

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator G Marshall

Senator L Pratt

Senator R Siewert

Senator the Hon J Troeth

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.

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Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Introduced into the House of Representatives on 27 October 2010

Portfolio: Attorney-General

Background

This bill provides the legislative measures necessary to ensure consistency between Australian law and the *Convention on Cluster Munitions* (the Convention) and will place Australia in a position to ratify the Convention. Australia signed the Convention on 3 December 2008 but has not as yet ratified it.

Reversal of onus

Various

The bill introduces a number of new offences in relation to the use of cluster munitions or explosive ‘bomblets’ and other activities related to such devices.

There are a number of proposed sections introduced by Schedule 1 of the bill which impose an evidential burden on defendants who wish to raise a defence specified in relation to a particular offence. (See proposed sections 72.39(1), 72.40, 72.41, and 72.41(1).) The Criminal Code (subsection 13.3(3)) states that a defendant who relies on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden.

Where a defendant bears an evidential burden, he or she must adduce evidence that suggests a reasonable possibility that a matter exists or does not exist. The explanatory memorandum states that it is appropriate and practical to require the defendant to adduce or point to evidence given that the various matters would be within the defendant’s personal knowledge. (See explanatory memorandum, pages 9, 11, 12, 14 and 16.) As the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (pp 28-29) states that the use of defences (and, thus, the imposition of an evidential burden on defendants) is appropriate only where the matter is peculiarly within the knowledge of the defendant. Further, it is more likely that an evidential burden will be considered appropriate where an offence

relates to conduct which poses a grave danger to public safety—which is clearly the case in relation to the proposed offences in this bill.

In the circumstances, the Committee makes no further comment on these provisions.

Education Services for Overseas Students Legislation Amendment Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced into the Senate on 27 October 2010

Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Background

This bill amends the *Education Services for Overseas Students Act 2000* and the *Ombudsman Act 1976* to provide for recommendations from the review of the Education Services for Overseas Students legislative framework, dated February 2010, titled *Stronger, simpler, smarter ESOS: supporting international students* (the ESOS Review) conducted by the Hon Bruce Baird AM. The bill will introduce provisions to amend the registration process for approved providers and improve access to a statutory independent external complaints body.

Poor explanatory memorandum

Strict liability

Items 10, 12, 14, 15, 16, and 17

Items 10, 12, 14, 15, 16, and 17 include statements that the offences provided for are strict liability offences. The penalties imposed for the offences are consistent with the 'basic principles' which the Committee outlined in its sixth report of 2002 (*Application of Absolute and Strict Liability Offences in Commonwealth Legislation*). The Committee takes the view that fault liability is one of the most fundamental protections of the criminal law and that 'strict liability should be introduced only after careful consideration' (see page 283 of the above report).

The Committee notes the comment at page 25 of the explanatory memorandum that these amendments 'reorganise existing offence provisions...to reflect modern drafting practice by locating the operative offence provisions within their corresponding, substantive provisions.' However, it is regrettable that the explanatory memorandum merely repeats the strict liability nature of the offences without attempting to justify the appropriateness of this approach. In addition, it is noted that in the case of the offence outlined in item 15 the elements of the offence may be set out in regulations (see the explanatory memorandum for item 15).

The Committee therefore **seeks the Minister's advice** as to why strict liability is considered appropriate in relation to each of these offences, and the justification for the approach to the elements of item 15.

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

Retrospective application

Item 8

Schedule 2 of the bill establishes and confers functions, powers and duties on the Overseas Students Ombudsman. Item 8 provides that the amendments in Part 1 of Schedule 2 applies in relation to action taken by a private registered provider before or after the commencement of Schedule 2. The law therefore applies to actions which occur prior to its commencement.

The proposed arrangements would not substantively retrospectively affect legal rights or obligations because the Ombudsman's powers do not include powers to make determinative rulings, but are of an investigatory nature. Nonetheless, the approach would still allow the retrospective application of the investigative powers and the ability to table reports about such conduct. The Committee expects that justification will be provided in the explanatory memorandum for any retrospective commencement or application of legislative proposals. In this case the explanatory memorandum at page 39 merely restates the effect of the provision without outlining reasons for the proposed approach. The Committee therefore **seeks the Minister's advice** about the justification for the retrospective application of Part 1 of schedule 2.

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

Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 27 October 2010

Portfolio: Treasury

Background

This bill implements changes to federal financial arrangements. It gives effect to reforms to the financing of health and hospital services set out in the National Health and Hospitals Network Agreement, endorsed by the States, with the exception of Western Australia, on 20 April 2010.

