providing for a decision not to investigate a complaint and proposed subsection 197BE(1) providing for a decision to transfer a complaint. In general terms, section 3 and Schedule 1 of the ADJR Act provides that the ADJR Act does not apply to a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958* (the Migration Act), or a purported privative clause decision within the meaning of section 5E of the Migration Act. Without going into extensive detail, the Department's view is that a decision under proposed sections 197BD and 197BE of the Bill may be a privative clause decision, or if the decision was affected by jurisdictional error, a purported privative clause decision. On this basis, the Department's view is that the ADJR Act would not apply to such decisions.

Attachment A

NZ Immigration Officer's Powers

Immigration Act 2009 (NZ)
328 Additional powers relating to detention by immigration officer

(1) Where an immigration officer is exercising the power of detention under section 312, the immigration officer may use such physical force as the officer has reasonable grounds for believing is reasonably necessary—

(a) to prevent the detained person from harming any person; or
(b) to prevent the detained person from damaging any property; or
(c) to prevent the detained person from escaping or attempting to escape from detention; or
(d) to recapture the person, if the person is fleeing, having escaped from detention.

(2) Where an immigration officer has detained a person under section 312, an immigration officer may search that person if the officer has reasonable grounds to believe that—

(a) the person has an item hidden or in clear view on or about his or her person; and
(b) the item poses a threat to the safety of the officer, or any other person; and
(c) there is a need to act immediately in order to address that threat.

(3) An immigration officer may, when carrying out a search under subsection (2), seize any item found on or about a person that the immigration officer has reasonable cause to suspect is an item that poses a threat to the safety of the officer or any other person.

(4) If necessary, reasonable force may be used to search a person under subsection (2) and seize any item under subsection (3).

(5) An immigration officer may detain and destroy any item that he or she seizes under subsection (4).

(6) An immigration officer who uses physical force or undertakes a search under this section must, not later than 3 working days after the use of the force or the search, give to the chief executive a written report of the use of the force or search, the circumstances in which it was used or conducted, and the matters that gave rise to the reasonable grounds to believe required by subsection (1) or (2).

Fact sheet available at: http://www.immigration.govt.nz/NR/rdonlyres/8C33D56E-47D4-457E-99AF-3103B94017DC/0/PowersofIOsfactsheetSep2012.pdf

Immigration and Asylum Act 1999 (UK)
146 Use of force.

(1)An immigration officer exercising any power conferred on him by the 1971 Act or this Act may, if necessary, use reasonable force.

(2)A person exercising a power under any of the following may if necessary use reasonable force—

(a)section 28CA, 28FA or 28FB of the 1971 Act (business premises: entry to arrest or search),
(b)section 141 or 142 of this Act, and
(c)regulations under section 144 of this Act.

Corrective Services Act 2006 (QLD)
143 Authority to use reasonable force

(1) A corrective services officer may use force, other than lethal force, that is reasonably necessary to—

(a) compel compliance with an order given or applying to a prisoner; or

Example—

A corrective services officer may use force that is reasonably necessary to compel a prisoner to submit to a search ordered by the chief executive under section 36 that applies to the prisoner.

(b) restrain a prisoner who is attempting or preparing to commit an offence against an Act or a breach of discipline; or
(c) restrain a prisoner who is committing an offence against an Act or a breach of discipline; or
(d) compel any person who has been lawfully ordered to leave a corrective services facility, and who refuses to do so, to leave the facility; or
(e) restrain a prisoner who is—
(i) attempting or preparing to harm himself or herself; or
(ii) harming himself or herself.

(2) The corrective services officer may use the force only if the officer—

(a) reasonably believes the act or omission permitting the use of force cannot be stopped in another way; and
(b) gives a clear warning of the intention to use force if the act or omission does not stop; and
(c) gives sufficient time for the warning to be observed; and
(d) attempts to use the force in a way that is unlikely to cause death or grievous bodily harm.

(3) However, the corrective services officer need not comply with subsection (2)(b) or (c) if doing so would create a risk of injury to—

(a) the officer; or
(b) someone other than the person who is committing the act or omission; or
(c) a prisoner who is—
(i) attempting or preparing to harm himself or herself; or
(ii) harming himself or herself.

(4) The use of force may involve the use of only the following—

(a) a gas gun;
(b) a chemical agent;
(c) riot control equipment;
(d) a restraining device;
(e) a corrective services dog under the control of a corrective services officer.

