



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**FOURTEENTH REPORT**  
**OF**  
**2015**

**2 December 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

## FOURTEENTH REPORT OF 2015

The committee presents its *Fourteenth 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:

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Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015	767
Migration Amendment (Complementary Protection and Other Measures) Bill 2015	772





# Australian Crime Commission Amendment (Criminology Research) Bill 2015

Introduced into the House of Representatives on 15 October 2015

Portfolio: Justice

## *Introduction*

The committee dealt with this bill in *Alert Digest No.12 of 2015*. The Minister responded to the committee's comments in a letter dated 30 November 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 12 of 2015 - extract*

## **Background**

This bill amends the *Australian Crime Commission Act 2002* to merge the functions of the Australian Institute of Criminology (AIC) into the Australian Crime Commission, including carrying out criminology research, sharing and publishing that research and carrying out commissioned research.

The bill also repeals the *Criminology Research Act 1971* to abolish the AIC as a statutory agency.

## **Trespass on personal rights and liberties—privacy Schedule 1, item 5, proposed section 59AE**

The overarching purpose of Schedule 1 is to make amendments necessary to enable the functions currently performed by the Australian Institute of Criminology (AIC) to be undertaken by the Australian Crime Commission (ACC) and to ensure that the merged agency can carry out the existing functions of the AIC (in particular the conduct and dissemination of criminological research).

Item 5 of schedule 1 inserts a provision which authorises the CEO of the ACC to disclose and publish criminological research if so doing would not be contrary to:

- subsection 25A(9) of the *Australian Crime Commission Act 2002* (the ACC Act);
- another law of the Commonwealth that would otherwise apply; or
- a law of a State or Territory that would otherwise apply.

This authorisation may apply in relation to research that contains personal information. Given that the Privacy Act does not apply to the ACC this raises a matter of concern, which is addressed by proposed subsection 59AE(2). Under this provision the ACC CEO will be prohibited from disclosing personal information that was collected for the purpose of criminological research for another purpose except if certain circumstances apply. These additional requirements are modelled on the information use and dissemination provisions of the Privacy Act, particularly Australian Privacy Principle 6. The explanatory memorandum gives the assurance that the inclusion of this provision ‘will ensure that personal information collected by the ACC for research purposes remain subject to the same disclosure protections that currently apply to the AIC’ (at p. 3). **In light of this assurance, the committee leaves the general question of whether the approach is appropriate to the Senate as a whole.**

However, it is unclear why the jurisdiction of the Information Commissioner, who is empowered to investigate breaches of the Privacy Act, should not be extended to investigate breaches of the disclosure regime that applies to the ACC in relation to criminological research. The explanatory memorandum notes that the ACC is subjected to a robust accountability framework which includes oversight by the Ombudsman, Integrity Commissioner and the Parliamentary Joint Committee on Law Enforcement. Nevertheless, it is not clear that the coverage by these oversight bodies would be coextensive with that of the Information Commissioner whose jurisdiction covers privacy issues expressly and has therefore developed extensive relevant expertise.

Additionally, the explanatory memorandum suggests that the ACC has experience in dealing with sensitive information and that it is well placed to put in place technical and administrative mechanisms to ensure that personal information collected for research is collected, used and stored appropriately. Although this may be accepted, it is not clear how this supports the conclusion that the Information Commissioner should not be given oversight of the new disclosure regime in the ACC Act.

**The committee therefore seeks the Minister’s advice as to whether the Information Commissioner can be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime.**

*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***

### ***1. Is the proposed approach for information disclosure appropriate?***

As outlined in the Alert Digest, Item 5 of Schedule 1 would insert a provision into the Australian Crime Commission Act 2002 (ACC Act) to authorise the CEO of the ACC to disclose and publish criminological research if doing so would not be contrary to:

- subsection 25A(9) of the ACC Act;
- another law of the Commonwealth that would otherwise apply; or
- a law of a State or Territory that would otherwise apply.

