SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2015

17 June 2015

ISSN 0729-6258 (Print)

ISSN 2204-3985 (Online)

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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

SIXTH REPORT OF 2015

The committee presents its *Sixth 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:

Bills	**Page No.**
Appropriation Bill (No. 4) 2014-2015	471
Law Enforcement Legislation Amendment (Powers) Bill 2015	476
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	479
Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015	491

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. The committee sought further information and the Minister responded in a letter dated 4 June 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**
- **ow 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 initial 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's initial 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.

Minister's further response - extract

Thank you for the letter of 14 May 2015, requesting further advice in relation to any other instances in which determinations have been made under clause 14 or similar provisions in the past ten years, and whether the government would consider it appropriate to subject these determinations to disallowance or, at least, to table such determinations.

As previously advised, determinations under clause 14 or its equivalent are rare. My department has researched the years back to the implementation of the Intergovernmental Agreement on Federal Financial Relations in 2008 and has been unable to identify any determinations apart from the National Disaster Relief and Recovery Arrangements Determination 2012. Details of this determination were previously provided to the Committee.

Since 2009, the framework for making payments to states, territories and local governments has fundamentally changed to enable greater parliamentary scrutiny and transparency. From the signing of the Intergovernmental Agreement on Federal Financial Relations in 2008, there was agreement between the Commonwealth and the states and territories that payments to the states and territories should be made under the Federal Financial Relations framework. Since that time, payments under clause 14 in Appropriation Bill (No. 4) 2014-2015 or equivalent have progressively decreased, and instead have been made under the standing appropriation contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008.*

The power to determine amounts of financial assistance to be paid to the states and territories under the Federal Financial Relations framework is delegated from the Parliament to the Treasurer. Accordingly, I suggest that questions in relation to parliamentary scrutiny may be more appropriately directed to the Treasurer.

I have copied this response to the Treasurer.

Committee's further response

The committee thanks the Minister for this further response.

The committee notes the Minister's advice that since the signing of the Intergovernmental Agreement on Federal Financial Relations in 2008 payments made under provisions equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 have progressively decreased, and instead have been made under the standing appropriation contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. In this regard, the Minister advised that his department 'has been unable to identify any determinations apart from the National Disaster Relief and Recovery Arrangements Determination 2012' which had been made under provisions equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 since the implementation of the Intergovernmental Agreement on Federal Financial Relations in 2008.

continued

The committee again thanks the Minister for Finance for this advice which has assisted the committee in understanding the operation of this standard provision and the determinations made under it. However, the committee requests the Finance Minister's further advice in relation to:

- **why it was necessary to utilise a provision equivalent to clause 14 in Appropriation Bill (No. 4) 2014-2015 to make the National Disaster Relief and Recovery Arrangements Determination 2012 (rather than utilising the process established under the Intergovernmental Agreement on Federal Financial Relations and related Acts); and**
- **whether this standard provision will still be required in future appropriation bills given that it appears that it has only been used on one occasion (in 2012) since the Intergovernmental Agreement on Federal Financial Relations was signed in 2008. In this regard, the committee notes that the standard provision was included in *Appropriation Bill (No. 2) 2015-2016* (clause 16).**

The committee also notes the Finance Minister's advice that the power to determine amounts of financial assistance to be paid to the States and Territories under the Federal Financial Relations framework is delegated from the Parliament to the Treasurer. The Minister therefore suggested that questions in relation to parliamentary scrutiny may be more appropriately directed to the Treasurer.

Noting this, 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 also seeks the Treasurer's general advice as to what parliamentary (and public) scrutiny mechanisms are available in relation to payments made to States and Territories under the standing appropriations contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. For example, the committee is interested in whether details about payments made to States and Territories (and the terms and conditions attached to them) are published in a comprehensive, systematic and publicly available manner.

Law Enforcement Legislation Amendment (Powers) Bill 2015

Introduced into the House of Representatives on 26 March 2015
Portfolio: Justice

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2015*. The Minister responded to the committee's comments in a letter dated 2 June 2015. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2015 - extract

Background

This bill amends the *Australian Crime Commission Act 2002* (the ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) to clarify the powers of Australian Crime Commission examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, to conduct hearings.