CORRECTIONS ACT 1997 (TAS)
34B. Authorised use of force

(1) A correctional officer may use force that is necessary and reasonable for this Act, including for any of the following:

(a) to compel compliance with a direction given in relation to a prisoner or detainee by the Director;
(b) to act under section 28;
(c) to prevent or stop the commission of an offence or disciplinary breach;
(d) to prevent the escape of a prisoner or detainee;
(e) to prevent unlawful damage, destruction or interference with property;
(f) to defend the correctional officer or someone else;
(g) to prevent a prisoner or detainee from inflicting self-harm;
(h) any other thing prescribed by the regulations.

(2) However, a correctional officer may use force only if the correctional officer believes, on reasonable grounds, that the purpose for which force may be used cannot be achieved in another way.

Mental Health (Treatment and Care) Act 1994 (ACT)
35 Powers in relation to detention, restraint etc
(1) This section applies if a psychiatric treatment order has been made in relation to a person.
(2) If the chief psychiatrist considers that it is necessary for the treatment and care of the person to detain the person at certain premises, the chief psychiatrist may—
(a) take, or authorise someone else to take, the person to the premises and for that purpose—
(i) use the force and assistance that is necessary and reasonable to apprehend the person and take the person to the premises stated by the chief psychiatrist; and
(ii) if there are reasonable grounds for believing that the person is at particular premises—enter those premises using the force and assistance that is necessary and reasonable; and
(b) keep the person at the premises in the custody that the chief psychiatrist considers appropriate; and
(c) subject the person to the confinement or restraint that is necessary and reasonable—
(i) to prevent the person from causing harm to himself, herself or someone else; or
(ii) to ensure that the person remains in custody under the order; and

(d) subject the person to involuntary seclusion if satisfied that it is the only way in the circumstances to prevent the person from causing harm to himself, herself or someone else.

36G Powers in relation to detention, restraint etc

(1) Subsection (2) applies if a community care order has been made in relation to a person and—

(a) a restriction order has also been made in relation to the person requiring the person to be detained at a community care facility; or

(b) the care coordinator requires the person to be detained at a community care facility under section 36K (Contravention of psychiatric treatment order or community care order).

(2) The care coordinator may—

(a) take, or authorise someone else to take, the person to the premises and, for that purpose—

(i) use the force and assistance that is necessary and reasonable to apprehend the person and take the person to the premises; and

(ii) if there are reasonable grounds for believing that the person is at particular premises- enter those premises using the force and assistance that is necessary and reasonable; and

(b) keep the person at the premises in the custody that the ACAT considers appropriate; and

(c) subject the person to the confinement or restraint that is necessary and reasonable—

(i) to prevent the person from causing harm to himself, herself or someone else; or

(ii) to ensure that the person remains in custody under the order; and

(d) subject the person to involuntary seclusion if satisfied that it is the only way in the circumstances to prevent the person from causing harm to himself, herself or someone else; and

...

38 Detention

(1) Where a person is taken to an approved health facility under section 37 or the Crimes Act, section 309 (1) (a), the person in charge of the facility shall detain the person at the facility and while the person is so detained—

(a) may keep the person in such custody as the person in charge thinks appropriate; and

(b) may subject the person to such confinement as is necessary and reasonable—

(i) to prevent the person from causing harm to himself or herself or to another person; or

(ii) to ensure that the person remains in custody; and

(c) may subject the person to such restraint (other than confinement) as is necessary and reasonable—

(i) to prevent the person from causing harm to himself or herself or to another person; or

(ii) to ensure that the person remains in custody

<u>Mental Health Act 2009 (SA)</u>

56—Powers of authorised officers relating to persons who have or appear to have mental illness

(3) An authorised officer may, subject to this section, exercise the following powers in relation to a person to whom this section applies:

(a) the authorised officer may take the person into his or her care and control;

(b) the authorised officer may transport the person from place to place;

(c) the authorised officer may restrain the person and otherwise use force in relation to the person as reasonably required in the circumstances;

(d) the authorised officer may restrain the person by means of the administration of a drug when that is reasonably required in the circumstances;

(e) the authorised officer may enter and remain in a place where the authorised officer reasonably suspects the person may be found;

(f) the authorised officer may search the person's clothing or possessions and take possession of anything in the person's possession that the person may use to cause harm to himself or herself or others or property.

