

Chapter 3

Provisions of the bill

Purpose of the Bill

3.1 The purpose of this bill is to establish the Australian Civilian Corps (ACC) and create a legal framework for the employment and management of ACC employees.¹ Under the provisions of the bill, civilian specialists are to be engaged 'as a new category of Commonwealth employee', to work in crisis environments overseas for specific periods before returning to their regular employment'.² The bill provides for terms and conditions and other employment arrangements that are designed specifically for this unique kind of employment.

Overseas jurisdiction

3.2 Clause 8 provides that the bill will apply to all actions, omissions, matters and things overseas. This clause expressly extends the application of the bill to things that take place outside Australia.³

The Director-General

3.3 If enacted, the bill would confer responsibility on the Director-General of AusAID, under the Minister for Foreign Affairs, for managing the ACC. On behalf of the Commonwealth, the Director-General would have 'all the rights, duties and powers of an employer in respect of ACC employees'.⁴

Employees

3.4 Clause 19 provides for the Director-General to engage persons as ACC employees. They may be engaged for the purposes of performing or potentially performing duties overseas, and/or performing duties in Australia that are incidental, preparatory or ancillary to the performance or potential performance of overseas duties. According to the Explanatory Memorandum, these duties might include undertaking training in Australia prior to a deployment or attending debriefing after a deployment.⁵

1 Explanatory Memorandum, Outline and paragraph, 4.

2 The Hon. Kevin Rudd, *House of Representatives Hansard*, 30 September 2010, p. 2.

3 See also Explanatory Memorandum, paragraph 20.

4 Clause 18.

5 Explanatory Memorandum, paragraph 54.

3.5 The bill states that ACC employees must be engaged for a specified period, which can be extended subject to limitations prescribed by regulations.⁶ For example regulations could be promulgated under this provision, imposing a limitation of 3 years on the term of employment or restricting to two the number of times an employee's term could be extended.⁷ According to the Explanatory Memorandum, these provisions reflect the time-limited nature of deployments for ACC employees. There would be no ongoing ACC employees.⁸

3.6 The provisions of the bill allow for a person employed by the Commonwealth in another capacity to be engaged as an ACC employee. People who are not Commonwealth public servants are also eligible for employment with the ACC.⁹

The ACC register

3.7 As noted in the previous chapter, AusAid has created a register that will be developed over the next four years. The Office of the Australian Civilian Corps has responsibility for maintaining the register, for recruiting and preparing specialists for overseas deployment and managing the deployments. In its submission, the CPSU noted the lack of detail about the operation of this register and asked:

Who is eligible to apply for the register? Does it have an expiry date? What is the relationship of someone on the register to the Commonwealth or AusAID Director General? Who maintains the register? Who decides who is on the register? Is there really to be a register? If so, the register and details about its operation need to be included in the Bill.¹⁰

3.8 The committee notes that an AusAID publication, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, provides information about the register, and gives some indication of the personnel who would be eligible to register. AusAID also has information on its website about the Corps, and the people it is looking to place on the register. It explains that specialists would be chosen for inclusion on the deployment register based on their expertise and demonstrated experience in relevant areas. It notes that they would 'require personal attributes appropriate for deployment into difficult environments such as self-reliance, flexibility, cross-cultural sensitivity and resilience and would undergo medical and police checks. AusAID provides a comprehensive list of the technical expertise needed. Through its website, AusAID also invites interested people to contact the agency for more information.¹¹

6 Subclause 19(2) and 19(3).

7 These examples were given in the Explanatory Memorandum, paragraph 54.

8 Explanatory Memorandum, paragraph 56.

9 Clause 19(6).

10 *Submission 3*, p. [3].

11 AusAID website, 'Australian Civilian Corps', <http://www.ausaid.gov.au/acc/> (accessed 29 October 2010).

3.9 The committee is satisfied with the information available on the register and does not see the need for the proposed legislation to include detail on this matter.

Conflicts of interest

3.10 When referring the bill for inquiry, the Senate Selection of Bills Committee identified potential conflicts of interest arising from AusAID selecting civilian specialists who may be AusAID employees as a matter for consideration.¹²

3.11 The Australian Public Service Commission was of the view that the existing procedures applying to the Australian Public Service (APS) were 'sufficient for the Office of the Australian Civilian Corps to apply in the selection and management of personnel on the ACC register'. It noted that disallowing AusAID staff to be included on the register 'could be detrimental to the overall objectives of the Australian Civilian Corps'.¹³

3.12 The committee accepts that making AusAID officers ineligible for engagement with the Corps would be both unfair to these officers and unnecessarily deny ACC the opportunity to engage AusAID officers with the required expertise and experience. To remove the risk of real or apparent conflicts of interest arising, the committee suggests that the Australia Government ensure that the selection process is transparent, without patronage or favouritism and based on merit. Further, that the values and code covering the conduct of ACC employees provide appropriate advice and directions on recruitment and selection procedures (see also paragraphs 3.17 and 3.55–56).