Retrospective application
Schedule 1, item 37
Schedule 2, item 38

Pursuant to sub-item 37(1), the amendments made by Part 1 of Schedule 1 will generally apply to all uses and disclosures of examination material and derivative material that are made, and summonses that are issued, at or after the amendments commence. However, in the case of the use and disclosure of examination material and derivative material (which may adversely impact on the rights of individuals), 'the amendments are intended to apply irrespective of whether the relevant examination occurred before or after the commencement of Part 1' (explanatory memorandum, p. 62). The explanatory memorandum does not address the fairness of the application of the proposed amendments to examination material and derivative material that was generated from examinations conducted prior to the commencement of the provisions.

The committee notes that the same issue arises in relation to the application of amendments made by Schedule 2 (see sub-item 38(1) of Schedule 2, which relates to the use and disclosure of hearing material and derivative material).

The committee therefore seeks the Minister's advice as to the rationale for applying these amendments to material that was generated from examinations (or hearings) conducted prior to the commencement of the provisions.

> *Pending the Minister's advice, 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 Committee seeks advice about the rationale for applying the amendments in the Bill to material that was generated from examinations or hearings conducted prior to the commencement of the Bill. The Committee states that, under item 37 of Schedule 1 and item 38 of Schedule 2 of the Bill, the amendments will apply to all uses and disclosures of examination, hearing and derivative material, irrespective of when the examination or hearing was conducted.

There are two reasons that the provisions in the Bill apply in this way.

First, the Bill does not expand the existing powers and practices of the ACC or the Integrity Commissioner. Rather, it clarifies those powers and practices and places them on a stronger legislative footing.

The Bill responds to a number of recent cases that have introduced uncertainty into the use of the ACC and the Integrity Commissioner's questioning powers. For example, in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (X7), the High Court emphasised the role of the principle of legality in legislation. That is, where legislation affects fundamental rights and freedoms, Parliament should clearly state how it intends to do so.

The Bill will put beyond doubt the legislative basis of the ACC and Integrity Commissioner's existing practices with respect to the use and disclosure of examination and hearing material. It will make the circumstances in which the ACC and Integrity Commissioner can disclose examination and hearing material clearer and more definite, particularly where the examinee or witness has been charged with an offence. It will also specifically authorise the use of that material in an investigation to find derivative material that can be used in prosecuting the examinee or witness.

There is one area where the Bill departs from the existing practices of the ACC and Integrity Commissioner. The Bill will introduce new rules governing the disclosure of examination, hearing and derivative material to prosecutors. These changes will better

protect the fair trial rights of examinees and witnesses who have been questioned by the ACC or Integrity Commissioner.

In this context, it is fair that the parts of the amendments dealing with the ability to disclose and use examination, hearing and derivative material should apply to all such material, irrespective of when it was obtained.

The second reason that the provisions in subitem 37(1) of Schedule 1 and subitem 38(1) of Schedule 2 of the Bill apply in this way is that it would not be practicable for the changes in the Bill to apply only in relation to material obtained from examinations or hearings that occurred after commencement.

This would have required the ACC, Integrity Commissioner and their partners to constantly track every piece of examination, hearing and derivative material to ensure that its disclosure or use complied with the rules applicable at the relevant time. This would have been particularly problematic in the case of derivative material, which may be discovered some time after the original examination or hearing and only after significant further investigation. Such an approach would have added further complexity to the implementation of the Bill, without giving any real added protection to examinees and witnesses.

Committee response

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

The committee draws this issue to the attention of Senators and leaves the question of whether the retrospective application of these amendments (to material that was generated from examinations or hearings conducted prior to the commencement of the bill) is appropriate to the Senate as a whole.

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. The committee sought further advice and the Minister responded in a letter dated 12 June 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.

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 <u>general</u> 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 initial 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's initial 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.

Minister's further response - extract

Insufficient safeguards

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.

Previous responses to the Committee have emphasised the difficulty of providing for all circumstances in legislation relating to the collection of personal identifiers under the *Migration Act 1958.*

The current legislative framework in the *Migration Act 1958* for the collection of personal identifiers was introduced more than ten years ago. This framework is inflexible and restricts the Department's authority to collect personal identifiers to specific circumstances. As a result, the Department is prevented from using current technology effectively because of limitations in legislation.

The Government's position is that using a legislative framework that expressly and exhaustively specifies the methods in which personal identifiers are to be collected under the new power, or to provide for future arrangements to be specified by regulation, will limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats.