Section 59AE(2) is a safeguard on the disclosure of personal information under the proposed regime. Under the new subsection 59AE(2), the ACC CEO may only disclose personal information that was collected for a research purpose for another purpose:

- with the individual's consent;
- where the individual concerned would reasonably expect the ACC to disclose their information; or
- where the ACC is otherwise required to disclose the information to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety.

The new regime is intended to supplement the ACC's existing information dissemination regime in sections 59AA and 59AB of the ACC Act. Currently, sections 59AA and 59AB contain strict information sharing provisions that apply to all information that is in the ACC's possession. This is appropriate, given the sensitive nature of the ACC's operations.

However, following a merger it will be important that the ACC can make AIC research available to other government agencies, researchers and the broader community in the same way as the AIC currently does. The new information disclosure regime in section 59AE is intended to achieve this objective and closely mirrors the circumstances in which the AIC Director can currently disclose research containing personal information.

Under subsection 16(b) of the *Criminology Research Act 1971* (CR Act), the AIC Director has the broad power of communicating the results of the AIC's research to the public and community. The CR Act does not contain any restrictions on this power.

However, unlike the ACC, the AIC is subject to the *Privacy Act 1988*. Under Australian Privacy Principle 6, the AIC may only disclose personal information collected for research purposes for another purpose:

- with the individual's consent;

- where the individual concerned would reasonably expect the AIC to disclose their information;
- where the disclosure is required or authorised by law;
- where a permitted general situation exists (including where the AIC believes that the disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety); or
- where the AIC reasonably believes the disclosure is necessary for an enforcement purpose.

The safeguards in new subsection 59AE(2) are modelled on these provisions of the Privacy Act, to ensure that personal information collected by the ACC for research purposes remains subject to similar restrictions on disclosure as currently apply to the AIC (noting that the ACC is exempt from the Privacy Act).

**2. *Can the Information Commissioner be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime?***

Given the sensitive nature of the ACC's operations, the Government's position is that the Information Commissioner (and his office) is not the most appropriate body to deal with complaints against the ACC. A separate system of oversight and accountability exists specifically to ensure that the ACC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability. Any privacy issues relating to the ACC should be monitored through this separate system. Consistent with this, the Government does not propose to give the Information Commissioner jurisdiction to investigate breaches of the proposed regime in new subsection 59AE(2).

The ACC is already subject to a robust oversight framework, including the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity and the Parliamentary Joint Committee on Law Enforcement. These bodies have extensive expertise on the ACC, its functions, statutory regime and secrecy provisions, making them the most appropriate forums to monitor the ACC's compliance with its obligations under the new criminology research disclosure regime.

In addition to these existing oversight mechanisms, following a merger the ACC will also become subject to the ethical requirements set by the *National Health and Medical Research Committee guidelines for research involving human subjects*. These include the requirement to ensure that unit-record data (which has the potential to identify a single participant) is only used for research purposes. An ethics committee will oversee the ACC's compliance with these requirements, as is currently the case for the AIC.

Ultimately, disclosure of personal information that was originally provided under a guarantee of confidentiality would discourage participation in criminology research projects and reduce the reliability and accuracy of the research, providing strong motivation for the ACC to ensure strict compliance with the proposed disclosure regime.

Further, the ACC currently holds a wide range of sensitive information, including sensitive law enforcement intelligence and coercively obtained information. It is very experienced in

ensuring that that information is held securely and accessed and disclosed on a need-to-know basis, consistent with its legislative obligations.

The Government considers that the ACC's existing and comprehensive oversight regime and the ACC's new obligation to comply with ethical requirements provides appropriate assurance that the ACC will comply with the proposed new information disclosure regime and that any alleged breaches of this regime will be appropriately investigated, without the need for additional oversight by the Information Commissioner.

I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.