Statement—humanitarian and development objectives

3.13 Although it welcomed the creation of the ACC, World Vision Australia (WVA) observed that some of the most important aspects of the proposed legislation were yet to be produced, including the ACC Values and the Code of Conduct. It noted:

As a highly visible new element of Australia's aid program, the ACC needs to be seen to be part of AusAID and to be fully aligned with Australia's international development and humanitarian objectives. While noting that the detail of this alignment will be described in the ACC Values, Code of Conduct or other operational guidelines, WVA considers that a clause should be inserted into the draft bill to describe the purpose of the ACC.¹⁴

12 Selection of Bills Committee, *Report No. 11 of 2010*, 30 September 2010, Appendix 2.

13 *Submission 2*.

14 *Submission 1* (made to the first inquiry).

3.14 World Vision Australia suggested that the legislation should 'specify the purpose of the ACC with regard to the achievement of Australia's humanitarian and development objectives'.¹⁵

3.15 The committee notes that the *Public Service Act 1999* provides, as one of its objectives, a central guiding principle—'to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public'.¹⁶ Although not necessary, the committee can see value in the proposed legislation making a clear statement on the overarching principle and objectives governing the operation of the ACC.

Recommendation 1

3.16 The committee recommends that the bill include a statement on the humanitarian and development purpose for establishing the Australian Civilian Corps.

ACC values and code of conduct

3.17 AusAID noted that ACC personnel would be required to adhere to a set of values 'tailored to the particular role of the ACC in assisting countries recover from disasters and conflict'. The values would provide the philosophical foundations for the ACC, set out the principles, standards and ethics to be embodied by the Corps and articulate its culture and operating ethos. They are also intended to 'guide personnel and underpin the Civilian Corps operations'. The Explanatory Memorandum stated that the values would be based on the APS Values, but designed 'to reflect the unique nature of the ACC and its overseas working environment'.¹⁷ According to AusAID, the values would also help inform selection processes.¹⁸

3.18 The bill does not elaborate on these values but clause 12 provides for regulations to be made that will prescribe them. Further, under clause 13, the Director-General may issue, by legislative instrument, directions in relation to the values for the purposes of determining their scope or application.¹⁹

3.19 There is also to be an ACC Code of Conduct that is to apply to ACC employees.²⁰ Again this code is not specified in the proposed legislation but the bill

15 *Submission 1* (made to the first inquiry).

16 Subsection 3(a), *Public Service Act 1999*.

17 Explanatory Memorandum, paragraphs 27–28.

18 AusAID, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, January 2010, p. 17.

19 Clause 13.

20 Clause 15.

provides for the promulgation of regulations that may prescribe the code.²¹ The Explanatory Memorandum stated:

It is intended that the ACC Code of Conduct will be a public statement of the standards of behaviour and conduct that are expected of ACC employees. It is proposed that the ACC Code of Conduct will incorporate elements of the APS Code of Conduct and will draw on the various overseas codes of conduct which already apply in APS agencies which have employees on duty overseas (including AusAID's Code of Conduct for Overseas Service).²²

3.20 The bill requires the code to include a rule that ACC employees must at all times behave in a way that upholds the ACC Values.²³ It also requires the Director-General to uphold and promote the ACC Values.²⁴

3.21 The Australian Public Service Commission informed the committee that the Office of the Australian Civilian Corps had agreed to consult with the Commission on elements of the subordinate legislation that would govern the Australian Civilian Corps operation, including the ACC Values and Code of Conduct.²⁵

3.22 In its submission, the Australian Red Cross, which has extensive experience in providing humanitarian assistance, highlighted the importance of the ACC having clearly defined values.²⁶ In the committee's view, AusAID should also consult with the Australian Red Cross in formulating its values and code of conduct.

3.23 The CPSU noted the proposal to link closely the ACC Values to those of the APS and to base the ACC Code of Conduct on the APS and various overseas codes already applying to APS agencies employing personnel on overseas duty. In its view, this connection should be stated in the primary legislation to ensure that the regulations reflect parliament's intention. In this regard, the committee notes that the APS Values and the APS Code of Conduct are contained in the Public Service Act. Given that the ACC Values and Code of Conduct are to be promulgated under regulations, the committee supports the CPSU's recommendations to amend clauses 12 and 15.