Committee's further response

The committee thanks the Minister for this response, however, the committee is not persuaded that the use of regulations to provide for future arrangements would 'limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats'. In fact, speed and flexibility are often cited to the committee as reasons for the use of subordinate legislation for matters that would otherwise be appropriately included in primary legislation. In addition, the use of regulations would appropriately provide for Parliamentary scrutiny of this and any future authorisation of procedures and processes under this provision.

The committee is of the view that the scope of the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers is broad and it is therefore highly desirable for the bill to provide that authorisation of new methods for the collection of personal identifiers should be established by regulation. The committee draws this view 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

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 initial 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[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.

[1] 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.

Committee's initial 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.

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.

Minister's further response - extract

Broad discretionary power Items 52 and 53

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.

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)

The Government is currently considering its response to the Senate legal and Constitutional Affairs Legislation Committee's 5 June 2015 report on the Bill, which raised a similar issue. A response to the Scrutiny of Bills Committee on this issue will be provided in due course.

Committee's further response

The committee thanks the Minister for this response and looks forward to receiving the further advice about this matter as soon as possible.

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

The Department will keep statistics on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person. The Department agrees to make these publicly available.

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

Information collected by the Department on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person, will be made available to the Ombudsman.

Committee's further response

The committee thanks the Minister for this response and welcomes his commitment to record and publish statistics about the collection of personal identifiers from minors and incapable persons without consent or without the presence of a parent, guardian or independent person.

Similarly, the committee thanks the Minister for his commitment to make information available to the Ombudsman in relation to the number of instances in which the collection power is used in these circumstances.

In the absence of a legislative requirement to undertake these actions, the committee seeks the Minister's advice as to how his department will ensure that they occur.

Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015

Introduced into the House of Representatives on 25 March 2015
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 5 of 2015*. The Assistant Minister responded to the committee's comments in a letter dated 9 June 2015. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2015 - extract

Background

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* (the Act) in relation to:

- eligibility requirements for compensation;
- financial viability of the Comcare scheme;
- medical expense payments;
- requirements for determining compensation payable;
- household and attendant care services;
- suspension of compensation payments for certain citizens absent from Australia;
- taking or accruing leave while on compensation leave;
- calculation of compensation payments;
- the compulsory redemption threshold;
- legal costs for proceedings before the Administrative Appeals Tribunal;
- compensation for permanent impairment;
- single employer licences;
- gradual onset injuries and associated injuries;
- obligations of mutuality;
- exception of defence-related claims from certain changes; and
- definitions.

The bill amends the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation Act 1988* and *Seafarers Rehabilitation and Compensation Act 1992* in relation to the vocational nature of rehabilitation services and return to work outcomes.

The bill also amends the *Administrative Decisions (Judicial Review) Act 1977* to provide that decisions relating to compensation paid for detriment caused by defective administration are not subject to review.

Trespass on personal rights and liberties—strict liability
Schedule 7, item 7, proposed subsection 120(8)

This item seeks to make amendments to the existing notice requirements that apply to a compensation recipient who proposes to leave Australia.

Proposed subsection 120(7) provides that a person commits an offence if they breach the notification requirements. Proposed subsection 120(8) specifies that the offence is a strict liability offence. There is, however, no explanation as to justification for the application of strict liability to the offence. **The committee therefore seeks the Minister's advice as to the rationale for proposed approach.**

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

Trespass on personal rights and liberties—reversal of onus
Schedule 7, item 7, proposed subsection 120(9)

As noted above, this item seeks to make amendments to the existing notice requirements that apply to a compensation recipient who proposes to leave Australia.

Proposed subsection 120(7) provides that a person commits an offence if they breach the notification requirements. Proposed subsection 120(9) provides that the offence does not apply if the person has a reasonable excuse; however a defendant bears an evidential burden in relation to this matter. As there is no explanation as to the justification for placing an evidential burden on the defendant, **the committee seeks the Minister's advice as to the rationale for the proposed approach.**

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

Assistant Minister's response - extract

Schedule 7, item 7, proposed subsection 120(8) - strict liability

Schedule 7, item 7, proposed subsection 120(9) - reversal of onus

Proposed subsection 120(7) provides it is an offence for a person to breach the requirements to notify the relevant authority about the person's departure from or return to Australia. Proposed subsection 120(8) provides that the offence is one of strict liability.