### ***Committee response***

The committee thanks the Minister for this detailed response and particularly notes the Minister's advice that:

- a separate system of 'oversight and accountability exists specifically to ensure that the ACC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability' and that 'any privacy issues relating to the ACC should be monitored through this separate system';
- the ACC will become subject to the *National Health and Medical Research Committee guidelines for research involving human subjects*; and
- there is 'strong motivation for the ACC to ensure strict compliance with the proposed disclosure regime' as unauthorised disclosure would discourage participation in criminology research projects.

However, the committee remains of the view that it would be appropriate for the Information Commissioner to be given jurisdiction to investigate breaches of the proposed disclosure regime, noting that:

- the Office of the Australian Information Commissioner (OAIC) has specific expertise in privacy law and policy;
- the jurisdiction of the OAIC could be limited to the proposed regime in new subsection 59AE(2); and
- the fact that the Commonwealth Ombudsman's jurisdiction covers the ACC demonstrates that a body that does not have specific expertise on the ACC and its functions can play a useful role in overseeing its operations, or parts of them.

*continued*

**The committee therefore:**

- **requests that the key information provided by the Minister be included in the explanatory memorandum (noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*); and**
- **draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

# Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015

Introduced into the House of Representatives on 20 August 2015

Portfolio: Treasury

*This bill received Royal Assent on 25 November 2015*

## ***Introduction***

The committee dealt with this bill in *Alert Digest No.9 of 2015*. The Treasurer responded to the committee's comments in a letter dated 30 September 2015. The committee sought further information and the Treasurer responded in a letter dated 24 November 2015. A copy of the letter is attached to this report.

## ***Alert Digest No. 9 of 2015 - extract***

## **Background**

This bill is part of a package of three bills. The bill amends various Acts relating to foreign acquisitions and takeovers to:

- introduce certain civil and criminal penalties;
- transfer to the Australian Taxation Office the responsibility of regulating foreign investment in residential real estate; and
- lower screening thresholds for investments in Australian agriculture.

## **Delegation of legislative power**

### **Schedule 1, item 4, proposed sections 44 and 48 of the *Foreign Acquisitions and Takeovers Act 1975***

Proposed section 44 permits regulations to be made that provide that a specified action is a 'significant action' for the purposes of the Act. The explanatory memorandum (at p. 51) provides three examples:

... it is anticipated that regulations will prescribe the following actions to be significant actions:

- the acquisition by a foreign person of an interest of at least 5 per cent in an entity or business that wholly or partly carries on an Australian media business;
- the acquisition by a foreign government investor of a direct interest in an Australian entity or Australian business; and
- the starting of an Australian business by a foreign government investor.

However, the explanatory memorandum does not explain why these and other proposed ‘significant actions’ cannot be included in the primary legislation rather than the regulations. **The committee therefore seeks detailed advice from the Treasurer as to the rationale for this proposed significant delegation of legislative power.**

The committee notes that the same issue arises in relation to proposed section 48 which specifies that the regulations may provide that a specified action is a ‘notifiable action’. **The committee therefore also seeks the Treasurer’s advice in relation to the rationale for this provision.**

*Pending the Treasurer’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.*

### ***Treasurer’s first response - extract***

#### **Schedule 1, item 4, proposed sections 44 and 48 of the Act - Delegation of legislative power**

Proposed sections 44 and 48 of the Act would enable regulations to be made that provide that a specified action is a ‘significant action’ and a ‘notifiable action’ respectively. In short, if I am notified that a person is proposing to take a significant action, I can make an order prohibiting the significant action if I am satisfied that the action would be contrary to the national interest. If a significant action has already been taken and I am satisfied that this is contrary to the national interest, I can make certain orders that have the effect of undoing that action (for example, by disposing of an interest that has been acquired). I can also impose conditions in such circumstances as an alternative to a disposal order. Some actions, which are called notifiable actions, must be notified to me before the action can be taken. A foreign person who takes a notifiable action without first notifying me may be liable to civil and criminal penalties. The Bill specifies that certain actions are significant actions or notifiable actions.

