

**Senate Standing Committee
for the Scrutiny of Bills**

The work of the committee in 2014

March 2015

© Commonwealth of Australia 2015

ISBN 978-1-76010-185-5

This document was produced by the Senate Standing Committee for the Scrutiny of Bills Secretariat and printed by the Senate Printing Unit, Parliament House, Canberra

MEMBERSHIP OF THE COMMITTEE

Members

Senator Helen Polley (Chair) (12.11.13 – present)	ALP, Tasmania
Senator John Williams (Deputy Chair) (1.7.14 – present)	NATS, New South Wales
Senator Anne Ruston (Deputy Chair) (14.11.13 – 1.7.14)	LP, South Australia
Senator Cory Bernardi (13.11.13 – present)	LP, South Australia
Senator the Hon Bill Heffernan (1.7.14 – present)	LP, New South Wales
Senator the Hon Kate Lundy (12.11.13 – 24.3.15)	ALP, Australian Capital Territory
Senator the Hon Ian Macdonald (13.11.13 – 1.7.14)	LP, Queensland
Senator Rachel Siewert (12.11.13 – present)	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
 Mr Glenn Ryall, Principal Research Officer
 Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
 Parliament House
 Canberra ACT 2600
 Phone: 02 6277 3050
 Email: scrutiny.sen@aph.gov.au
 Website: http://www.aph.gov.au/senate_scrutiny

TABLE OF CONTENTS

MEMBERSHIP OF THE COMMITTEE	iii
PREFACE	vii
Chapter 1	
Introduction	1
Background.....	1
Committee establishment	1
Committee membership.....	1
Amendments to standing orders 24 and 25	2
The committee’s scrutiny principles	3
The committee’s mode of operation.....	4
The committee’s workflow.....	5
Committee publications and resources.....	7
Alert Digest	7
Reports.....	7
Scrutiny News	7
Other resources	8
Interaction with other legislative scrutiny committees.....	8
Structure of the report.....	8
Acknowledgements	9
Chapter 2	
Work of the committee in 2014	11
Statistics.....	11
Impact of the committee’s work in 2014.....	12
Chapter 3	
Case studies	17

Acts and Instruments (Framework Reform) Bill 2014.....	17
Appropriation Bill (No. 1) 2014-2015	20
National security and counter-terrorism bills	22
New approach to the use of general instrument-making powers	26
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014	28
Chapter 4	
Future role and direction	31
2012 committee inquiry into its future role and direction.....	31
Focus for 2015	34
Appendix 1	
The committee’s scrutiny principles in detail	37
Appendix 2	
Extract from the Procedure Committee’s <i>First Report of 2014</i>	49
Appendix 3	
Extract from the <i>Journals of the Senate</i> of 15 July 2014	59
Appendix 4	
Standing Orders 24 and 25(2A) [with provisions amended or added in 2014 underlined].....	63
Appendix 5	
Recommendations from the 2012 report into the committee's future role and direction	69

Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during 2014. It gives an account of the operation of the committee during that year, including examples of the kinds of issues that arose under each of the five criteria against which the committee tests the legislation it scrutinises.

Chapter 1

Introduction

Background

1.1 Since 1981, the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members—three senators from the government party or parties and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators). In accordance with standing order 24(4) the chair of the committee is a member of the opposition. The committee's general practice of nominating a government member to be deputy chair has now been formalised by a 2014 amendment to standing order 24(5) which provides that the 'committee shall

elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate’.

1.5 Members of the committee during 2014 were:

Chair and Deputy Chairs

Senator Helen Polley (Chair)	ALP, Tasmania	12.11.13 - present
Senator John Williams (Deputy Chair)	NATS, New South Wales	01.07.14 - present
Senator Anne Ruston (Deputy Chair)	LP, South Australia	14.11.13 – 01.07.14

Members

Senator Cory Bernardi	LP, South Australia	13.11.13 - present
Senator the Hon Bill Heffernan	LP, New South Wales	01.07.14 - present
Senator the Hon Kate Lundy	ALP, Australian Capital Territory	12.11.13 – 24.3.15
Senator the Hon Ian Macdonald	LP, Queensland	13.11.13 – 01.07.14
Senator Rachel Siewert	AG, Western Australia	12.11.14 - present

Amendments to standing orders 24 and 25

1.6 On 24 March 2014 the Chair wrote to the President of the Senate regarding recommendations arising from the committee’s inquiry into its future role and direction which may have required amendments to standing orders. The President then referred this matter to the Procedure Committee for consideration. The recommendations considered by the Procedure Committee related to:

- a permanent public inquiry power;
- the ability to report on *provisions* of bills (even if the bill has not been formally introduced into the Senate);
- election of deputy chair (adoption of standard committee provisions);
- authority to print documents and evidence;
- power to authorise broadcasting of public proceedings;
- providing an explicit reference in standing orders to framework bills (i.e. bills that rely ‘excessively’ on delegated legislation);
- scrutiny of national scheme legislation (providing an explicit reference in standing orders to exposure drafts of proposed legislation); and
- a standing reference of committee comments to legislation committees undertaking bill inquiries.

1.7 On 26 June 2014 the Procedure Committee tabled its *First Report of 2014*, which included consideration of the matters raised by this committee. In that report the Procedure Committee outlined proposed amendments to standing orders that would give effect to changes in the areas outlined above. The Procedure Committee drew these matters to the attention of the Senate, but left it to this committee to consider and initiate the necessary amendments.

1.8 An extract of the Procedure Committee's report is attached at Appendix 2. This extract includes:

- the Procedure Committee's comments in relation to 'matters referred by the Scrutiny of Bills Committee';
- the Chair's letter to the President;
- a summary of the relevant recommendations arising from the 2012 inquiry; and
- the Procedure Committee's list of amendments required to implement changes to standing orders proposed by this committee.

1.9 On 15 July 2014 the Chair moved the following motion in the Senate:

That the amendments to standing orders set out in Attachment B of the Procedure Committee's *First report of 2014* be adopted, with effect from the next day of sitting.¹

1.10 The motion was passed and thus the amendments to standing orders came into effect on 16 July 2014. An extract from the *Journals of the Senate* of 15 July 2014 which sets out the amendments to standing orders is attached at Appendix 3.