21 Clause 15.

22 Explanatory Memorandum, paragraphs 33–34.

23 Subclause 15(2).

24 Clause 14 and Explanatory Memorandum, paragraphs 32–34.

25 *Submission 2*.

26 *Submission 4*, p. [3].

Recommendation 2

3.24 The committee recommends that a new subsection (2) be added to section 12 as follows:

(2) Regulations made under this Section must provide that Australian Civilian Corps Values be consistent with the APS Values.

3.25 The committee recommends that a new subsection (1A) be added to section 15 as follows:

(1A) Regulations made under this Section must provide that Australian Civilian Corps Code of Conduct incorporate the APS Code of Conduct and the AusAID Code of Conduct for Overseas Service.

Breaches of code

3.26 The provisions of the bill contemplate that on occasion an ACC employee may breach the ACC Code of Conduct. Under clause 17 of the bill, the Director-General would be able to impose various sanctions on an ACC employee found to have breached the code. Such sanctions would include: termination of employment; re-assignment of duties; deductions from salary, by way of fine; and a reprimand.

3.27 These sanctions are modelled on those applying to a breach of the APS Code of Conduct but do not include a reduction in classification or in salary. The Explanatory Memorandum noted that these measures were omitted as such action was 'not considered appropriate given the short-term nature of most ACC employment'.²⁷

3.28 Subclause 17(2) allows regulations to be made that may limit this power to impose sanctions, for example, by placing a ceiling on the amount that may be deducted from an employee's salary by way of fine.²⁸ Although this provision reflects the approach taken in section 15 of the *Public Service Act 1999*, the Scrutiny of Bills Committee expressed concern about the power to impose a fine. In its view, this power 'is granted in very wide discretionary terms' and therefore sought the Minister's advice on whether some limits to its exercise should be prescribed in the primary legislation.²⁹

3.29 Failing an amendment to the bill that would place reasonable constraints on the exercise of this power, the committee suggests that regulations made under subclause 17(2) provide guidance on the circumstances that would warrant a fine and on upper limits.

27 Explanatory Memorandum, paragraph 41.

28 Explanatory Memorandum, paragraph 40.

29 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 8 of 2010, p. 4.

Right to review

3.30 When dealing with the right to review, the provisions governing breaches of the code of conduct depart from those in the Public Service Act. Subclause 17(3) requires the Director-General to establish procedures for determining whether an ACC employee has breached the code. These procedures are not a legislative instrument.³⁰ The provisions of the bill also allow for procedures that set out matters to be taken into account when determining a sanction.³¹ Subclause (6) provides that the procedures:

- must have due regard to procedural fairness;
- may be different for different categories of ACC employees; and
- must entitle an ACC employee to an internal AusAID review of the following decisions:
 - that the employee has breached the ACC Code of Conduct; and
 - to impose a sanction on the employee.³²

3.31 Subclause 17(7) allows the Director-General to provide exemptions to the entitlement to an internal review relating to decisions on breaches and sanctions. As an example, a note to this subclause explains that the instrument might provide that there is no entitlement to review 'if the application for review is frivolous or vexatious'.

3.32 The Public Service Act also allows for exemptions to review but requires that any such exemptions must be made under regulation and hence subject to Parliamentary scrutiny. In addition, the Public Service Act has provisions which afford an APS employee greater protections when seeking a review. For example, the committee notes that, while the Public Service Act allows for regulations to prescribe exemptions to the entitlement to review, it requires among other things for the regulations to:

...provide for an application for review to be referred to the Merit Protection Commissioner if the applicant is not satisfied with the outcome of an initial review within the responsible Agency.³³

30 Subclause 17(10).

31 Explanatory Memorandum, paragraphs 39–43.

32 The Explanatory Memorandum provides the following advice: 'There are two fundamental principles of procedural fairness; the hearing rule and the bias rule. The hearing rule requires a decision-maker to give an opportunity to be heard to a person whose interests will be adversely affected by the decision. The bias rule requires a decision-maker to be disinterested or unbiased in the matter to be decided'. Explanatory Memorandum, paragraphs 45—46. Although not mentioned, another important safeguard ensuring procedural fairness is a person's right to have full knowledge of, and the evidence supporting, the allegation against them.

33 Paragraph 33(4)(c), *Public Service Act 1999*.

3.33 The committee is concerned about two critically important aspects of clause 17. Firstly, there is no provision for an external review. Secondly, the Director-General may impose sanctions for a breach of the Code of Conduct and establish procedures for determining whether an ACC employee has breached the Code including providing for exemptions to the entitlement for a review. Unlike those in the Public Service Act, these procedures are not legislative instruments.³⁴

3.34 The Scrutiny of Bills Committee also raised concerns about the absence of any form of external merits review and the possible inappropriate delegation of legislative powers in the case of exceptions to the entitlement to review. It stated:

...in the context of breaches of the Australian Civilian Corps Code of Conduct, these [exceptions] are to be made by the Director-General and are (by subclause 17(1)) declared not to be a legislative instrument. For this reason, the power to provide for exceptions to the entitlement to review may be thought to make rights unduly dependent upon (potentially) non-reviewable decision.