Poor explanatory memorandum

Various

The Committee considers that an effective explanatory memorandum is an essential aid to proper Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

In the Committee's view, especial care should be taken to ensure the accuracy of the index in an explanatory memorandum that adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order). Flaws in the index can significantly undermine the usefulness of the whole explanatory memorandum.

It is regrettable that the explanatory memorandum accompanying this bill did not include an index which cross-references each item with the page numbers identifying where the item is explained. The Committee **requests that the Treasurer** issues an explanatory memorandum that contains an index.

In the circumstances, the Committee makes no further comment on this matter.

Legislative instruments - disallowance Various

For States participating in the Agreement, the proposed amendments to the *Federal Financial Relations Act* allow the Minister to make determinations about (i) dedicated GST revenue and payment amounts for a State (item 18, proposed section 6A; item 21, proposed subsections 15D(1) and (2)); (ii) special payments and State adjustment amounts (item 21, proposed subsections 15E(1) and (2) and section 15G); and (iii) top-up payments (proposed subsections 15H(1), (2) and 15H(5)). Although these determinations will be legislative instruments, they will not be disallowable (proposed subsections 6A(4), 15D(9), 15G(3) and 15H(13)). This is justified (explanatory memorandum, at page 17) on the basis that the determinations will facilitate the operation of an intergovernmental body or scheme involving the Commonwealth and the States. It is also noted that the Minister's discretion is structured by the requirement in the proposed section 21A to consider the NHHN Agreement and the intergovernmental Agreement. Section 21B provides for procedural protection for States where a determination which is inconsistent with the NHHN is made and would result in 'substantial financial detriment' to one or more States.

In addition, the proposed subsection 15B(2) provides that the Minister's determination (under subsection 15B(1)) for amounts to be paid into the NHHN Fund are legislative instruments, but are not subject to disallowance. Exemption from the normal disallowance provisions of the *Legislative Instruments Act* is justified in the explanatory memorandum on the basis that the determinations facilitate the operation of an intergovernmental body or scheme.

Although the removal of parliamentary oversight is a serious matter, subparagraph 44(1)(a) of the *Legislative Instruments Act* provides that the section 42 disallowance process does not apply to instruments if the enabling legislation 'facilitates the establishment or operation of an intergovernmental body or scheme'. These proposed provisions are therefore consistent with the operation of the *Legislative Instruments Act*.

In the circumstances, the Committee makes no further comment on these provisions.

Standing appropriation Section 15A

The proposed section 15A establishes the NHHN Fund to facilitate the payment of dedicated GST revenue, special payments and top-up payments under the *Federal Financial Relations Act*. The section specifies that the Fund will be a Special Account for the purposes of section 21 of the *Financial Management and Accountability Act 1997*. This means that, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for these purposes. This proposed new section is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

Although the explanatory memorandum does not expressly detail the reasons as to why a standing appropriation is appropriate in this instance, it is noted that the amounts to be credited will be based on an intergovernmental agreement and that amounts can only be debited from the Fund for the purposes specified. Nevertheless, the Committee **seeks the Minister's advice** as to whether the Commonwealth's funding of the NHHN Agreement could be subject to approval through the standard annual appropriations process, thus ensuring continuing Parliamentary oversight.

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

International Financial Institutions Legislation Amendment Bill 2010

Introduced into the House of Representatives on 28 October 2010

Portfolio: Treasury

Background

This bill amends the *International Monetary Agreements Act 1947* to authorise the subscription by Australia to additional shares in the capital stock at the International Bank for Reconstruction and Development.

The bill also amends the *International Finance Corporation Act 1955* to allow Australia to adopt a proposed amendment to the Articles of Agreement of the International Finance Corporation and to amend the *Multilateral Investment Guarantee Agency (MIGA) Act 1997* to adopt four amendments to the MIGA Convention which have been recently adopted by the MIGA Council of Governors.

The Committee has no comment on this bill.

Migration Amendment (Detention of Minors) Bill 2010

Introduced into the Senate 28 October 2010

Portfolio: Senator Hanson-Young

Background

This bill amends the *Migration Act 1958* to ensure that minors are not be held in immigration detention facilities but instead be placed, along with their immediate family members or guardians, in community residential housing.

The bill also seeks to ensure that the Minister, must, within 12 days, determine that a minor is to reside at a specified place within the community and appoint a person to act as a guardian to the minor.

The Committee has no comment on this bill.

National Broadband Network Financial Transparency Bill 2010

Introduced into the House of Representatives on 25 October 2010

Portfolio: Mr Turnbull

Background

This bill requires the NBN Co to prepare and publish a business case and for the Productivity Commission to prepare a cost-benefit analysis of the National Broadband Network proposal and publish it by 31 May 2011.

No explanatory memorandum

This bill, introduced as a private Member's bill, was introduced without an explanatory memorandum. The Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents can assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **seeks the Member's advice** as to whether an explanatory memorandum could be provided.