1.11 Current standing orders 24 and 25(2A) (with amended or new provisions underlined) are provided in full at Appendix 4.

1.12 Further information in relation to the implementation of recommendations arising from the 2012 inquiry into the committee's future role and direction is provided in chapter 4.

The committee's scrutiny principles

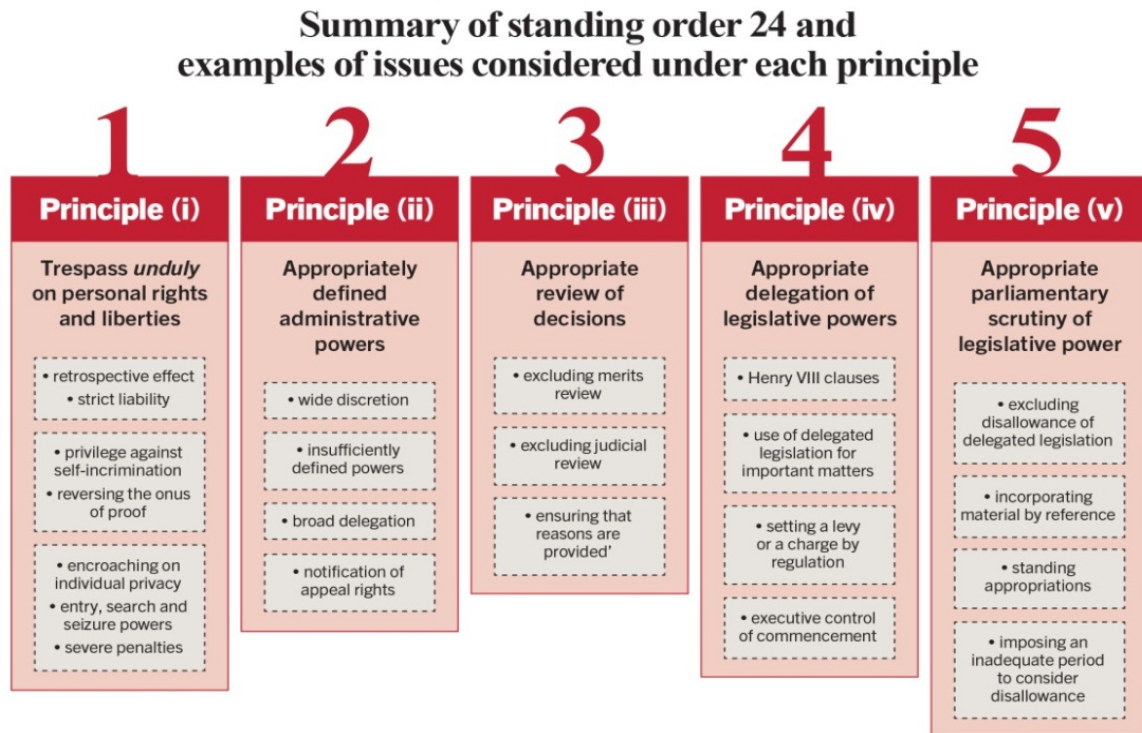
1.13 As noted above, the scope of the committee's interest in bills, and amendments to bills, is established by the principles outlined in Senate standing order 24(1)(a). (This was not affected by the amendments to standing order 24 outlined above.) Over the years the committee has primarily taken a case-by-case approach to articulating issues of concern and then communicating them through its correspondence with ministers and through its regular publications.

1.14 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill that comes before it for consideration,

1 *Journals of the Senate*, 15 July 2014, pp 1174–1175.

the committee takes its previous views on these matters into account, though it does not consider that it is constrained by them.

1.15 Some of the long-standing matters of concern identified by the committee over the years by reference to individual criteria are included in the diagram below and outlined in more detail in Appendix 1.



The committee's mode of operation

1.16 As noted above, the committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a)² and usually meets each sitting week to consider them. The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.17 In undertaking its work the committee is supported by a secretariat comprised of a secretary, a principal research officer and a legislative research officer. The committee also obtains advice from a legal adviser who is appointed by the committee

² The five principles are discussed in detail in Appendix 1, with specific case studies in chapter 3.

with the approval of the President of the Senate. The committee enjoyed the assistance of Associate Professor Leighton McDonald during this period.

The committee's workflow

1.18 The committee's usual process for undertaking its work is shaped by the process for the introduction into, and passage of bills through, the Parliament. (The main steps in the committee's work are outlined in the diagram on page 6.)

1.19 In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material and provides a report indicating the level of compliance for each bill against the committee's scrutiny principles. The secretariat is also involved in examining the bills as well as proposed parliamentary amendments to bills. The work undertaken by the legal adviser and the secretariat provides the foundation for the committee's consideration of the legislative proposals before the Parliament.

1.20 Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision.

1.21 Once a response is received, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles and reports this to the Senate.

Managing the committee's workload

1.22 The committee works to ensure that (wherever possible) its comments on bills are available to senators prior to passage of the bill, although the ability for the committee to provide its final comments on a particular bill prior to passage often depends on the legislative timeframe and timing of the minister's response.

1.23 For example, in 2014 the committee took an expedited approach to its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to ensure that its final comments on the bill would be available as soon as practicable. On 13 October 2014 the committee presented an Alert Digest out of sitting to enable the committee to publish its initial views on the bill promptly and to allow time for the Attorney-General to provide a response to the committee's comments prior to passage of the bill. The committee then presented a Report on the bill out of sitting on 23 October 2014 and a Further Report relating to the bill during consideration of the bill in committee of the whole on 29 October 2014.

1.24 The committee also reports on the responsiveness of ministers to its requests for information on a quarterly basis in the committee's report. The committee notes that generally ministers were timely and responsive to its requests for information during 2014, which is essential to an effective scrutiny process.