The problem also gives rise to concerns that the power to make exceptions is inappropriately delegated as it is not subject to parliamentary scrutiny.³⁵

3.35 The committee remains concerned about the wide discretionary powers that clause 17 confers on the Director-General especially in respect of the rights to a review and the absence of a provision allowing expressly for an external merits review.

Recommendation 3

3.36 The committee recommends that consistent with the Public Service Act, the bill require that exemptions to the entitlement to review be made under regulations and subject to Parliamentary scrutiny.

Recommendation 4

3.37 The committee recommends that the bill include a provision that would allow an ACC employee, following an adverse finding of AusAID's internal review, to apply for the matter to be referred to an external merits review authority. The committee suggests that this provision should be modelled on section 33 of the Public Service Act.

Terms and conditions of employment

3.38 AusAID explained that deployed civilian specialists would receive a remuneration package that reflected 'the particular conditions and hardships of each

34 Section 33, *Public Service Act 1999*.

35 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 8 of 2010, p. 5.

deployment'.³⁶ Under the bill, the Director-General may from time to time determine in writing the remuneration and other terms and conditions of employment applying to an ACC employee or employees.³⁷ While clause 20 enables the Director-General to make determinations with regard to ACC employees' terms and conditions, clause 9 states that the Australian Civilian Corps Act would operate subject to the Fair Work Act.³⁸ A note to clause 20 also makes clear that the National Employment Standards under the Fair Work Act, which provide certain minimum entitlements to national system employees, would apply to ACC employees.³⁹

Equity

3.39 The CPSU acknowledged that the Director-General's discretion to set terms of employment would be limited by the operation of the National Employment Standards. It was concerned, however, that the bill 'appears to allow the Director General to set employment conditions for Corps employees below minimum standards applying to Commonwealth employees generally'. It recommended that:

The Bill must be amended to ensure that any direction under s.20(1) provides no less than the remuneration and other conditions of employment provided for in a Fair Work instrument and/or a WR Act collective transitional instrument and other conditions which apply at that time to comparable employees engaged by AusAID.⁴⁰

3.40 The committee understands the CPSU's concerns to ensure that a benchmark is set that would guarantee that remuneration and other conditions of employment for an ACC employee would not fall below that of a comparable Commonwealth employee.

3.41 The CPSU was also concerned about equity issues under the employment arrangements specified in the Bill and the potential for Corps employees to be on different wages and conditions. It stated:

If someone comes from outside the APS where their salary is not maintained, they might be working on lower conditions than someone seconded from an APS agency which does have salary maintenance.

36 AusAID, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, January 2010, pp. 5 and 16.

37 Subclause 20(1).

38 Explanatory Memorandum, paragraphs 21 and 60–62. Subclause states that the Act has effect subject to the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

39 See for example note to Subclause 20(2). The Minister for Foreign Affairs stated that ACC employees would 'have all the rights and protections afforded to Commonwealth employees, and be covered by the same minimum standards of employment as other Australian employees under the Fair Work Act' The Hon. Kevin Rudd, *House of Representatives Hansard*, 30 September 2010, p. 2.

40 *Submission 3*, p. [2].

Conversely, should APS employees on salary maintenance be more expensive than other employees, this raises concerns about preference not being given to APS employees because of the higher remuneration cost.⁴¹

3.42 It argued that these complex issues must be worked through before the Bill is finalised.⁴²

3.43 The committee agrees with the CPSU that issues around matters such as equity need to be clarified. It recognises the difficulties, however, resolving such matters, especially where the circumstances of each engagement and the levels and types of skills required are so variable. The engagement of people from the private sector is a further complicating factor. It is of the view that the overarching policy governing the determination of employment arrangements needs to be stated clearly and implemented consistently and fairly. Transparency and access to information would enable potential applicants to judge for themselves whether or not to accept the terms and conditions of their employment.