The *Safety, Rehabilitation and Compensation Act 1988* currently contains notification requirements in respect of an employee who is receiving weekly incapacity payments and who proposes to leave or actually leaves Australia (subsections 120(2) and (3) of the Act). In addition, where the employee is absent from Australia for a period of more than three months, the employee is required to notify the relevant authority of his or her overseas residential address each three months that the person is absent from Australia (subsection 120(4) of the Act). Failure to provide those address details each three months is a strict liability offence (subsection 120(5) of the Act).

Schedule 7 of the Bill proposes to amend the Act to suspend the payment of weekly incapacity benefits to an employee who is absent from Australia for private purposes for more than six weeks. The Bill also contains provisions to allow the six week period to be extended, or waived, in particular circumstances to ensure the flexibility to allow for a compassionate response to a genuine need to be absent from Australia. The objective of the amendments is to ensure that employees receive consistent rehabilitation and medical treatment. At present, there is no limitation on payment of compensation to a person outside Australia. A person who is receiving compensation payments for incapacity is required under section 120 of the Act to inform the relevant authority of any overseas travel, however, the person remains eligible to receive compensation while outside Australia, regardless of the length of absence. Extended absences from Australia by an injured employee may negatively impact on the employee's access to medical treatment and rehabilitation programmes which would assist in his or her return to work.

The prospect of effective assessment of an employee's continuing incapacity for work, of the amount that the employee is able to earn in suitable employment and of the efficacy of medical treatment is very much diminished if the employee is outside Australia. In addition, there are significant barriers to an employer arranging an effective rehabilitation programme while the employee is outside Australia.

In light of the policy to ensure that all employees under the Comcare scheme receive consistent rehabilitation and medical treatment, it is generally necessary to require employees to be in Australia in order to receive rehabilitation and medical services and to

comply with the obligations under the scheme. It is, therefore, also necessary to require employees to notify the relevant authority in respect of their absence from Australia.

It is appropriate to preserve the existing strict liability offence provision as applied to the new notification requirements to ensure the integrity of the Comcare scheme in ensuring that injured employees do not unreasonably remove themselves from access to rehabilitation and qualified medical treatment. Without a rigorous notification system, relevant authorities would not be aware of when an employee who is receiving weekly incapacity payments leaves Australia. Such an employee would then be able to continue to receive weekly incapacity payments despite no longer being entitled to the payments. The proposed new notice requirements are specific and do not contain uncertainty as to the operation or what actions are necessary to take to satisfy the requirements. In addition, proposed subsection 120(9) provides that breach of the notice requirements will not be a strict liability offence where the employee has a reasonable excuse. This prevents an unfairly harsh result on an employee who was genuinely unable to comply with the notice requirements.

As it is the employee who has the reasonable excuse, it is appropriate that the evidential burden be placed on the employee. It would be ineffective to require a relevant authority to prove that an employee who did not meet the notification requirements did not have a reasonable excuse for failing to do so.

Committee response

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

As a matter of general principle, the committee reiterates the importance of ensuring that persons are made aware of notification requirements such as those provided for in this bill, especially when failure to comply with the requirements may result in the person committing a strict liability offence.

Senator Helen Polley
Chair

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MC15-001287

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

Dear Senator Polley

Thank you for the letter of 14 May 2015, requesting further advice in relation to any other instances in which determinations have been made under clause 14 or similar provisions in the past ten years, and whether the government would consider it appropriate to subject these determinations to disallowance or, at least, to table such determinations.

As previously advised, determinations under clause 14 or its equivalent are rare. My department has researched the years back to the implementation of the Intergovernmental Agreement on Federal Financial Relations in 2008 and has been unable to identify any determinations apart from the National Disaster Relief and Recovery Arrangements Determination 2012. Details of this determination were previously provided to the Committee.

Since 2009, the framework for making payments to states, territories and local governments has fundamentally changed to enable greater parliamentary scrutiny and transparency. From the signing of the Intergovernmental Agreement on Federal Financial Relations in 2008, there was agreement between the Commonwealth and the states and territories that payments to the states and territories should be made under the Federal Financial Relations framework. Since that time, payments under clause 14 in Appropriation Bill (No. 4) 2014-2015 or equivalent have progressively decreased, and instead have been made under the standing appropriation contained in the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*.

The power to determine amounts of financial assistance to be paid to the states and territories under the Federal Financial Relations framework is delegated from the Parliament to the Treasurer. Accordingly, I suggest that questions in relation to parliamentary scrutiny may be more appropriately directed to the Treasurer.

I have copied this response to the Treasurer.