Committee's Work Flow

BILLS and explanatory memoranda are **INTRODUCED** into the Parliament

AMENDMENTS can be proposed by the Parliament

Bills and amendments are **EXAMINED** by the **LEGAL ADVISER** against the five principles described in Senate standing order 24

The secretariat prepares a **DRAFT ALERT DIGEST** based on the legal adviser's report. *Alert Digests* include the initial comments made by the committee about a bill or amendment. The **COMMITTEE CONSIDERS** the draft *Alert Digest*, usually at its meeting on the Wednesday of each Senate sitting week

The committee's **ALERT DIGEST** is then **TABLED IN THE SENATE**, usually on the Wednesday afternoon or Thursday of a Senate sitting week

Where scrutiny concerns are raised (in an *Alert Digest*), the committee **WRITES TO THE RELEVANT MINISTER, MEMBER OR SENATOR** responsible for the bill or amendment, inviting them to respond to the committee's concerns

The secretariat prepares a **DRAFT REPORT** containing correspondence received from a Minister, Member or Senator responding to any concern raised in an *Alert Digest*. The **COMMITTEE CONSIDERS** the draft *Report*, usually at its meeting on the Wednesday of each Senate sitting week

The committee's **REPORT** is **TABLED IN THE SENATE**, usually on the Wednesday afternoon or Thursday of a Senate sitting week

Committee publications and resources

1.25 The committee regularly publishes two documents: its *Alert Digest* and its *Report*, which can be accessed online from the committee's website once they have been presented to the Senate.³

Alert Digest

1.26 On the basis of the legal adviser's report and the secretariat's examination of the bills and any amendments, the secretariat prepares a draft *Alert Digest* which is considered by the committee at its regular meeting on the Wednesday morning of each Senate sitting week. The *Alert Digest* contains a brief outline of each of the bills introduced in the previous week, as well as any comments the committee wishes to make. Comments are identified by reference to the relevant principle in standing order 24. The *Alert Digest* is usually tabled in the Senate on the Wednesday afternoon of each Senate sitting week.

1.27 When concerns are raised by the committee and outlined in an *Alert Digest*, the process noted above in relation to the committee's workflow is followed: correspondence is forwarded to the minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns. Ministers generally seek advice from their department before responding.

Reports

1.28 When a minister or other proposer responds to a concern raised in an *Alert Digest*, the secretariat produces a draft *Report* for the committee's consideration. A draft *Report* contains the relevant extract from the *Alert Digest*, the text of the minister's response, and any further comments the committee may wish to make. Draft *Reports* are also considered at the committee's regular meetings, and, once agreed, are presented to the Senate at the same time as the *Alert Digest* for that week.

1.29 The committee generally requests that any response from a minister be received in sufficient time for it to be scrutinised and circulated to members for consideration before the next committee meeting. Ideally, as noted above, the committee likes to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account before passage.

Scrutiny News

1.30 The committee secretariat prepares a brief *Scrutiny News* email each sitting week which is sent to all senators, their staff and committee office staff. *Scrutiny News* highlights recent comments drawn from material in the committee's *Alert Digest* and *Report*, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.

3 The committee's website is available at http://www.aph.gov.au/senate_scrutiny.

Other resources

1.31 The committee also produces occasional reports on matters specifically referred to it by the Senate – see, for example, *Inquiry into the future direction and role of the Scrutiny of Bills Committee* (2012) and the committee’s report into *Entry, Search and Seizure Provisions in Commonwealth Legislation* (Twelfth Report of 2006).

1.32 The committee also tables a regular report, such as this one, which summarises its work. Previously this has been done once per Parliament, however the committee has decided to update its approach so that for 2014 onwards it will table reports on its work annually.

Interaction with other legislative scrutiny committees

1.33 The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

1.34 Examples of the committee’s interaction with the other legislative scrutiny committees during 2014 are provided below:

- The committee worked closely with the Regulations and Ordinances Committee after the committees became aware of a new practice of including a general instrument-making power in bills for principal Acts. The committee will continue to draw this issue to the attention of the Regulations and Ordinances Committee where it is identified in bills in the future.⁴
- In considering the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, the committee noted the work of the Parliamentary Joint Committee on Human Rights (the PJCHR) and referred to that committee’s comments where appropriate. For example, the committee noted the PJCHR’s comments in relation to the right to privacy, in the context of considering whether the bill appropriately delegated legislative power.⁵

1.35 The committee will continue to work closely with the Regulations and Ordinances Committee and the PJCHR, where appropriate, in the future.

Structure of the report

1.36 The structure of this report is:

4 This issue is discussed in detail at pages 17–20.

5 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 16 of 2014*, 26 November 2014, p. 3.

-
- Chapter 1 provides general background information about the committee, information about changes to standing orders 24 and 25, the committee's mode of operation and the committee's interaction with other legislative scrutiny committees.
 - Chapter 2 provides information about the work of the committee during 2014, including statistical information and the impact of the committee's work on legislation, explanatory materials and parliamentary consideration of bills;
 - Chapter 3 outlines some more detailed case studies of the committee's work during 2014;
 - Chapter 4 considers the implementation of recommendations arising from the 2012 inquiry into the committee's future role and direction and provides general information about the committee's focus for 2015;
 - Appendix 1 outlines the application of each of the committee's scrutiny principles in detail (including relevant examples from the committee's scrutiny of bills during 2014);
 - Appendix 2 is an extract from the Procedure Committee's *First Report of 2014* relating to proposed amendments of standing orders arising from the committee's future role and direction inquiry;
 - Appendix 3 is an extract from the *Journals of the Senate* of 15 July 2014 which sets out the amendments to standing orders 24 and 25 made in 2014;
 - Appendix 4 is current standing orders 24 and 25(2A) (with the provisions amended or added in 2014 underlined); and
 - Appendix 5 outlines the recommendations from the committee's 2012 report into the committee's future role and direction.

Acknowledgements

1.37 The committee wishes to acknowledge the work and assistance of its legal adviser Associate Professor Leighton McDonald.

1.38 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, departments and agencies during the reporting period. Their responsiveness to the committee is critical to the legislative process as it ensures that the committee can perform its scrutiny function effectively.

Chapter 2

Work of the committee in 2014

2.1 This chapter provides information about the work of the committee during 2014 (and November–December 2013),¹ including statistical information and the impact of the committee’s work on legislation, explanatory materials and parliamentary consideration of bills.

Statistics

2.2 Each year the committee usually analyses between 200 and 250 bills. The table below sets out the bills scrutinised by the committee from the beginning of the 44th Parliament (12 November 2013) until the end of 2014.