3.44 As noted earlier, however, all employees enjoy the protections afforded under the Fair Work Act.

Accrual of employment entitlements

3.45 The Public Service Commission was confident that officers transferring from the Public Service Act to the ACC would not incur any loss of terms and conditions, such as leave entitlements.⁴³ The CPSU was not so convinced. With regard to matters such as superannuation, it noted that for APS employees seconded to the ACC, 'consideration must be given to the impact on these entitlements, with proper attention given to rectifying any possible detriment for those in defined benefit schemes'. It recommended that consideration must also be given to amending the bill to ensure that employment by the ACC counts as service for all purposes.⁴⁴ It argued that the same principle should apply to a private sector employee:

There is a lack of clarity regarding continuity of 'service' if a private sector employee is given unpaid leave to work for the Corps. Does a private sector employee who is on unpaid leave from their normal employment to enable employment by the Corps still accrue Long Service Leave, redundancy entitlements, personal and other accrued entitlements with their normal employer during service with the Corps and how is that provided for under law?⁴⁵

41 *Submission 3*, p. [4].

42 *Submission 3*, p. [4].

43 *Submission 2*.

44 *Submission 3*, p. [4].

45 *Submission 3*, pp. [5–6].

3.46 The CPSU explained that the Fair Work Act 2009 defines 'service and continuous service' in relation to accrual of employment entitlements.⁴⁶ It noted further that the Act 'provides that a period of unpaid leave or absence to perform eligible community service is 'service' with the employer who grants the leave without pay to enable the employee to perform the service.'⁴⁷ The Public Service Act sets out what constitutes eligible community service in Division 8 of Part 2-2 and includes voluntary emergency management activity. In the union's view, the Act appears to exclude the absence of an employee to perform voluntary emergency management activity if that community service is paid employment.⁴⁸ It argued:

As service with the Corps is paid, it appears that the *Fair Work Act* protections provided to employees performing eligible community service within Australia are currently not provided to employees taking up employment with the Corps.⁴⁹

3.47 The CPSU suggested that the government 'should either amend the *Fair Work Act 2009* or this Bill to ensure private sector employees are not disadvantaged in relation to accrued entitlements when employed by the Corps'.⁵⁰

Recommendation 5

3.48 The committee recommends that the government look closely at the provisions governing accrued entitlements to ensure that employees who take up employment with the ACC are not disadvantaged in respect of entitlements such as superannuation, long service and annual leave.

Leave from regular employer

3.49 The bill provides for leave to be granted to a Commonwealth employee for the purpose of employment with the Corps. Under clause 27, the Prime Minister may issue directions to a Commonwealth employer in relation to the granting of leave to Commonwealth employees for the purposes of service in the Corps.

3.50 The CPSU pointed out that the directions the Prime Minister may issue under clause 27(2) are not dependent upon an APS employee actually requesting leave without pay to work for the Corps. It argued that this arrangement was in contrast to clause 26(1) which provides an employer (other than a Commonwealth employer) may, at the request of an employee, grant unpaid leave to enable the employee to take up employment with the Corps.

46 *Submission 3*, p. [6] is referring to s.22, *Fair Work Act 2009*.

47 *Submission 3*, p. [6] is referring to s.22(2)(b)(i), *Fair Work Act 2009*.

48 *Submission 3*, p. [6] is referring to s.109(2) *Fair Work Act 2009*.

49 *Submission 3*, p. [6].

50 *Submission 3*, p.[6].

3.51 It recommended that 'this anomaly should be rectified to guard against any suggestion that the government intends to allow Commonwealth employees to be required to take leave to begin service with the Corps without requesting such'.⁵¹ To remove any such doubt, the committee makes the following recommendation.

Recommendation 6

3.52 The committee recommends that paragraph 27(2)(a) of the bill be amended to include the term 'at the request of the employees'. Paragraph 27(2)(a) to read:

(a) the granting of leave to employees, at the request of the employees, for the purposes of service in the Australian Civilian Corps.

Suspension or termination of employment

3.53 The bill provides for regulations to be made dealing with the suspension of ACC employees from their duties. In respect of terminating employment, the bill provides for the Director-General to terminate the employment of an ACC employee by written notice. Such actions are governed by the rules and entitlements that apply to termination of employment under the Fair Work Act.⁵² The committee notes that the Public Service Act requires that a written notice terminating the employment of an ongoing APS employee must specify the grounds for termination.⁵³ Given the significance of such a decision on an employee's reputation and career prospects, the committee believes that, if an ACC employee's employment with ACC is terminated, he or she should be entitled to know the reasons for their dismissal.

Recommendation 7

3.54 The committee recommends that subclause 23(2) be added requiring the notice to specify the ground or grounds that are relied on for termination.

3.55 The committee notes that the bill does not contain certain provisions that are in the Public Service Act including provisions covering protection for whistleblowers, prohibition on patronage and favouritism and promotion of employment equity.⁵⁴ In light of concerns expressed earlier about conflicts of interest and related probity matters, the committee suggests that the bill incorporate these sections from the Public Service Act.

51 *Submission 3*, p. [4].