The Committee draws Senators' attention to this circumstance, 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.

Proposed timeframe

Clause 4

Clause 4 of this bill would require the NBN Co to prepare a business case for the NBN and publish it by 19 November 2010. It is noted that it is likely that this timeframe will need to be reconsidered.

In the circumstances, the Committee makes no further comment on this matter.

Radiocommunications Amendment Bill 2010

The Committee commented on the content of this Bill in *Digest No. 7 of 2010* and the Committee has since identified an error in its commentary: inadvertently two items were treated as falling within an exemption under table item 41 of section 44 of the *Legislative Instruments Act 2003*, when in fact this is the case only for previous item 9 (item 10 in the reintroduced bill). Corrected text for both items appears below.

Legislative instrument – exemption from disallowance Item 4

This item seeks to exempt subsection 82(3) ministerial determinations from the parliamentary disallowance process under section 42 of the *Legislative Instruments Act 2003*.

These determinations would specify a class of services for which it would be in the public interest to re-issue the spectrum licences to the same licensee.

The Committee's view is that removing parliamentary oversight is a serious matter and that a comprehensive justification for it should be provided. In this case, the explanatory memorandum at pages 3 and 18 includes a detailed outline of the justification for the approach, including that (at page 18):

This instrument is being exempted from the disallowance regime because any delay stemming from a potential disallowance of such a ministerial determination would severely impact upon the successful conclusion of licence re-issue discussions between the Government and the relevant incumbent licensees. There would also be adverse follow-on impacts on commercial and investment certainty for incumbent licencees if re-issue discussions are delayed.

The Committee notes this explanation, the fact that determinations will be published on the Federal Register of Legislative Instruments and also that the disallowance process provides a timeframe of 15 sitting days within which to give a notice of motion to disallow a legislative instrument (section 42 of the LIA). In the circumstances the Committee **leaves to the Senate as a whole** the question of whether exempting any instruments made under section 82(3) is appropriate.

The Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of

legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

**Legislative instrument – exemption from disallowance
Item 10**

This item seeks to provide that a ministerial determination made under subsection 294(1) of the Act is not a legislative instrument and it therefore will not be subject to disallowance. These determinations relate to fixing spectrum access charges and the times such charges are payable. The justification for this approach at page 4 of the explanatory memorandum is that:

The intention of this amendment is to protect commercially sensitive pricing information relating to the reissue of 15 year spectrum licences. By giving a written ministerial direction to the ACMA, under subsection 294(2), which is not a legislative instrument and not subject to disallowance, it will protect this information during licence reissue discussions.

The explanatory memorandum also states at page 4 that although the direction will not be published the Government intends to continue its current practice of publishing the prices paid for licences once the licence re-issue process is complete.

The Committee's view is that removing parliamentary oversight is a serious matter and that a comprehensive justification for it should be provided. In this case the Committee notes that instruments of this kind are a class of instruments that ordinarily would be exempt from disallowance under table item 41 of section 44 of the *Legislative Instruments Act 2003*.

In the circumstances, the Committee makes no further comment on this item.

Social Security Amendment (Income Support for Regional Students) Bill 2010

Introduced into the Senate on 28 October 2010

Portfolio: Senator Nash

Background

This bill seeks to amend the *Social Security Act 1991* to provide the same eligibility criteria for Independent Youth Allowance for students residing in the Inner Regional zone of the Australian Standard Geographical Classification – Remoteness Area map as currently applies to students residing in the Outer Regional, Remote and Very Remote zones.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Australian National Preventive Health Agency Bill 2010

On 27 October 2010 the House of Representatives agreed to six amendments and subsequently passed the bill. None of these fall within the Committee's terms of reference.

Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010

[Digest 5/10 response in 6th Report]

On 27 October 2010 a supplementary explanatory memorandum was tabled and 15 amendments were agreed to and the bill was passed in the House of Representatives.

One of the amendments falls within the Committee's terms of reference. Amendment number (6) relates to schedule 2, item 3, subparagraph 26BB(8) and proposes that a determination made under section 26BB(1) (relating to permissible ingredients) 'may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.'

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

Although legitimate reasons for the use of such a provision can be guessed at, it is unfortunate that the explanatory memorandum does not address this issue. The Committee **seeks the Minister's advice** about the justification for the approach.

Pending the Minister's advice, 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.

SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses 43rd Parliament From 25 to 28 October 2010

P Indicates bills passed by the Senate

N Indicates bills negatived by the Senate

	Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 20910 — Schedule 1, item 21, section 15A (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
	International Financial Institutions Legislation Amendment Bill 2010 — Schedule 1, item 1, section 9