It is essential that the Bill includes a mechanism that allows the Government to protect Australia’s national interest over time by enabling it to quickly and effectively regulate evolving markets and new patterns in foreign investment (such as the emergence of new investment structures) and respond to changes in the Australian economy. Proposed sections 44 and 48 of the Act provide such a mechanism.



### ***Committee response***

The committee thanks the Treasurer for this response.

The committee notes the Treasurer's advice that these provisions (which enable the regulations to provide that a specified action is a 'significant action' or a 'notifiable action') are needed to allow the government 'to quickly and effectively regulate evolving markets and new patterns in foreign investment (such as the emergence of new investment structures) and respond to changes in the Australian economy.'

The committee considers that this general explanation does not justify the proposed delegation of legislative power with sufficient clarity. Given the significant consequences that may apply when a specified action is declared to be a 'significant action' or a 'notifiable action' (including the application of civil and criminal penalties and the potential for an order requiring a person to dispose of an interest), **the committee reiterates its request to the Treasurer for detailed advice as to the rationale for the significant delegation of legislative power in these provisions. In particular, it would assist the committee if examples could be provided of situations in which it is envisaged that these regulation-making powers would need to be utilised with such urgency that providing for the matter in an amendment to the primary legislation would be ineffective. In addition, noting the significant consequences outlined above, the committee requests the Treasurer's advice as to whether the disallowance process for these regulations can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:**

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*).**

### ***Treasurer's further response - extract***

While the Bill has now been passed by the Senate, I wanted to respond to the Committee's request for advice about the rationale for including provisions in the Bill that would enable regulations to be made which provide that a specified action is a 'significant action' or a 'notifiable action'. The Committee also requested advice as to whether the disallowance process for the regulations could be amended to provide for increased Parliamentary oversight.

Successive governments have relied on Australia's Foreign Investment Policy (Policy) to supplement the requirements in the *Foreign Acquisitions and Takeovers Act 1975* (Act), and have on occasions revised the Policy to expand the categories of foreign investment proposals that are screened. Changes to the Policy have often been bolstered by enacting amendments to the Act that applied retrospectively with effect from the date of the change to the Policy or the making of a public announcement. For example, on 12 February 2009, the former Government announced amendments to clarify the operation of the Act to ensure that it applied equally to all foreign investments irrespective of the way they are structured. The amending legislation, the *Foreign Acquisitions and Takeovers Amendment Act 2010*, received Royal Assent on 12 February 2015 and applied retrospectively to the date of the announcement.

While this approach has enabled successive governments to protect the national interest by quickly amending Australia's foreign investment framework in response to changing circumstances, the disadvantage of this approach is that it has frequently relied on either enacting legislation which has retrospective effect or on making amendments to the Policy. By allowing regulations to be made which provide that a specified action is a significant action or a notifiable action, the need to rely on the Policy or retrospective legislation will be minimised. Altering the disallowance provisions that apply to the making of regulations under the Act would undermine the utility of introducing the new regulation-making powers, and would force governments to continue to rely on making amendments to the Policy in response to changing circumstances.

#### ***Committee further response***

The committee thanks the Treasurer for this detailed response, though notes that it would have been useful to receive the information before the bill was passed by both Houses of Parliament. The committee notes the Treasurer's advice to the effect that:

- in the past the system has relied on changes to Australia's Foreign Investment *Policy* to supplement the requirements in the current Act;
- if necessary, the Act was then amended with retrospective effect;
- by allowing regulations to be made which provide that a specified action is a significant action or a notifiable action, the need to rely on the *Policy* or retrospective legislation will be minimised; and
- 'altering the disallowance provisions that apply to the making of regulations under the Act would undermine the utility' of the proposed approach.