52 Clause 23.

53 Section 29, *Public Service Act 1999*.

54 See sections 16, 17 and 18, *Public Service Act 1999*.

Recommendation 8

3.56 The committee recommends that the government give consideration to including in the bill provisions governing the protection of whistleblowers, prohibition on patronage and favouritism and promotion of employment equity.

Safety and security—duty of care

3.57 When recommending that the provisions of the bill be examined, the Selection of Bills Committee identified concerns relating to the protection of ACC employees working overseas as matters for consideration.⁵⁵ Subclause 19(4) permits the Director-General to impose conditions on engagement. These conditions may deal with probation, citizenship, formal qualifications, security, character and health clearances, which may include psychological clearances. An employee may need to satisfy these conditions before employment commences or during the employment.⁵⁶

3.58 According to AusAID: 'A rigorous recruitment process will underpin the selection of high calibre and experienced individuals', who would be required to undergo 'medical, psychological and security checks'.⁵⁷ They are to be selected on personal attributes appropriate to the environments in which they would work and include cross-cultural sensitivity, flexibility, self-reliance and resilience.⁵⁸ AusAID explained that the safety of deployed civilian specialists would be a priority and noted that 'during deployment planning, threat and risk assessments will be prepared and appropriate arrangements for security will be put in place'.⁵⁹

3.59 The CPSU, however, expressed strong reservations about the occupational health and safety aspects of the proposed legislation. It argued that while deployed overseas, an ACC employee must have the same rights and obligations that they would have under Australian law if employed in Australia. The CPSU suggested that such rights and obligations should be protected in the proposed legislation. In its assessment, however, it was not clear where the duty of care resides. It stated:

The Bill appears to be part of a process of transitioning of civilian public servants into roles traditionally occupied by defence personnel, but without the health and safety support of defence organisations. AusAID for example currently has one staff counsellor for all of its Australian and overseas deployed personnel, and CPSU members advise that AusAID struggles to

55 Selection of Bills Committee, *Report No. 11 of 2010*, 30 September 2010, Appendix 2.

56 Explanatory Memorandum, paragraphs 55–57.

57 AusAID, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, January 2010, p. 11.

58 AusAID, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, January 2010, p. 11.

59 AusAID, *The Australian Civilian Corps, Supporting stabilisation and recovery from disaster and conflict*, January 2010, p. 17.

meet its duty of care to ensure that those working in high pressure/traumatic/unstable situations are appropriately demobilised.⁶⁰

3.60 In its view, there exists 'a significant risk for the government and for AusAID' with this transition to the 'new way of doing business'.⁶¹ The Australian Red Cross also recognised the need for careful and specific management when sending humanitarian and development specialists overseas to provide technical assistance in times of crisis. From its extensive experience, it produced a list of 'key learnings for deployees' that may assist in the successful management of the ACC. They included obligatory pre-departure briefing and preparation, including safety and security and in country support whilst on deployment, including access to psychosocial services.⁶²

3.61 The committee notes that it raised a number of similar concerns in its report on Australia's involvement in peacekeeping. The government's response to recommendations in that report provide some insight into improvements made in mission planning and the pre-deployment preparation of military and civilian personnel. The government acknowledged the need for personnel to satisfy pre-deployment training and the scope for further development and refinement of training modules.⁶³ It should be noted that the Australian Red Cross has developed 'expertise in health and psychosocial support for deployees and such modules could be tailored to the needs' of the ACC.⁶⁴

Secondment of ACC employees

3.62 Subclause 24(1) allows the Director-General to arrange for an Australian Civilian Corps employee to be seconded for a specified period to anybody or organisation (including an international body or organisation). The CPSU held concerns for ACC employees under these arrangements. It noted:

Seconded employees are likely to be engaged in overseas locations suffering natural disaster or conflict. Such situations are often politically unstable and provide less personal security than one would expect to enjoy in Australia. When a Corps employee is seconded to another body or organisation, who controls the employee and does the body or organisation have a duty to provide a safe place and system of work, or does that duty remain with the Corps? This is a critical issue which needs to be addressed.⁶⁵

60 *Submission 3*, p. [5].

61 *Submission 3*, p.[5].

62 *Submission 4*, p. [4].

63 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008, pp. 177–8. Government Response to the Senate Standing Committee on Foreign Affairs, Defence and Trade report on *Australia's involvement in peacekeeping operations*, response to recommendation 11 and 12.

64 *Submission 4*, p. [5].

65 *Submission 3*, p. [7].