2.3 The table also outlines statistics in relation to the number of bills and amendments for which the committee had comments.

2.4 The committee considered 255 bills in 2014, this compares to 252 bills in 2011 and 237 bills in 2012 (the two non-election years of the 43rd Parliament).

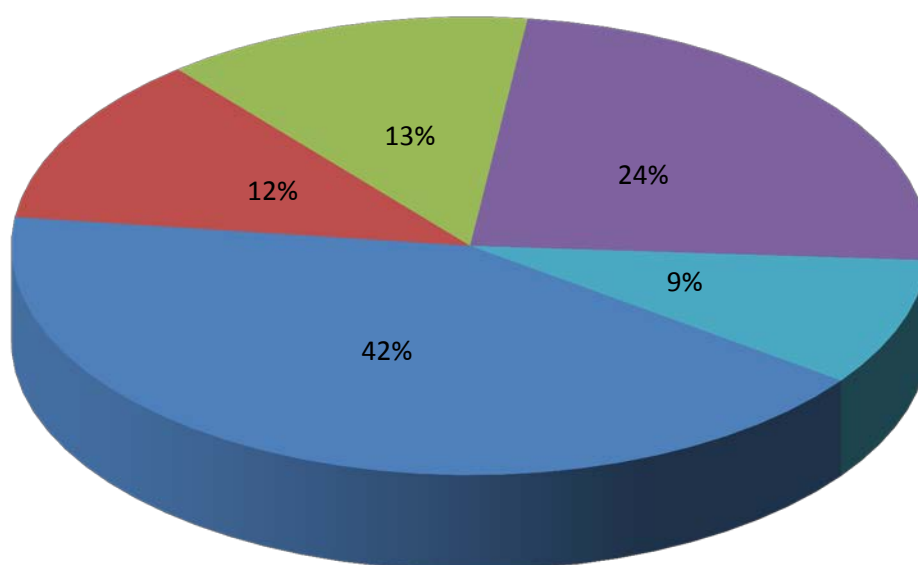
Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on	Digests tabled	Reports tabled
2013 (from 12 Nov 2013)	45	15	3	-	2	2
2014	255	90	36	10	18	19
Total	300	105	39	10	20	21

1 As a result of the move to reporting on the committee’s work on an annual rather than a parliamentary term basis (see paragraph 1.32 above), this report includes statistics for the first two months of the 44th Parliament in addition to statistics for calendar 2014 year.

2.5 The chart below provides a breakdown of the committee's comments on bills by principle.

2.6 The chart shows, consistent with previous practice, that the most common principle upon which the committee commented in 2014 was principle (i) relating to possible undue trespass on personal rights in liberties (42 per cent). This compares with 53 per cent for the same principle during the 43rd Parliament.

**Scrutiny comments on bills by principle under standing order 24(1)(a)
November 2013 to December 2014**



- (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
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

Impact of the committee's work in 2014

2.7 The work of the committee in scrutinising bills against the five principles outlined above assists and improves parliamentary consideration of legislation in a number of important ways, including:

- amendments to legislation;
- improved explanatory material;
- more informed consideration of issues in legislation committee reports;

- more informed debate in the Senate and committees; and
- more comprehensive Bills Digests.

Amendments to legislation

2.8 One of the most noticeable outcomes of the committee's scrutiny of bills is amendments to legislation that arise from the committee's work. Amendments may be moved by any senator directly in response to the committee's comments, or as a result of a recommendation of a Senate legislation committee which, in turn, explicitly drew on this committee's comments. Alternatively, amendments which reflect the committee's comments can be moved by a senator without any direct acknowledgment of the committee's work, or there may have been a cumulative impact if a similar point was also made in another forum (such as a legislation committee inquiry)—it is therefore difficult to gauge with complete accuracy the impact that the committee has in terms of amendments to legislation.

2.9 However, it is clear that some amendments are moved directly in response to the committee's comments. Examples of government amendments moved directly in response to the committee's comments in relation to the National Security Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 are discussed in detail in chapter 3.²

Improved explanatory material

2.10 The committee regularly requests that additional information be included in explanatory memoranda to ensure that provisions of bills on which the committee has commented are adequately explained.

2.11 The committee's intention in requesting that important information be included in explanatory memoranda is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.

2.12 In the amendments section of the each Alert Digest the committee provides commentary on updated explanatory material. Two examples of explanatory memoranda that were revised during 2014 in response to the committee's comments are outlined below.

Explanatory Memoranda

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions.

In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

2 See pages 22–25 for discussion of the National Security Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014

2.13 On 28 August 2014 an addendum to the explanatory memorandum for this bill was tabled in the Senate. This addendum included information which the committee had requested in its *Fifth Report of 2014*. The additional information related to the use of guidelines (i.e. delegated legislation) to determine important matters under the legislative scheme.³

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

2.14 On 24 November 2014 a replacement explanatory memorandum was tabled in the House of Representatives. The replacement explanatory memorandum included information which the committee had requested in its *Thirteenth Report of 2014*. The additional information related to an item of the bill which retrospectively validated certain powers relating to airport investigations.⁴

Use in legislation committee reports

2.15 The committee routinely forwards its comments on bills to Senate legislation committees so that these committees may take the Scrutiny of Bills Committee's comments into consideration during their inquiries into particular bills.

2.16 This practice is now reflected in the standing orders as a result of amendments made to standing orders 24 and 25 in 2014.⁵ New standing order 25(2A) provides that:

The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

2.17 Two examples of the consideration of this committee's comments in legislation committee reports during 2014 are outlined below.

Australian Citizenship and Other Legislation Amendment Bill 2014

2.18 On 1 December 2014 the Legal and Constitutional Affairs Legislation Committee tabled its report in relation to the provisions of the Australian Citizenship and Other Legislation Amendment Bill 2014. The Legal and Constitutional Affairs Committee considered a number of matters commented on by this committee in its report, including:

- insufficiently defined administrative powers in relation to revocation of citizenship;⁶ and

3 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2014*, 3 September 2014, p. 34.

4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 17 of 2014*, 3 December 2014, p. 14.