Protective Services Officers - Vic

Protective Services Officers (PSOs) powers are derived from a number of Acts. See the following link for comprehensive background on protective service offenders and the Bill that was introduced to extend powers to PSO's in public places: http://www.parliament.vic.gov.au/publications/research-papers/2068-justice-legislation-amendment-protective-services-officers-bill-2011

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-004037

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

Dear Senator Polley

Thank you for your letter of 19 March 2015 in relation to comments made in the Committee's Alert Digest No. 3 of 2015 concerning the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.

In response to the Committee's request for further information on the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015, I provide the attached.

The contact officer in my Department is Dr Ben Evans, Assistant Secretary, Strategy Branch, who can be contacted on 02 6264 1961.

Thank you for considering this response.

Yours sincerely

PETER DUTTON

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Attachment A

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Breadth of discretion

From a scrutiny perspective, the committee therefore expresses the view that it remains unpersuaded that the purposes underlying the bill could not be achieved without the introduction of an extremely broad discretionary power. If there are broader purposes for which it is considered necessary to collect personal identifiers, it is suggested that a better approach from a scrutiny perspective is for these to be identified and appropriate, targeted amendments introduced.

In light of these comments, the committee requests further advice from the Minister which gives more detailed consideration to the problem posed by the breadth of discretionary power in this context.

In 2013-14 over 35 million passengers arrived and departed from Australia's border and nearly five million visas were granted. Passengers travelling in and out of Australia are estimated to rise to 50 million by 2020. Traveller volumes and the use of online services are increasing and criminals are becoming increasingly sophisticated in their attempts to circumvent the law. The reforms in the Bill will strengthen border controls. The reforms proposed in the Bill support the Department's capacity to verify identity by providing the flexibility to respond on a case-by-case basis to higher risk individuals while allowing most people to move seamlessly and efficiently across the border.

The current legislative framework in the *Migration Act 1958* (the Migration Act) for the collection of personal identifiers was introduced more than ten years ago. While restricting the Department's authority to collect personal identifiers to specific circumstances may have been appropriate at that time, this is no longer the case. It is no longer practical or appropriate to respond to increasing risks from terrorism-related events in Australia and other countries using a legislative framework that was introduced at the start of the last decade.

Technological innovation now allows the Department to collect personal identifiers quickly, using non-intrusive scanners and other devices. Yet, the Department cannot utilise this new technology effectively because of limitations in legislation. It is a critical capability to identify people applying for a visa to travel to Australia, crossing Australia's border or remaining in the Australian community. The Bill will provide the Department with authority to collect personal identifiers quickly and efficiently with minimal disruption and intrusion for the majority of individuals. The Department's handling of personal identifiers collected from citizens and non-citizens will remain subject to legislative rules and public scrutiny, as is currently the case.

Types of personal identifiers

The Bill does not add new types of personal identifiers that the Department is authorised to collect.

Subsection 5A(1) of the Migration Act defines a personal identifier as:

a) *fingerprints or handprints of a person (including those taken using paper and ink or digital live-scanning technologies);*
b) *a measurement of a person's height and weight;*
c) *a photograph or other image of a person's face and shoulders;*
d) *an audio or a video recording of a person;*
e) *an iris scan;*
f) *a person's signature; and*
g) *any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the Crimes Act 1914.*

There are no personal identifiers prescribed for the purposes of paragraph 5A(1)(g).

When personal identifiers can be collected

The powers to collect personal identifiers are currently contained in a number of provisions in the Migration Act. These powers:

- restrict the types of personal identifiers that can be collected to specific circumstances only;
- restrict the circumstances when personal identifiers can be collected;
- do not cover a number of circumstances where personal identifiers could assist to resolve concerns about the identity of a person or their immigration, criminal and/or security histories when determining a non-citizen's permission to enter, stay or depart Australia;
- prevent the collection of personal identifiers from minors and incapable persons where the consent and presence of a parent, guardian or an independent person is withheld in certain circumstances.

These restrictions are legislatively complex and inefficient, and limit the Department's capability to collect personal identifiers to strengthen border protection and ensure the integrity of Australia's permanent and temporary migration programmes.

The Bill addresses these current restrictions. For example, the Department is not authorised to collect fingerprints from persons departing Australia. This restricts the Department to using paper-based credentials to attempt to resolve identity or other security concerns as they arise, even though technology is now available to conduct a more accurate, faster and higher-integrity check using a fingerprint scan in less than one minute. The recent case of

the convicted terrorist Khaled Sharrouf, who in December 2013 used his brother's passport to leave Australia to participate in terrorist-related activities, illustrates the need to expand the use of fingerprint-based checks to resolve concerns at the border.