3.63 The CPSU argued further that Corps employees who are seconded to another body or organisation should not suffer a reduction in remuneration or conditions of employment (including the provision of appropriate accommodation and security) during that secondment. It stated that this objective 'should be guaranteed in the Bill rather than requiring individual employees to negotiate the terms of the secondment'. It stated further:

Any Corps employee who is seconded must be provided with the same rights and obligations they would have under Australian law if they were employed within Australia. This is especially important in relation to occupational health and safety, workers compensation, the ability to initiate tort action, personal security, privacy, professional liability, due process in dealing with disputes arising from the seconded employment and other employment and civil rights.⁶⁶

3.64 The committee notes that subclauses 24(5) and 24(6) appear to answer in part the concerns raised about the status, responsibilities and obligations of ACC employees seconded to another organisation. A secondment does not affect the person's status as an ACC employee or the application of any provision in the bill during the period of secondment. The Explanatory Memorandum stated further that 'the ACC Code of Conduct would continue to apply to an ACC employee who is on secondment'.⁶⁷ Subclause 24(6) makes clear that a secondment does not affect any rights, powers or immunities that a secondee has by virtue of holding any office or position to which they have been seconded. Nor does a secondment affect the extent to which the secondee is subject to obligations or liabilities in relation to discipline by virtue of holding any office or position to which they have been seconded.

3.65 The CPSU also noted that conflicts of interest 'may occur where a Commonwealth employee is seconded to another body or organisation if the function of that body or organisation is to deliver Corps projects'. It noted that this situation 'may result in Corps employees managing and delivering projects at the same time which is clearly inappropriate'. It was of the view that the problem may be addressed through the proposed ACC Values to be incorporated into the proposed ACC Code of Conduct.⁶⁸

3.66 While welcoming secondments as an important part of the ACC, World Vision Australia was concerned that the terms of secondment 'leave the door open for inappropriate deployments, particularly in humanitarian or emergency situations in which the roles of civilian and military actors must be clearly defined'. It recommended that clause 24 be amended 'to specify that secondments must be

66 *Submission 3*, pp. [6–7].

67 Explanatory Memorandum, paragraph 75.

68 *Submission 3*, p. [7].

consistent with the guidelines of the Australian Civilian Corps and other international principles including those of principles of civil-military cooperation'.⁶⁹

3.67 The committee accepts that the Director-General should take every care to ensure that an ACC employee is not being seconded to an organisation or into a situation or taking on duties that would bring that employee into conflict with the ACC Values or Code of Conduct. As an extra safeguard against any such likelihood, the committee supports WVA's suggestion and makes the following recommendation.

Recommendation 9

3.68 The committee recommends that an additional subclause be inserted in clause 24 stating that any arrangements for, agreements on and actual secondments under this clause must be consistent with ACC Values and Code of Conduct and AusAID Code of Conduct for Overseas Service.

3.69 The CPSU has raised a number of questions about the terms and conditions of employment, and duty of care responsibilities for ACC employees seconded to another organisation. The committee believes that the Australian Government should review the provisions of the bill to ensure that a seconded ACC employee is entitled to all the rights and protections afforded to an ACC employee. To achieve this objective, the committee notes the CPSU recommendation that a new subclause 24(3A) be inserted in clause 24 stating that, 'An Agreement made under subsection (2) or (3) shall not reduce the remuneration or other employment conditions of Australian Civilian Corps' employees'.⁷⁰

Returning to employment after deployment

3.70 The Australian Public Service Commission was of the view that membership of the Civilian Corps presented a unique development opportunity.⁷¹ Even so, the CPSU noted that for AusAID and other APS employees seconded to work for the ACC there were 'concerns around whether their previous positions will be available on their return'. In its view, this situation must be clarified to ensure that employees return to their substantive position'. It recommended that the bill be amended to 'provide the opportunity for APS employees to return to their substantive position on the conclusion of the period of service with the ACC'.⁷²

3.71 The committee understands the importance of providing assurances to a person who is transferring to the ACC that their substantive position would be available to them on their return. Practical considerations and the inability to predict future circumstances, such as a major agency or departmental restructure, mean that

69 *Submission 1.*

70 *Submission 3, p. [6].*

71 *Submission 2.*

72 *Submission 3, pp. [4–5].*

such an assurance is difficult to give. The committee believes, however, that an employee should be able to resume duties with their home agency or department in a substantive position at level and without loss of status or entitlements.

3.72 AusAID explained that the ACC would place a high priority on achieving a 'smooth and positive transition for returning civilian specialists back to their workplace'. It referred to assisting employees readjust to normal life, by providing medical and psychological debriefing and support arrangements. The committee believes that AusAID also needs to give close attention to and resolve matters relating to employment arrangements for ACC employees on their return to ensure that they would not be disadvantaged because of their absence due to service with the ACC.