5 See paragraphs 1.6–1.12 above and see also chapter 4.

6 Senate Legal and Constitutional Affairs Legislation Committee, *Australian Citizenship and Other Legislation Amendment Bill 2014 [Provisions]*, December 2014, p. 28.

- proposed changes that sought to limit access to merits review.⁷

Acts and Instruments (Framework Reform) Bill 2014

2.19 On 2 December 2014 the Legal and Constitutional Affairs Legislation Committee tabled its report in relation to the provisions of the Acts and Instruments (Framework Reform) Bill 2014. As part of its inquiry the Legal and Constitutional Affairs Committee examined the issue of the recent inclusion of general instrument-making powers in bills which was considered in detail by both this committee and the Senate Regulations and Ordinances Committee.⁸

Debate in the Senate and committees

2.20 The committee's comments on bills are regularly referred to in debate in the Senate. For example, there was extensive discussion of the committee's comments on the National Security Legislation Amendment Bill (No. 1) 2014 during consideration of the bill in committee of the whole on 24 September 2014.⁹

2.21 In addition, the committee's comments are also regularly referred to during committee hearings into particular bills. Two examples of this from 2014 are provided below.

Migration Amendment (Protection and Other Measures) Bill 2014

2.22 During a hearing of the Legal and Constitutional Affairs Legislation Committee as part of its inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014 the Chair sought information from the department in relation to an issue of retrospectivity commented on by this committee.¹⁰

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

2.23 During a hearing of the Legal and Constitutional Affairs Legislation Committee as part of its inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 this committee's

7 Senate Legal and Constitutional Affairs Legislation Committee, *Australian Citizenship and Other Legislation Amendment Bill 2014 [Provisions]*, December 2014, pp 36–37.

8 Senate Legal and Constitutional Affairs Legislation Committee, *Acts and Instruments (Framework Reform) Bill 2014 [Provisions]*, December 2014, pp 25–26. See also pages 17–20 of this report for discussion of the Scrutiny of Bills Committee's consideration of general instrument-making powers during 2014.

9 *Senate Hansard*, 24 September 2014, pp 6927–6947. Further information about the committee's consideration of the National Security Legislation Amendment Bill (No. 1) 2014 is provided at pages 22–25 of this report.

10 Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, Migration Amendment (Protection and Other Measures) Bill 2014, 5 September 2014, pp 63–64.

comments in relation to the exclusion of the common law rules of natural justice were raised by witnesses appearing at the hearing.¹¹

Use in Bills Digests

2.24 The Parliamentary Library prepares Bills Digests to assist senators and members in understanding the key matters in many bills introduced into the Parliament. These Bills Digests regularly canvass issues raised by the Scrutiny of Bills Committee thereby enabling interested senators and members to understand key issues raised by this committee.

2.25 The committee's comments were considered in some detail in many Bills Digests during 2014 including, for example, in relation to the following ten bills:

- Australian Sports Anti-Doping Authority Amendment Bill 2014;
- Business Services Wage Assessment Tool Payment Scheme Bill 2014;
- Carbon Farming Initiative Amendment Bill 2014;
- Competition and Consumer Amendment (Industry Code Penalties) Bill 2014;
- Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014;
- Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014;
- Intellectual Property Laws Amendment Bill 2014;
- Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014
- Migration Legislation Amendment Bill (No. 1) 2014; and the
- Trade Support Loans Bill 2014.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 14 November 2014, p. 38.

Chapter 3

Case studies

3.1 Case studies which provide examples of the committee's work help to illustrate:

- the committee's approach to its scrutiny role;
- the committee's role in identifying matters of concern as assessed against the scrutiny principles outlined in standing order 24(1)(a) and obtaining relevant information which informs the legislative process; and
- the committee's role in providing the foundation for amendments to provisions and improvements to the content of explanatory material.

3.2 This chapter includes examples of the committee's work during 2014 involving each principle. The case studies include instances of significant legislation considered during the year (such as national security legislation) and a number also highlight issues of continuing interest into the future, including:

- changes to the Commonwealth legislative framework;
- instrument-making powers;
- the classification of items as 'ordinary annual services of the government' in appropriation bills; and
- the Commonwealth government's responses to the *Williams* decisions in the High Court (i.e. legislative authorisation for spending schemes).

Acts and Instruments (Framework Reform) Bill 2014

SCRUTINY SNAPSHOT: The committee will monitor all provisions that delegate legislative powers for their compliance with Drafting Direction 3.8 to ensure that, as a general rule, disallowance and sunseting processes will apply and that any departure from this approach is fully justified in explanatory material.

Standing order 24(1)(a)(iv) – appropriate delegation of legislative powers

3.3 The Acts and Instruments (Framework Reform) Bill 2014 made several changes to the legislative framework for Commonwealth Acts and instruments. The bill was significant as it introduced major structural changes to key legislative frameworks at the Commonwealth level, which had not been undertaken in this area since 2003. The changes included:

- changing the name of the *Legislative Instruments Act 2003* (the LI Act) to the *Legislation Act 2003* to reflect the consolidation of requirements for publishing Commonwealth legislation;

- changing the definition of *legislative instrument*;
- establishing the new category of *notifiable instruments*;
- establishing the Federal Register of Legislation (the Register) in place of the Acts database and the Federal Register of Legislative Instruments; and
- allowing the First Parliamentary Counsel to make editorial changes to Acts and instruments in the Register.

3.4 The committee commented on a number of issues in relation to the bill under principles 24(1)(a)(iv) and 24(1)(a)(v) of the committee's terms of reference,¹ including:

- a change to the provision which declares instruments to be legislative instruments; and
- changes to the First Parliamentary Counsel's editorial powers.

Instruments declared to be legislative instruments

3.5 Current subsection 6(a) of the LI Act effectively deems any instrument 'described as a regulation by the enabling legislation' to be a legislative instrument. This means that unless a specific exemption is provided in the enabling legislation, any regulation is a legislative instrument and subject to the provisions of the LI Act, including those relating to sunseting and disallowance, which are essential aspects of Parliamentary scrutiny of delegated legislation.

3.6 In the bill, section 10 only preserved this approach in relation to regulations and some other instruments. Given the importance of the disallowance process to Parliamentary scrutiny, the committee sought the Attorney-General's advice as to why all instruments made on the basis of general instrument-making powers should not be included in the definition of legislative instruments (so that disallowance and sunseting requirements apply unless they are explicitly excluded).