While subsection 5A(3) of the Migration Act outlines more than a dozen purposes for which personal identifiers may be used, the Department is restricted in its authority to collect personal identifiers to the following specific circumstances:

Citizens:

- at Australia's border, facial images, signature and a type of identifier contained in a person's passport can be required on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175), and on entry a person can also be required to provide fingerprints or an iris scan (section 166).

The Bill does not expand the circumstances where Australian citizens can be required to provide personal identifiers. Australian citizens can, as is currently the case, only be required to provide one or more personal identifiers under the Bill when at Australia's border; both at arrival and departure, and when travelling, or appearing to intend to travel, on an overseas vessel from a port to another port.

Non-citizens:

- visa decision-making (sections 40 and 46);
- at Australia's border, on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175);
- evidencing that a non-citizen holds a lawful visa (section 188) and when a non-citizen is being detained on the basis that they hold a visa that is subject to cancellation on certain grounds (section 192); and
- immigration detention decision-making (section 261AA).

The progressive expansion of the Department's biometric programme over time has resulted in the collection of personal identifiers from some non-citizens, but not others, depending on the timing of their visa application or arrival in Australia. The Bill will close significant gaps in the Department's authority to collect personal identifiers from non-citizens living in the Australian community.

These gaps where the Department is currently restricted in its authority to collect personal identifiers include:

- non-citizens holding a valid visa who are subject of an investigation;
- non-citizens found to be in breach of their visa conditions (eg., working when their visa does not authorise them to do so);

- non-citizens whose identity, security, criminal history or immigration history become of concern after visa grant; and
- non-citizens who become of concern after arrival in Australia, who have not been subject to higher-integrity checks that are possible using personal identifiers compared to the current use of paper-based document checks.

Also, the Department collects a facial image only on the overwhelming majority of non-citizens who travel on a tourist visa, business, family or student visa. A one-to-one match of a person to a facial image in a passport or other travel document is generally sufficient to verify a person's identity. However, where this is not possible, the Department seeks authority to collect an additional personal identifier, such as a scan of fingers. Biometric-based checks provide a higher level of integrity than is possible using paper-based credentials, and enables security and other checks with Australian law enforcement and overseas partner agencies.

As stated in the Explanatory Memorandum to the Bill, the Department collected an additional personal identifier (ie., fingerprints) on less than two percent of people granted a visa in 2013/14. The Department is prevented from conducting more checks because of the Migration Act, which requires a time-consuming identification test.

Flexible, discretionary framework

The Committee has suggested that more targeted amendments could be introduced, rather than the discretionary power proposed in the Bill. It would be impractical to adequately specify separate legislative provisions to address all current gaps in the Migration Act. Nor would such an approach provide authority to collect personal identifiers in new circumstances that may arise in the future without further legislative amendments.

The flexible approach adopted in the Bill provides an appropriate balance between improving the effectiveness of checks to prevent identity fraud and detect non-citizens with undisclosed adverse histories from entering, departing or remaining in Australia. An alternative approach to that proposed in the Bill would be to follow the example of the United States and introduce a mandatory, universal biometric collection policy for non-citizens that involves a visa pre-approval process of providing a biometric facial image and ten fingerprints in person. Such a measure would be expensive and inconvenience hundreds of thousands of travellers. It is also unnecessary, given the overwhelming majority of travellers are legitimate, and need not be subject to additional measures that will negatively impact on the smooth transit of increasing numbers of travellers at Australia's border.

The Bill will establish a practical framework to authorise officers to determine from whom to collect personal identifiers based on individual circumstances and factors. The Bill provides the flexibility to require personal identifiers in some circumstances on a case-by-

case basis. For example, at Australia's border, rather than potentially collecting an additional personal identifier from everyone, including persons of low risk, the Department seeks authority to collect personal identifiers from *any person* who is identified as higher risk.

The Department has developed a range of sophisticated and innovative tools and capabilities to analyse risk when making visa application decisions and when people are crossing Australia's border. These mathematical, statistical and machine-intelligence techniques produce evidence-based data that can be used to detect persons of higher risk. Examples where these tools are used include where a person:

- 'fails' automated immigration clearance through Smartgate or a manual face-to-passport check, because their facial image does not 'match' the passport photo or the passport is listed as 'stolen';
- an alert is triggered against the Department's Central Movement Alert List; and
- matches a profile (eg., a person might match a profile for identity fraud, which may include combinations or patterns of a range of variables, such as age or where a ticket was purchased with cash).