*continued*

While it may be accepted that the proposed system is an improvement on reliance on a combination of policy change and retrospective legislation, the committee remains concerned about the significance of the matters being delegated. The committee is of the view that a revised disallowance process could be used to appropriately retain Parliamentary involvement in the legislative process without compromising flexibility and responsiveness. However, as the bill has already been passed the committee makes no further comment about the bill.

# Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Introduced into the House of Representatives on 14 October 2015  
Portfolio: Immigration and Border Protection

## *Introduction*

The committee dealt with this bill in *Alert Digest No. 12 of 2015*. The Minister responded to the committee's comments in a letter dated 26 November 2015. A copy of the letter is attached to this report.

### *Alert Digest No. 12 of 2015 - extract*

## **Background**

This bill amends the statutory framework in the *Migration Act 1958* relating to the protection status determination process for persons seeking protection on complementary protection grounds.

## **Merits review**

### **Item 31, subparagraph 502(1)(a)(ii)**

Section 502 of the Migration Act authorises the Minister to declare a person to be an 'excluded person' in circumstances where the Minister intends to refuse a protection visa on character grounds and decides that, because of the seriousness of the circumstances, it is in the national interest to make that declaration. As a consequence of being declared an 'excluded person', a person is not able to seek merits review of a decision in the AAT.

Item 32 expands the scope of this provision so that it applies not only to persons seeking a protection visa under the Refugee Convention but also to those seeking 'complementary' protection. The statement of compatibility explains that this amendment is designed to 'ensure consistency in the Ministers powers when dealing with non-citizens of serious character concern' (at paragraph 53). The statement of compatibility further states that 'it is expected [the power to declare that a person is an 'excluded person'] will only be used in limited situations where there is a clear national interest reason to limit access merits review' (at paragraph 55).

The committee has a longstanding interest in limiting broad discretionary decisions which impact directly on individuals that are not subject to merits review. Merits review provides a level of assurance that judicial review cannot, given the restricted grounds on which courts are able to review decisions. For example, in general, judicial review cannot correct

for factual errors even when those errors are serious and material. For this reason the committee does not consider that consistency with existing powers in the Migration Act which exclude ministerial decisions on character grounds from merits review is a compelling justification for the introduction of further, similar powers.

In light of the limited capacity of judicial review to ensure administrative justice in the context of broad discretionary powers, the committee expects a more detailed justification for proposals to further limit the availability of merits review. As the justification for the approach is limited to (1) ensuring consistency, (2) the 'expectation' that the powers will be used infrequently, and (3) a claim that Australia's treaty obligations do not require merits review of such decisions, **the committee seeks more detailed advice from the Minister which explains why an appropriate form of merits review is not warranted in relation to the making of these decisions.**

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

### ***Minister's response - extract***

Section 502 of the *Migration Act 1958* (the Act) provides the Minister for Immigration and Border Protection (the Minister) with the power, in certain circumstances, to declare a person to be an 'excluded person'. As a consequence of being declared an 'excluded person', a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal. These circumstances apply where the Minister intends to make a personal decision to refuse to grant or to cancel a protection visa on character-related grounds and require the Minister to decide that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared an excluded person.

Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. The Government now considers it appropriate to extend the scope of section 502 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person. The amendments to section 502 will give effect to this policy.

As stated in the Statement of Compatibility with Human Rights in the Explanatory Memorandum to the Bill, and as has been acknowledged by the Committee, the intention of this provision is to ensure consistency in the Minister's powers when dealing with non-citizens of serious character concern, and is therefore expected to be used in limited situations where there are clear national interest reasons to limit access to merits review.

Furthermore, while merits review can be an important safeguard, there is no express requirement under the International Covenant on Civil and Political Rights or the Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment that it is required in the assessment of *non-refoulement* obligations.

The Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, and circumstances can and do arise where a non-citizen is of sufficient concern to require the Minister to consider the case personally. In exercising any personal powers to decide to refuse to grant or to cancel a protection visa on character-related grounds, the Minister is required to use his or her discretion lawfully and reasonably within the administrative law framework, and must consider the national interest.

All persons impacted by the personal decisions made by the Minister will remain able to access judicial review. In a judicial review action, a court would consider whether or not the power conferred by the Migration Act has been properly exercised. For a discretionary power under the Migration Act, this could include consideration of whether the discretionary power has been exercised (or not exercised, as the case may be) in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

The proposed amendment to subparagraph 502(1)(a)(ii) will ensure that personal Ministerial decision-making is consistent across the character and general visa cancellation frameworks within the Act.

***Committee response***

The committee thanks the Minister for this response and **requests that the key information be included in the explanatory memorandum (noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation e.g. section 15AB of the *Acts Interpretation Act 1901*).**

However, the committee reaffirms its view that the lack of merits review in relation to the exercise of broad discretionary powers which have a direct and immediate effect on an individual is a matter of significant scrutiny concern.

For this reason, the committee does not consider that consistency with existing provisions is a sufficiently compelling justification for the introduction of new powers which are not reviewable on their merits.

*continued*

The committee also notes the Minister's advice that judicial review will be available and that this enables a court to consider whether or not the power conferred by the Migration Act has been 'properly' exercised. However, the availability of judicial review does not displace the case for merits review. Judicial review is limited to legality review, the grounds of which are considerably narrower than those involved in merits review (which involves a reconsideration of whether the decision reached was correct or preferable). More particularly, although a court can, as suggested by the Minister, consider whether a discretionary power has been exercised in 'a reasonable matter', it is clear that the courts apply the notion of reasonableness in a stringent and restricted manner. As Justice Gageler recently observed in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377 review on the basis that a decision is unreasonable has in practice been rare in Australian law. Judicial review is of great importance, but its scope remains much narrower than the scope of merits review.

**The committee therefore retains its view that an appropriate form of merits review is warranted in relation to the making of these decisions. The committee draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Senator Helen Polley  
Chair







**THE HON MICHAEL KEENAN MP**  
**Minister for Justice**  
**Minister Assisting the Prime Minister on Counter-Terrorism**

MC15-008926

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

30 NOV 2015

Dear Chair *Helen*

Thank you for your letter of 12 November 2015 in relation to the Senate Scrutiny of Bills Committee's request for further information about the *Australian Crime Commission Amendment (Criminology Research) Bill 2015*, as outlined in the Committee's Alerts Digest No. 12 of 2015 tabled on 11 November 2015.

The Committee has sought additional information about Schedule 1, item 5, proposed section 59AE. This section relates to the disclosure of criminological research and related information by the ACC. The Committee has asked whether the proposed approach for disclosing information is appropriate and has sought further advice as to whether the Information Commissioner can be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime.

***1. Is the proposed approach for information disclosure appropriate?***

As outlined in the Alert Digest, Item 5 of Schedule 1 would insert a provision into the *Australian Crime Commission Act 2002* (ACC Act) to authorise the CEO of the ACC to disclose and publish criminological research if doing so would not be contrary to:

- subsection 25A(9) of the ACC Act
- another law of the Commonwealth that would otherwise apply, or
- a law of a State or Territory that would otherwise apply.

Section 59AE(2) is a safeguard on the disclosure of personal information under the proposed regime. Under the new subsection 59AE(2), the ACC CEO may only disclose personal information that was collected for a research purpose for another purpose:

- with the individual's consent
- where the individual concerned would reasonably expect the ACC to disclose their information, or
- where the ACC is otherwise required to disclose the information to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety.

The new regime is intended to supplement the ACC's existing information dissemination regime in sections 59AA and 59AB of the ACC Act. Currently, sections 59AA and 59AB contain strict information sharing provisions that apply to all information that is in the ACC's possession. This is appropriate, given the sensitive nature of the ACC's operations.