3.7 The Attorney-General replied that it is not practicable or desirable to provide a categorical declaration that instruments made under a broad instrument-making power are legislative instruments because 'it is preferable to determine the status of instruments in enabling legislation on a case-by-case basis, and to express that clearly on the face of the enabling legislation'.

3.8 The committee noted this view, and stated that while it would welcome the status of instruments being clearly expressed on the face of the enabling legislation, it considers it desirable to continue existing legislative support for the position that, generally, instruments should be deemed to be legislative and subject to disallowance and sunseting. The committee expressed surprised that a workable approach could not be drafted, with appropriate exceptions, to accommodate at least a significant majority of circumstances in which a broad instrument-making power is utilised.

1 These principles relate to appropriately delegating legislative powers and insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

3.9 However, the committee also noted that the Office of Parliamentary Counsel Drafting Direction 3.8 contains a standard provision (at paragraph 22) authorising the making of legislative instruments under primary legislation, which effectively deems the instruments permitted by the enabling legislation to be legislative instruments. If this standard provision is used appropriately it will substantially address the committee's concern, as all instruments made in accordance with this general instrument-making power will be legislative instruments (and therefore be subject to disallowance and sunseting). However, the committee remained concerned that this is subject to the approach being adopted in every instance without the safety net of a default position.

3.10 The committee intends to closely monitor this issue into the future and expects that explanatory material will provide a detailed justification if the standard provision is not used.²

First Parliamentary Counsel's editorial powers

3.11 Several provisions in the bill provided the First Parliamentary Counsel (the FPC) with editorial powers to amend the text of registered legislation in specified circumstances. The committee sought the Attorney-General's advice in relation to the proposed scope of the discretion to make editorial changes, including how it would relate to the existing process for Chair's amendments, and whether transparency and accountability requirements should apply to the use of this discretion.

3.12 In response, the Attorney-General noted that:

- the FPC will issue further guidance (in the form a Drafting Direction or other publically available document) about cases in which it would be appropriate to use the power;
- it is intended that the editorial change power will be exercised very carefully and with due conservatism;
- the FPC would not seek to achieve by editorial amendment what could not be achieved by a parliamentary correction (i.e. a Chair's or Clerk's amendment), and '...while a Bill is before the Parliament, if a clear formal error is found, the OPC would seek to make the requisite correction by the established parliamentary process, to ensure that the Bill as enacted is correct';
- clear evidence of editorial changes will be preserved on the public record;
- given the 'minor, formal and detailed nature of the changes involved', and the fact that public notice is required to be given in the Register of every use of the editorial change power, it is not intended to require the FPC to report to the Parliament on this matter; and that
- in addition, any individual concerned by an editorial change could raise the matter with the FPC who would take any such concerns very seriously.

2 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 7–20.

3.13 The Attorney-General also advised that most amendments in Statute Law Revision bills would be able to be made by the editorial changes powers.

3.14 The committee noted that many items currently in Statute Law Revision bills provide for retrospective commencement. For example, in relation to the Statute Law Revision Bill 2009, the committee accepted the retrospective application of certain provisions on the basis that the explanatory memorandum provided ‘a thorough explanation as to why retrospectivity is considered appropriate’ and the commencement of the relevant items is tied to the time specified in the amending Act for the commencement of the misdescribed or redundant amendment.³ **The issue of retrospectivity continues to be one of significant interest to the committee.**

3.15 In the committee’s *Alert Digest No. 2 of 2015* the committee welcomed a government amendment to the bill which inserted a requirement to review the operation of the new *Legislation Act 2003* five years after its commencement. **The committee noted that this review will enable reflection on the issues raised by the committee during its consideration of the bill after the new scheme has been in operation for a significant amount of time.**⁴

Appropriation Bill (No. 1) 2014-2015

SCRUTINY SNAPSHOT: The committee will continue to query instances in which expenditure items appear to be inappropriately classified as ‘ordinary annual services of the government’ as this prevents the Senate from exercising its constitutional right to amend non-ordinary annual services items.

Standing order 24(1)(a)(v) – insufficiently subject the exercise of legislative power to parliamentary scrutiny

3.17 This bill appropriates money for the ‘ordinary annual services of the government’. The inappropriate classification of expenditure items as ‘ordinary annual services of the government’ (when they in fact relate to new programs or projects) undermines the Senate’s constitutional right to amend proposed laws appropriating money on all matters not involving the ordinary annual services of the government.

3.18 As a result of continuing concerns relating to the misallocation of some items in appropriation bills, on 22 June 2010 the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

3 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 7–20. See also Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 14 of 2009*, 18 November 2009, p. 21.

4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 37.

-
- 2) That appropriations for expenditure on:
- a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.⁵

3.19 The committee noted that it appears that a reliance on existing broad ‘departmental outcomes’ to categorise appropriations, rather than on individual assessment as to whether an appropriation relates to a new program or project, continues and, indeed, appeared to be reflected in the allocation of some items in these appropriation bills.

3.20 The committee sought the Minister’s advice as to whether, and if so what, consideration has been given to addressing this issue

3.21 The Minister replied that the government will continue to prepare appropriation bills in line with a process outlined by the former Finance Minister in 1999 and will therefore not be reconsidering its approach to this matter. The committee reiterated its agreement with the comments of the Appropriations and Staffing Committee on this matter and in particular noted that the current approach is (1) based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure, and (2) is not consistent with the Senate resolution on this matter of 22 June 2010. **The committee will continue to draw this important matter to the attention of Senators where appropriate in the future.**⁶

5 *Journals of the Senate*, 22 June 2010, pp 3642–3643.

6 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, 27 August 2014, pp 402–406.

National security and counter-terrorism bills

SCRUTINY SNAPSHOT: The committee will continue to identify aspects of legislative proposals that appear to trespass unduly on personal rights and liberties. The committee will seek to elicit a full justification if explanatory material is inadequate and to suggest practical ways in which to address scrutiny concerns (such as appropriately narrowing the scope of a proposal or strengthening safeguards).