Delegation of minister's power

3.73 Subclause 30(1)(c) would allow the Minister to delegate in writing any or all of his proposed powers to 'a person who holds an office or appointment under an Act'. The Scrutiny of Bills Committee expressed concern about subclause 30(1) and the broad delegation of the Minister's power to 'a person who holds an office or appointment under the Act'. It noted:

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum simply describes the effect of the provision and does not provide any explanation or justification of it.⁷³

3.74 The Scrutiny of Bills Committee sought the Minister's advice on this matter so it could 'better assess whether the clause makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'.⁷⁴

Costs and logistics

3.75 When recommending that the provisions of the bill be referred for examination, the Selection of Bills Committee identified concerns relating to costs and logistics of the program as matters for consideration.⁷⁵

3.76 The bill states that there are no direct financial impacts from this bill which as noted earlier establishes an employment framework. There will be costs, however, for the actual recruitment, employment and training of the 500 civilians. In 2009, AusAID announced that the government would provide \$52 million 'to enable the rapid deployment of Australian civilians into overseas disaster or conflict affected

73 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 8 of 2010, pp. 6–7.

74 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 8 of 2010, p. 7.

75 Selection of Bills Committee, *Report No. 11 of 2010*, 30 September 2010, Appendix 2.

countries'.⁷⁶ The provisions of the bill also do not cover the logistics of developing the register and deploying civilians to overseas operations.

3.77 The committee recognises the ACC is in its infancy and that matters relating to costs and logistics will become evident as the Corps continues to evolve.

Reporting obligations

3.78 The committee notes that the Government intends to have the ACC fully operational by 2011. By that time, the values and the code of conduct should have been issued. Their promulgation may satisfy some of the concerns raised by World Vision and the CPSU and provide answers to questions about conflicts of interest. The Director-General may also have issued directions or written determinations that may clarify procedures relating to the scope or application of the values and the code of conduct, the remuneration and other terms and conditions of employment for ACC employees.

3.79 Unforeseen or unintended consequences, if any, that arise as the ACC becomes fully operational and the costs associated with the work of the ACC should also start to become apparent. At this early developmental stage, the committee believes that it is critical for the Director-General to provide a comprehensive account of the ACC as it evolves and of any difficulties encountered in implementing the provisions of the bill that may require legislative refinements.

3.80 The Explanatory Memorandum notes that the ACC will not have its own annual report but its activities will be included in AusAID's Annual Report.⁷⁷ In light of the importance of informing Parliament about the activities of this new and important body as it develops, the committee recommends that the Director-General ensure that the report on the ACC is self contained, comprehensive and assists parliamentary scrutiny.

Recommendation 10

3.81 The committee recommends that the Explanatory Memorandum be more explicit on ACC's reporting obligations by specifying that the report on the activities of the ACC will form a separate and discrete section in AusAID's Annual Report and will include financial statements.

3.82 The committee also recommends that the Australian Government review the operation of the ACC including the employment framework established under the provisions of this bill no later than mid-2013 for the Minister to table in Parliament.

76 AusAID website, 'New Australian Civilian Corps to assist in disaster and conflict zones', Focus online, Archived, 27 October 2009, http://www.ausaid.gov.au/hottopics/topic.cfm?ID=7115_4988_8043_4374_974

77 Explanatory Memorandum, paragraph 25.

Further consultation

3.83 The committee notes that the CPSU has requested that the government consult with the union with regard to any amendments to the bill, the process of finalising the bill and the employment arrangements of Corps employees generally. In light of the expertise and the interest that the union has in employment matters relating to public servants, the committee supports the CPSU's suggestion. It also suggests that AusAID consult with the Australian Red Cross not only on the ACC Values and Code of Conduct but the development of training modules.

Conclusion

3.84 The committee has examined the provisions of the bill and identified a number of concerns. The most serious deficiencies are around the issues of protecting the rights of ACC employees from the exercise of inappropriate delegated authority or the Director-General's wide discretionary powers. Although the bill is modelled on the Public Service Act, there are notable omissions and it is these important omissions that, in the committee's view, leave some rights unnecessarily vulnerable particularly an ACC employee's right to review.

3.85 The committee accepts that the ACC Values and ACC Code of Conduct may go some way to allaying these concerns and urges the Australian Government to ensure that these documents take account of the concerns identified in this report. In other cases, the committee believes that the government should consider amending the bill to ensure consistency with the Public Service Act and to put beyond doubt queries about employment conditions especially in respect of entitlements for review and accrued employment entitlements. The committee notes its recommendation for more stringent reporting obligations and for a review.

Recommendation 11

3.86 The committee recommends that, subject to consideration of the committee's recommendations dealing with the provisions of the bill, the Senate pass the bill.

Senator Mark Bishop
Chair