The Department's biometric programme has demonstrated the effectiveness of using personal identifiers to combat identity fraud and to detect undisclosed adverse security, law enforcement and/or immigration information. More than 9,000 instances of fingerprint matches of non-citizens with Australian law enforcement agencies and partner countries (Canada, New Zealand, United Kingdom and United States) have revealed discrepancies between the biographic data provided to the Department and that provided to another agency as well as undisclosed security and criminal histories.

Insufficient safeguards

The committee therefore expresses reservations about the breadth of paragraph 257A(5)(b) and seeks further advice from the Minister as to the rationale for the proposed approach. In this regard, the committee particularly notes the lack of limits on the specification of further ways to collect personal identifiers, the lack of Parliamentary oversight of the important policy issues that the specification of further methods of collection may entail, and that the implementation of the use of 'hand-held electronic scanners to collect an image of a person's fingers' could be achieved through the use of a targeted amendment which included appropriate safeguards.

Developments in biometric technologies are at the forefront of the reforms in the Bill. The Bill supports collecting personal identifiers, such as fingerprints, by way of a mobile, non-intrusive scanning device. Safeguards that apply to current technology are not relevant to this new, quick scanning technology.

In addition to collecting personal identifiers by way of an identification test, the Department seeks legislative authority to collect personal identifiers in other ways. For example, it is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial image and 10 fingerprints may take 30-60 minutes to complete; and
- impractical and inefficient for the Department to delay large numbers of travellers to conduct the test.

Verification checks

The Bill supports collecting personal identifiers, specifically fingerprints, by way of a 'verification check'. The Department currently conducts verification checks on a consent basis at Perth and Melbourne airports. Currently, the verification check involves a scan of a single finger of a non-citizen who has previously provided their facial image and 10 fingerprints when lodging a visa application overseas in a higher-risk country. These checks take less than 60 seconds to complete and are conducted in public using a mobile, hand-held device. More than 12,000 verification checks have been conducted at Perth and Melbourne airports since 2012 using the mobile scanner.

The Department intends to use an upgraded hand-held scanner using the new powers in the Bill:

- rather than a 'one-to-one' check directly against an individual's fingerprint data, the expanded 'verification check' will involve a 'one-to-many' check against existing data holdings. A one-to-many search involves seeking to match a single biometric against thousands of biometrics in a database. The Department's checks with partner countries are a current example of a 'one-to-many' search conducted by the Department.

- the verification check is efficient, quick and non-intrusive. Rather than taking 30 to 60 minutes to complete via an 'identification test', the check will take approximately 30 seconds to complete. This will allow the Department to strengthen Australia's border and conduct more checks than is possible currently.

- checks will be conducted in public; only two to four fingers will be scanned.

- results of checks will be available in real-time; results of an 'identification test' are usually available within 24 hours, which makes collecting personal identifiers by an identification test impractical at the border.

The approach to conducting verification checks in public is consistent with other checks conducted in public at airports, such as bag checks and the explosives residue check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's professional integrity framework. Administrative and criminal penalties may apply for breaches.

In addition to being used at Australia's border, a 'verification check' will support the Department to identify non-citizens in the Australian community who:

- are working in breach of their visa conditions;
- have remained in Australia beyond the date of their visa, and are therefore in Australia unlawfully; and
- have come to the attention of law enforcement while living in the Australian community.

Collecting personal identifiers by a means other than an identification test, provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient, quick and non-intrusive. Only those individuals identified as being of higher risk would be subject to a verification check.

The technological capability to conduct a verification check using a mobile, hand-held scanner device has only recently offered the opportunity to implement a relatively non-expensive, accurate and speedy additional tool to be able to effectively and efficiently resolve identity and other concerns. The Bill will provide the flexibility to collect personal identifiers in situations that require a fast and non-intrusive method of collection. This approach is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that are accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Minors and incapable persons

The committee therefore seeks the Minister's advice as to whether consideration has been given to including more detail in the bill about what matters must be addressed and considered in exercising this power in the context of minors and incapable persons. In this regard, the committee notes that leaving such requirements to policy does not enable Parliament to assess whether the limitations on rights have been adequately justified.

There are an increasing number of cases known, including some now reported in the media, where minors are implicated in violent extremism. In some instances this includes under-age women travelling overseas to marry foreign fighters; an extreme case of our broader concerns about vulnerable children.