Kind regards

Mathias Cormann
Minister for Finance

9 June 2015

THE HON MICHAEL KEENAN MP
Minister for Justice

MC15-000267

02 JUN 2015

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

Dear Senator Polley Helen

I refer to the Senate Scrutiny of Bills Committee's (Committee) Alert Digest No. 5 of 2015 and its comments on the Law Enforcement Legislation Amendment (Powers) Bill 2015 (Bill). I thank the Committee for its consideration of the Bill.

The Bill makes a range of amendments to the *Australian Crime Commission Act 2002* and the *Law Enforcement integrity Commissioner Act 2006* to clarify the examination powers of the Australian Crime Commission (ACC) and the Integrity Commissioner.

The Committee seeks advice about the rationale for applying the amendments in the Bill to material that was generated from examinations or hearings conducted prior to the commencement of the Bill. The Committee states that, under item 37 of Schedule 1 and item 38 of Schedule 2 of the Bill, the amendments will apply to all uses and disclosures of examination, hearing and derivative material, irrespective of when the examination or hearing was conducted.

There are two reasons that the provisions in the Bill apply in this way.

First, the Bill does not expand the existing powers and practices of the ACC or the Integrity Commissioner. Rather, it clarifies those powers and practices and places them on a stronger legislative footing.

The Bill responds to a number of recent cases that have introduced uncertainty into the use of the ACC and the Integrity Commissioner's questioning powers. For example, in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (X7), the High Court emphasised the role of the principle of legality in legislation. That is, where legislation affects fundamental rights and freedoms, Parliament should clearly state how it intends to do so.

The Bill will put beyond doubt the legislative basis of the ACC and Integrity Commissioner's existing practices with respect to the use and disclosure of examination and hearing material. It will make the circumstances in which the ACC and Integrity Commissioner can disclose examination and hearing material clearer and more definite, particularly where the examinee

or witness has been charged with an offence. It will also specifically authorise the use of that material in an investigation to find derivative material that can be used in prosecuting the examinee or witness.

There is one area where the Bill departs from the existing practices of the ACC and Integrity Commissioner. The Bill will introduce new rules governing the disclosure of examination, hearing and derivative material to prosecutors. These changes will better protect the fair trial rights of examinees and witnesses who have been questioned by the ACC or Integrity Commissioner.

In this context, it is fair that the parts of the amendments dealing with the ability to disclose and use examination, hearing and derivative material should apply to all such material, irrespective of when it was obtained.

The second reason for that the provisions in subitem 37(1) of Schedule 1 and subitem 38(1) of Schedule 2 of the Bill apply in this way is that it would not be practicable for the changes in the Bill to apply only in relation to material obtained from examinations or hearings that occurred after commencement.

This would have required the ACC, Integrity Commissioner and their partners to constantly track every piece of examination, hearing and derivative material to ensure that its disclosure or use complied with the rules applicable at the relevant time. This would have been particularly problematic in the case of derivative material, which may be discovered some time after the original examination or hearing and only after significant further investigation. Such an approach would have added further complexity to the implementation of the Bill, without giving any real added protection to examinees and witnesses.

I trust this information will assist the Committee in its inquiries.

Should the Committee require further information, the responsible adviser for this matter in my office is Sarah Wood, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-015659

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

Dear Senator Polley

I refer to the Committee's Fifth Report of 2015 relating to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.

In response to the Committee's request for further information on the Bill, I provide the attached.

The contact officer in my department is Dr Ben Evans, A/g First Assistant Secretary, Strategic Policy and Planning Division, who can be contacted on (02) 6264 1961.

Thank you for considering this response.

Yours sincerely

PETER DUTTON 12/6/15.

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

Attachment A

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Insufficient safeguards

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.

Previous responses to the Committee have emphasised the difficulty of providing for all circumstances in legislation relating to the collection of personal identifiers under the *Migration Act 1958*.

The current legislative framework in the *Migration Act 1958* for the collection of personal identifiers was introduced more than ten years ago. This framework is inflexible and restricts the Department's authority to collect personal identifiers to specific circumstances. As a result, the Department is prevented from using current technology effectively because of limitations in legislation.

The Government's position is that using a legislative framework that expressly and exhaustively specifies the methods in which personal identifiers are to be collected under the new power, or to provide for future arrangements to be specified by regulation, will limit the ability of the Department to effectively utilise new and emerging biometrics technology and respond quickly to new and unprecedented threats.