However, following a merger it will be important that the ACC can make AIC research available to other government agencies, researchers and the broader community in the same way as the AIC currently does. The new information disclosure regime in section 59AE is intended to achieve this objective and closely mirrors the circumstances in which the AIC Director can currently disclose research containing personal information.

Under subsection 16(b) of the *Criminology Research Act 1971* (CR Act), the AIC Director has the broad power of communicating the results of the AIC's research to the public and community. The CR Act does not contain any restrictions on this power.

However, unlike the ACC, the AIC is subject to the *Privacy Act 1988*. Under Australian Privacy Principle 6, the AIC may only disclose personal information collected for research purposes for another purpose:

- with the individual's consent
- where the individual concerned would reasonably expect the AIC to disclose their information
- where the disclose is required or authorised by law
- where a permitted general situation exists (including where the AIC believes that the disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to protect public health and safety), or
- where the AIC reasonably believes the disclosure is necessary for an enforcement purpose.

The safeguards in new subsection 59AE(2) are modelled on these provisions of the Privacy Act, to ensure that personal information collected by the ACC for research purposes remains subject to similar restrictions on disclosure as currently apply to the AIC (noting that the ACC is exempt from the Privacy Act).

## ***2. Can the Information Commissioner be given appropriate jurisdiction to investigate breaches of the proposed disclosure regime?***

Given the sensitive nature of the ACC's operations, the Government's position is that the Information Commissioner (and his office) is not the most appropriate body to deal with complaints against the ACC. A separate system of oversight and accountability exists specifically to ensure that the ACC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability. Any privacy issues relating to the ACC should be monitored through this separate system. Consistent with this, the Government does not propose to give the Information Commissioner jurisdiction to investigate breaches of the proposed regime in new subsection 59AE(2).

The ACC is already subject to a robust oversight framework, including the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity and the Parliamentary Joint Committee on Law Enforcement. These bodies have extensive expertise on the ACC, its functions, statutory regime and secrecy provisions, making them the most appropriate forums to monitor the ACC's compliance with its obligations under the new criminology research disclosure regime.

In addition to these existing oversight mechanisms, following a merger the ACC will also become subject to the ethical requirements set by the *National Health and Medical Research Committee guidelines for research involving human subjects*. These include the requirement to ensure that unit-record data (which has the potential to identify a single participant) is only used for research purposes. An ethics committee will oversee the ACC's compliance with these requirements, as is currently the case for the AIC.

Ultimately, disclosure of personal information that was originally provided under a guarantee of confidentiality would discourage participation in criminology research projects and reduce the reliability and accuracy of the research, providing strong motivation for the ACC to ensure strict compliance with the proposed disclosure regime.

Further, the ACC currently holds a wide range of sensitive information, including sensitive law enforcement intelligence and coercively obtained information. It is very experienced in ensuring that that information is held securely and accessed and disclosed on a need-to-know basis, consistent with its legislative obligations.

The Government considers that the ACC's existing and comprehensive oversight regime and the ACC's new obligation to comply with ethical requirements provides appropriate assurance that the ACC will comply with the proposed new information disclosure regime and that any alleged breaches of this regime will be appropriately investigated, without the need for additional oversight by the Information Commissioner.

I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.

Yours sincerely

**Michael Keenan**





## TREASURER

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

Dear Senator Polley

Thank you for the letter of 15 October 2015 from the Senate Scrutiny of Bills Committee (Committee) in relation to the issues outlined in the Committee's *Eleventh Report of 2015* concerning the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Bill).

While the Bill has now been passed by the Senate, I wanted to respond to the Committee's request for advice about the rationale for including provisions in the Bill that would enable regulations to be made which provide that a specified action is a 'significant action' or a 'notifiable action'. The Committee also requested advice as to whether the disallowance process for the regulations could be amended to provide for increased Parliamentary oversight.