The Department is prohibited by law from collecting certain types of personal identifiers from minors[1] under the age of 15 and incapable persons[2]. In locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors or incapable persons. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor or an incapable person by refusing consent or refusing to be present with a minor or incapable person during collection of personal identifiers. This would undermine the purpose of the Bill by removing the Department's authority to collect personal identifiers. The results would be:

- reduced integrity of identity data by not definitively linking identity with associated security information;
- inconsistency with partner countries where fingerprints are collected based on operational policy. The United States requires fingerprints from minors who are more than 14 years old as a matter of policy. In New Zealand, the Immigration Act (2009) does not set an age limit for the collection of biometrics. The UK Immigration (Biometric Registration) Regulations (2008) extended the biometric requirement to provide both a digital photograph and fingerprints to minors aged six upwards, which aligns with EU Regulation;
- preventing the case-by-case collection of personal identifiers from individuals identified as of concern;
- less protection for children who have been, or who are at risk of being trafficked;
- failure to address the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply. The Department is aware of cases where persons have claimed to be under 15 years of age to prevent collection of fingerprints. This circumvents the purpose of conducting fingerprint checks, which is to accurately identify individuals and detect persons of concern. Collecting fingerprints is the most reliable method to accurately ensure that the right person is subject to action, and not another person who is misidentified;
- failure to address the risk of radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere. The conflict in the Middle East has provided evidence of the involvement of children in extreme acts of violence. Where a minor is suspected of involvement in terrorist activity or serious criminal activity, fingerprints would enable searches of Australian law enforcement data holdings and partner country databases, such as the United States.

[1] A person under the age of 18 years.

[2] A person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier, such as a person with an intellectual disability.

The Bill supports the approach increasingly adopted by international organisations such as the United Nations in using biometrics to protect vulnerable people. Since 2013, the UNHCR has been developing a new global Biometric Identity Management System (BIMS) that involves collecting a facial image, fingerprints and iris scans of refugees, including children, worldwide. According to the UNHCR's *Policy on Biometrics in Refugee Registration and Verification (2010),* biometrics provide stronger protections for refugees by preventing identity theft.

Consent to collect

The Bill will authorise personal identifiers to be collected from a minor or incapable person without the consent of a parent/guardian or independent person, which will align current provisions in the Migration Act with those that apply at Australia's border where consent is not required.

The Bill will align Australia with the mandatory biometric collection rules that currently operate in almost all other countries.

Presence of a parent/guardian or independent person

The Bill will also permit the Department to collect personal identifiers from minors and incapable persons without the presence of a parent/guardian or independent person. This measure is to ensure that the collection of personal identifiers is not prevented by a parent/guardian/independent person refusing to be present during collection of personal identifiers. Such a refusal would be as disruptive if a parent/guardian or independent person refused consent for personal identifiers to be collected.

Nothing in the Migration Act authorises the collection of personal identifiers in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person, including a minor or incapable person, with humanity and with respect for human dignity. Use of force or other form of coercion to collect personal identifiers from any person would not be used under the new power in section 257A. Where an individual refuses to provide a personal identifier, including a parent/guardian/independent person who refuses on behalf of a minor or incapable person, the consequences will depend on the circumstances at the time. For example, in the context of a visa application, a minor's visa application may be refused, thereby preventing their travel to Australia.

Existing policy framework

The Department already exercises flexibility and discretion under provisions in the Migration Act when collecting personal identifiers. For example, currently:

- as a matter of policy, the Department does not collect facial images of a visa applicant in Australia who is aged 0 to 4 years. (No change under the Bill to this policy is proposed);

- as a matter of policy, the Department does collect a facial image of a minor aged 0 to 4 years at the time of visa application where the minor is offshore. (No change under the Bill to this policy is proposed);
- the Department collects only a facial image from 5 to 9 year olds who apply for a visa onshore. (No change under the Bill is proposed).

Primarily, collecting personal identifiers, particularly offshore, is an important tool to protect children who have been, or who are at risk of being trafficked. The full extent of child trafficking of minors into Australia is not known. Personal identifiers, particularly fingerprints, would make it easier to more accurately identify a child than is possible using a facial image, given the significant degree of change in facial features that occurs as children age.

The Bill will enable the Department to collect personal identifiers to respond to risks as they arise in its operational environment with less intrusion than is currently possible using non-biometric based methods.