Broad discretionary power Items 52 and 53

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.

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)**

The Government is currently considering its response to the Senate Legal and Constitutional Affairs Legislation Committee's 5 June 2015 report on the Bill, which raised a similar issue. A response to the Scrutiny of Bills Committee on this issue will be provided in due course.

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

The Department will keep statistics on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person. The Department agrees to make these publicly available.

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

Information collected by the Department on the number of instances in which personal identifiers are collected from minors and incapable persons without the consent or the presence of a parent, guardian or independent person, will be made available to the Ombudsman.

THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE

9 JUN 2015

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

Dear Senator

This letter is in response to the letter from your Committee of 14 May 2015 to Senator the Hon. Eric Abetz concerning the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015. As the Minister is currently on leave, I am responding on his behalf.

In its *Alert Digest No. 5 of 2015*, the Committee has requested further information from me in respect of two proposed provisions contained in the Bill.

Schedule 7, item 7, proposed subsection 120(8) – strict liability

Schedule 7, item 7, proposed subsection 120(9) – reversal of onus

Proposed subsection 120(7) provides it is an offence for a person to breach the requirements to notify the relevant authority about the person's departure from or return to Australia. Proposed subsection 120(8) provides that the offence is one of strict liability.

Proposed subsection 120(9) operates to provide, however, that the breach of those notification requirements is not an offence if the person has a reasonable excuse in relation to the breach.

The *Safety, Rehabilitation and Compensation Act 1988* currently contains notification requirements in respect of an employee who is receiving weekly incapacity payments and who proposes to leave or actually leaves Australia (subsections 120(2) and (3) of the Act). In addition, where the employee is absent from Australia for a period of more than three months, the employee is required to notify the relevant authority of his or her overseas residential address each three months that the person is absent from Australia (subsection 120(4) of the Act). Failure to provide those address details each three months is a strict liability offence (subsection 120(5) of the Act).

Schedule 7 of the Bill proposes to amend the Act to suspend the payment of weekly incapacity benefits to an employee who is absent from Australia for private purposes for more than six weeks. The Bill also contains provisions to allow the six week period to be extended, or waived, in particular circumstances to ensure the flexibility to allow for a compassionate response to a genuine need to be absent from Australia. The objective of the amendments is to ensure that employees receive consistent rehabilitation and medical treatment. At present, there is no limitation on payment of compensation to a person outside Australia. A person who is receiving compensation payments for incapacity is

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required under section 120 of the Act to inform the relevant authority of any overseas travel, however, the person remains eligible to receive compensation while outside Australia, regardless of the length of absence. Extended absences from Australia by an injured employee may negatively impact on the employee's access to medical treatment and rehabilitation programmes which would assist in his or her return to work.

The prospect of effective assessment of an employee's continuing incapacity for work, of the amount that the employee is able to earn in suitable employment and of the efficacy of medical treatment is very much diminished if the employee is outside Australia. In addition, there are significant barriers to an employer arranging an effective rehabilitation programme while the employee is outside Australia.

In light of the policy to ensure that all employees under the Comcare scheme receive consistent rehabilitation and medical treatment, it is generally necessary to require employees to be in Australia in order to receive rehabilitation and medical services and to comply with the obligations under the scheme. It is, therefore, also necessary to require employees to notify the relevant authority in respect of their absence from Australia.

It is appropriate to preserve the existing strict liability offence provision as applied to the new notification requirements to ensure the integrity of the Comcare scheme in ensuring that injured employees do not unreasonably remove themselves from access to rehabilitation and qualified medical treatment. Without a rigorous notification system, relevant authorities would not be aware of when an employee who is receiving weekly incapacity payments leaves Australia. Such an employee would then be able to continue to receive weekly incapacity payments despite no longer being entitled to the payments. The proposed new notice requirements are specific and do not contain uncertainty as to the operation or what actions are necessary to take to satisfy the requirements. In addition, proposed subsection 120(9) provides that breach of the notice requirements will not be a strict liability offence where the employee has a reasonable excuse. This prevents an unfairly harsh result on an employee who was genuinely unable to comply with the notice requirements.

As it is the employee who has the reasonable excuse, it is appropriate that the evidential burden be placed on the employee. It would be ineffective to require a relevant authority to prove that an employee who did not meet the notification requirements did not have a reasonable excuse for failing to do so.

I trust this information is of assistance.

Yours sincerely

LUKE HARTSUYKER