Standing order 24(1)(a)(i) – trespass unduly on personal rights and liberties

3.22 Over the course of the year the following significant national security and counter-terrorism bills were considered by the Parliament:

- National Security Legislation Amendment Bill (No. 1) 2014;
- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; and
- Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.

3.23 These bills raised issues relating to several of the committee’s terms of reference, including principle 24(1)(a)(i) (trespass unduly on personal rights and liberties), 24(1)(a)(ii) (make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers), and 24(1)(a)(iii) (make rights, liberties or obligations unduly dependent upon non-reviewable decisions).

3.24 The committee’s comments in relation to these bills also informed debate in the Senate (see, for example, debate on the National Security Legislation Amendment Bill (No. 1) 2014).⁷

Authorisation of special intelligence operations

3.25 The committee commented in relation to several aspects of schedule 3 of the National Security Legislation Amendment Bill (No. 1) 2014. The schedule established a statutory framework for the conduct of ‘special intelligence operations’ (SIOs) which provided for limited immunity from civil and criminal liability for conduct undertaken by ASIO in an SIO.

3.26 Proposed section 35H in the bill described the effect of a special intelligence operation (SIO) authority. The provision provided that an SIO authority has the effect of authorising ‘each person who is identified...to engage in the special intelligence conduct specified in the special intelligence operation authority’. The explanatory memorandum (at p. 107) stated that proposed section 35H is ‘material to the application of the protection from criminal or civil liability’.

3.27 The committee noted that it is a matter of concern (under principle 1(a)(i) of the committee’s terms of reference) that it is possible that the limits of conduct authorised by an SIO authority may not be clear. The result is that the extent of the

⁷ *Senate Hansard*, 24 September 2014, pp 6927–6947.

trespass on personal rights occasioned by the immunity from liability will also not be clear. Proposed section 35D set out the required content of a special intelligence operation authority. Paragraph 35D(1)(c) (in the bill as introduced) provided that the authority must ‘state a *general* description of the nature of the special intelligence conduct that the persons referred to’ in the SIO authority ‘may engage in’ [emphasis added].

3.28 The committee noted that under the provisions of the bill as introduced the limits of authorised conduct under an SIO may be unclear because an SIO authority is only required to state authorised conduct in *general terms*. The committee therefore sought the Attorney-General’s advice as to whether it is possible to require authorised conduct to be particularised with more clarity.

3.29 The Attorney-General responded that it would not be practicable to require an SIO authority to include a significantly higher degree of particularisation of conduct in advance of the commencement of an operation. The Attorney-General did, however, note, among other things, that he had asked his department to give consideration to whether the policy intent could be achieved by removing the word ‘general’ from paragraph 35D(1)(c) so that an SIO authority is required to include a statement of the nature of the authorised conduct.

3.30 **The committee welcomed the introduction by the Attorney-General of an amendment to paragraph 35D(1)(c) in response to the comments made by the committee in relation to this matter.** The amendment removed the word ‘general’ so that an SIO authority is required to state a description of the nature of the authorised conduct (rather than just a ‘general description’ of the nature of that conduct).⁸ The committee considered that the amendment would reduce, though not eliminate, the potential for this provision to constitute an undue trespass on personal rights and liberties.⁹

Delegation of ASIO staff and financial management powers to ‘a person’

SCRUTINY SNAPSHOT: The committee will continue to draw attention to bills that allow significant and wide-ranging powers to be delegated to ‘a person’. The committee prefers to see a limit set on either the sorts of powers that can be delegated, or on the category of people to whom they can be given.

Standing order 24(1)(a)(ii) – appropriately defined administrative powers

3.31 An item in the National Security Legislation Amendment Bill (No. 1) 2014 repealed existing section 16 of the ASIO Act, which enabled the Director-General to delegate any of his or her powers relating to the management of the staff of ASIO or

8 The amendment was agreed to on 25 September 2014.

9 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2014*, 24 September 2014, p. 622.

the financial management powers provided under the ASIO Act to ‘an officer of the Organisation’. The proposed replacement provision provided, among other things, that these powers may be delegated to ‘any person’ (rather than to ‘an officer of the Organisation’).

3.32 The committee consistently draws attention (under principle 1(a)(ii) of the committee’s terms of reference) to legislation which allows significant and wide-ranging powers to be delegated to ‘a person’. Generally, the committee prefers to see limits on the categories of persons to whom significant powers may be delegated (the committee usually expects that delegates will be confined to members of the Senior Executive Service or to the holders of nominated offices unless there is a strong justification for a broader approach).

3.33 The committee sought advice from the Attorney-General as to why departure from this well established principle as proposed in the bill was appropriate in the circumstances. The committee also noted that the existing provision already cast the power to delegate in very broad terms, that is, to ‘an officer of the Organisation’.

3.34 The Attorney-General provided a detailed response and noted that the functions and powers of the Director-General that may be the subject of a delegation under the proposed 16 were limited. The Attorney-General also indicated that he would revise the explanatory memorandum to the bill to include an explanation of these matters. **The committee noted that additional information in the explanatory memorandum would assist in improving understanding of the scope of the delegation provided under the new provision. The committee, however, reiterated its general preference that limits be placed on the categories of persons to whom significant powers may be delegated.**¹⁰

Merits review of decisions to cancel welfare payments

SCRUTINY SNAPSHOT: The committee will continue to draw attention to provisions that explicitly or otherwise exclude, or fail to provide for, effective judicial and/or merits review.

Standing order 24(1)(a)(iii) – unduly dependent upon non-reviewable decisions

3.35 Schedule 2 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 amended several Acts to provide that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been cancelled, on national security grounds.

3.36 The committee noted that key decisions leading to the cancellation of payments will not be subject to normal merits review arrangements. In addition, the committee noted that the requirement to give reasons under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) will not apply in relation to

10 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2014*, 24 September 2014, pp 585–588.

these decisions by virtue of an item in the bill. Without a statement of reasons for the decisions resulting in the cancellation of payments the practical utility of any judicial review would be negligible.