Successive governments have relied on Australia's Foreign Investment Policy (Policy) to supplement the requirements in the *Foreign Acquisitions and Takeovers Act 1975* (Act), and have on occasions revised the Policy to expand the categories of foreign investment proposals that are screened. Changes to the Policy have often been bolstered by enacting amendments to the Act that applied retrospectively with effect from the date of the change to the Policy or the making of a public announcement. For example, on 12 February 2009, the former Government announced amendments to clarify the operation of the Act to ensure that it applied equally to all foreign investments irrespective of the way they are structured. The amending legislation, the *Foreign Acquisitions and Takeovers Amendment Act 2010*, received Royal Assent on 12 February 2010 and applied retrospectively to the date of the announcement.

While this approach has enabled successive governments to protect the national interest by quickly amending Australia's foreign investment framework in response to changing circumstances, the disadvantage of this approach is that it has frequently relied on either enacting legislation which has retrospective effect or on making amendments to the Policy. By allowing regulations to be made which provide that a specified action is a significant action or a notifiable action, the need to rely on the Policy or retrospective legislation will be minimised. Altering the disallowance provisions that apply to the making of regulations under the Act would undermine the utility of introducing the new regulation-making powers, and would force governments to continue to rely on making amendments to the Policy in response to changing circumstances.

Yours sincerely

The Hon Scott Morrison MP

28/11 / 2015





**THE HON PETER DUTTON MP  
MINISTER FOR IMMIGRATION  
AND BORDER PROTECTION**

Ref No: MS15-029297

Ms Toni Dawes  
Committee Secretary  
Senate Standing Committee for the Scrutiny of Bills  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your letter, dated 12 November 2015, in relation to comments made in the Committee's Alert Digest No.12 of 2015, concerning the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the Bill). I provide the following advice to the Committee as a result of the comments in the Alert Digest.

**Merits Review**

**Item 31, subparagraph 502(1)(a)(ii)**

***...the Committee seeks more detailed advice from the Minister which explains why an appropriate form of merits review is not warranted in relation to the making of these decisions.***

Section 502 of the *Migration Act 1958* (the Act) provides the Minister for Immigration and Border Protection (the Minister) with the power, in certain circumstances, to declare a person to be an 'excluded person'. As a consequence of being declared an 'excluded person', a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal. These circumstances apply where the Minister intends to make a personal decision to refuse to grant or to cancel a protection visa on character-related grounds and require the Minister to decide that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared an excluded person.

Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. The Government now considers it appropriate to extend the scope of section 502 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person. The amendments to section 502 will give effect to this policy.

As stated in the Statement of Compatibility with Human Rights in the Explanatory Memorandum to the Bill, and as has been acknowledged by the Committee, the intention of this provision is to ensure consistency in the Minister's powers when dealing with non-citizens of serious character concern, and is therefore expected to be used in limited situations where there are clear national interest reasons to limit access to merits review. Furthermore, while merits review can be an important safeguard, there is no express requirement under the International Covenant on Civil and Political Rights or the Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment that it is required in the assessment of *non-refoulement* obligations.

The Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, and circumstances can and do arise where a non-citizen is of sufficient concern to require the Minister to consider the case personally. In exercising any personal powers to decide to refuse to grant or to cancel a protection visa on character-related grounds, the Minister is required to use his or her discretion lawfully and reasonably within the administrative law framework, and must consider the national interest.

All persons impacted by the personal decisions made by the Minister will remain able to access judicial review. In a judicial review action, a court would consider whether or not the power conferred by the Migration Act has been properly exercised. For a discretionary power under the Migration Act, this could include consideration of whether the discretionary power has been exercised (or not exercised, as the case may be) in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

The proposed amendment to subparagraph 502(1)(a)(ii) will ensure that personal Ministerial decision-making is consistent across the character and general visa cancellation frameworks within the Act.

Yours sincerely

PETER DUTTON