



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2002

18 September 2002

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MEMBERS OF THE COMMITTEE

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
Senator A Murray

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, 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 2002

The Committee presents its Tenth Report of 2002 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Veterans' Affairs Legislation Amendment Act (No. 1) 2002

Veterans' Affairs Legislation Amendment Act (No. 1) 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 4 of 2002*, in which it made various comments. The Minister for Veterans' Affairs has responded to those comments in a letter dated 24 June 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

Schedules 1 and 2 to the bill propose to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* respectively, as a consequence of the income support supplement to war widows and widowers introduced in 1994 under the *Veterans' Entitlements Act 1986*.

Schedules 3, 4, 5 and 6 propose to amend the *Aged Care (Consequential Provisions) Act 1997*, the *Social Security and Veterans' Affairs Legislation Amendment (Family and Other Measures) Act 1997*, the *Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997* and the *Veterans' Affairs Legislation Amendment Act (No. 1) 2000*, respectively, to correct misdescribed amendments that resulted in intended amendments not being made.

Schedule 6 also proposes to amend the *Veterans' Entitlements Act 1986* to correct certain references, omissions and other typographical errors and omit redundant provisions.

Incorporation of material as in force from time to time
Schedule 6, items 20, 55, 58, 59, 63, 66 and 68

A number of items in Schedule 6 to the bill will enable documents prepared by the Repatriation Commission to “apply, adopt or incorporate matter contained in any other instrument or writing whatever” as in force or existing at a particular time, or from time to time “even if the other instrument or writing does not yet exist when the document or instrument varying the document is made”. These items explicitly overturn the intention of section 49A of the *Acts Interpretation Act 1901*.

The Committee usually expresses concern where provisions enable the incorporation of extrinsic material ‘as in force from time to time’. Such provisions enable persons or organisations outside the Parliament to change the obligations imposed on people without the Parliament’s knowledge, and without the opportunity for Parliament to scrutinise (and, if so minded) disallow the variation.

The Explanatory Memorandum notes that these provisions “will provide for more flexibility in the operation of the provisions and will prevent the need for amendments to the instruments when there are changes to the specifications referred to in non-legislative documents that have been incorporated into provisions of the instruments”.

In addition, on 24 April 2002 the Minister for Veteran’s Affairs wrote to the Committee in advance of the publication of this *Digest* (a copy of the Minister’s letter is attached to this *Digest*). In that letter, the Minister stated that only the following instruments would be able to incorporate non-legislative documents as in force from time to time:

- The *Guide to the Assessment of Rates of Veterans’ Pensions* made under section 29 of the Veterans Entitlements Act (VEA);
- The *Treatment Principles* made under section 90 of the VEA;
- The *Repatriation Private Patient Principles* made under section 90A of the VEA;
- The *Repatriation Pharmaceutical Benefits Scheme* made under section 91 of the VEA;
- The *Vehicle Assistance Scheme* made under section 105 of the VEA;
- The *Veterans’ Vocational Rehabilitation Scheme* made under section 115B of the VEA; and

- The *Veterans' Children Education Scheme* made under section 117 of the VEA.

The Minister states that these instruments are all required to be tabled in the Parliament, but there is no indication that they are themselves disallowable.

While it is currently envisaged that only the *Treatment Principles* and the *Repatriation Pharmaceutical Benefits Scheme* will incorporate material as in force from time to time, it is considered that the other instruments should also have this facility.

The Minister also states that the incorporation of documents that 'do not yet exist' would be used to incorporate draft or interim documents before they had been formally made. However, the bill itself does not contain any limitations on the power to incorporate, simply referring to the incorporation of "any other instrument or writing whatever".

While the incorporation of non-legislative documents by reference – as and when they may be amended – clearly maximises flexibility in the law, it also maximises uncertainty and minimises scrutiny.

Notwithstanding the Department's commitment to making information about amendments available directly to service providers, and available generally through its website, the Committee remains concerned about the likelihood that information about the applicable law at any particular time might be open to dispute, to the disadvantage of veterans, particularly where 'non-existent' documents are concerned.

And the Committee is also concerned where extrinsic material may be incorporated in documents which are themselves not subject to parliamentary scrutiny. The Committee therefore **seeks the Minister's advice** as to whether the VEA instruments listed above are disallowable instruments and (if not) why they should not be – particularly where it is proposed that they incorporate extrinsic material in this form.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions as they may be considered to insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I have no comments to make and I advise that I will be seeking to have the “incorporation-by-reference items” of the Bill withdrawn.

The Committee thanks the Minister for this response, which advises that the provisions of the bill which the Committee drew to the attention of Senators will be removed.

Jan McLucas
Chair



RECEIVED

27 JUN 2002

MINISTER FOR VETERANS' AFFAIRS ^{Senate Standing Committee}
MINISTER ASSISTING THE MINISTER FOR DEFENCE ^{for the Scrutiny of Bills}

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 16 May 2002 from the Secretary of the Standing Committee for the Scrutiny of Bills advising me that the Committee would be happy to consider any response I might care to make to the Committee's comments on the *Veterans' Affairs Legislation Amendment Bill (No.1) 2002* (the Bill).

I have no comments to make and I advise that I will be seeking to have the "incorporation-by-reference items" of the Bill withdrawn.

Yours sincerely

DANNA VALE MP

24 JUN 2002