3.37 The committee therefore sought advice from the Attorney-General as to the justification for the limitations on the reviewability of these decisions, and whether removing the obligation to provide reasons will undermine what review procedures remain. The Attorney-General noted that for security reasons the decisions of relevant Ministers to issue notices in relation to stopping welfare payments will not be subject to merits review. The Attorney-General also noted that while there would be no requirement to provide reasons, this would not prevent reasons from being provided to the person where appropriate and that as much information as possible will be provided to the person so long as the disclosure of that information would not prejudice national security.

3.38 The committee's preference is for there to be a right to reasons for such a significant decision, even if it is necessary to provide for limitations to the information which must be disclosed. The committee therefore sought further advice from the Attorney-General as to why a blanket exemption from the requirement to provide reasons is required when paragraph 14(1)(a) of the ADJR Act (which provides that the Attorney-General may certify that disclosure of information concerning a specified matter would be contrary to the public interest 'by reason that it would prejudice the security, defence or international relations of Australia') could not be used in circumstances where the provision of reasons may prejudice national security.

3.39 The Attorney-General's response noted that following consideration of the committee's comments on the reviewability of decisions to cancel welfare payments, the bill was amended to remove the blanket exemption from the requirement to provide reasons. As a result of these amendments section 13 of the ADJR Act (Reasons for decision may be obtained) will apply to ministers' decisions to issue a notice and therefore an individual may be provided with the reasons for the cancellation unless disclosure of those reasons would prejudice Australia's security, defence or international relations.

3.40 The committee welcomed the fact that this amendment was moved in response to the comments made by the committee and noted that it addressed the committee's concerns about the provision of reasons regarding ministers' decisions to issue notices in relation to stopping welfare payments.¹¹

3.41 The committee did, however, also reiterate its general view (under principle 24(1)(a)(iii) of the committee's terms of reference) that it remained unconvinced that merits review is inappropriate in relation to decisions to cancel welfare payments.¹²

11 The amendment was agreed to on 29 October 2014.

12 Senate Standing Committee for the Scrutiny of Bills, *Sixteenth Report of 2014*, 26 November 2014, pp 892–895.

New approach to the use of general instrument-making powers

SCRUTINY SNAPSHOT: The committee will be closely monitoring matters relating to the delegation of legislative power, including:

- the use of general instrument-making powers and their justification;
- the requirement for a strong justification where significant matters are included in delegated legislation;
- ensuring the inclusion of a specific provision stating that regulations will prevail over general instruments; and
- preventing the delegation of a power to make legislative instruments under a general instrument-making power.

Standing order 24(1)(a)(iv) – appropriate delegation of legislative powers

3.42 Over the course of the year the committee (and the Senate Regulations and Ordinances Committee) became aware of a new practice of including a general *instrument-making* power in bills for principal Acts. The committee commented on this issue in relation to a number of bills including the Asset Recycling Fund Bill 2014, the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Trade Support Loans Bills 2014.

3.43 These provisions allow the Minister to make *rules* prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make *regulations*, and as such, any instruments made under such powers were required to be drafted by the Office of Parliamentary Counsel (OPC) and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this new version of the clause.

3.44 The committee noted that it is concerned about implications for the level of executive scrutiny applying to subordinate instruments, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

3.45 The committee also noted the concerns that the Senate Regulations and Ordinances Committee raised regarding the prescribing of matters by ‘legislative rules’, including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a general regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability

of Parliament (and the public in general) to understand and effectively scrutinise such instruments.¹³

3.46 Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requested the Minister's advice as to:

- whether general rule-making powers would permit a rule-maker to make certain types of special provisions, such as offence provisions, entry, search and seizure provisions, provisions which impose (or set or amend the rate) of taxes and provisions which make textual modifications to Acts (or modify their operation); and
- whether there are any processes or procedures in place which provide for OPC to monitor the compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would more appropriately be drafted by OPC.

3.47 The Minister provided detailed advice from the First Parliamentary Counsel in relation to this matter and in September the committee (along with the Senate Regulations and Ordinances Committee) met with the First Parliamentary Counsel and officers from OPC to discuss the matter.

3.48 Subsequent to these discussions and consideration of this matter by both committees the Office of Parliamentary Counsel released a new version of Drafting Direction 3.8 (relating to subordinate legislation) (DD3.8) in December 2014 which 'notes some considerations, and sets out some standard forms, for drafting provisions of legislation dealing with subordinate legislation' of direct relevance to the matters outlined above.

3.49 The committee supports the views of the Regulations and Ordinances Committee outlined in its *Delegated Legislation Monitor No. 17 of 2014* and noted that it will be closely monitoring:

- instances of general instrument-making powers in primary legislation for **consistency with DD3.8** and whether the **justification for, and scope of, the power is clearly addressed in accompanying material**;
- the DD3.8 requirement to recommend to instructors that **the explanatory memorandum should provide a 'strong justification' if significant matters are included in legislative instruments other than regulations**, and set out the factors relevant to that justification (paragraph 30);
- the DD3.8 requirement that Acts should **include a provision** to specify that, in the event of a conflict, **regulations will prevail over general instruments** (such as rules). Where this does not occur (for policy reasons) the drafters are

13 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 5 of 2014*, 14 May 2014, pp 1–5).

to recommend to instructors that the explanatory memorandum should explain the approach that has been adopted (paragraph 38);

- the DD3.8 requirement that **Acts should include a provision preventing the delegation of the power to make legislative instruments under a general instrument-making power**. Where this does not occur (for policy reasons) the drafters are to recommend to instructors that the explanatory memorandum should explain the approach that has been adopted (paragraphs 24 and 25); and
- the **extent to which the standard provision authorising the making of legislative instruments under primary legislation is being used** (as it is drafted in a way that will ensure that instruments generally continue to be subject to disallowance and sunseting requirements) (paragraph 22).

3.50 The committee will draw these matters to the attention of both the Senate and the Regulations and Ordinances Committee where appropriate in the future.¹⁴

Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014

SCRUTINY SNAPSHOT: The committee has now commented on the legislative response to the *Williams* High Court decisions on two occasions. The committee's preference is that important matters, such as establishing legislative authority for arrangements and grants, should be included in primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals.

Standing order 24(1)(a)(iv) – appropriate delegation of legislative powers

3.51 As noted above, one of the committee's tasks is to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately (standing order 24(1)(a)(iv)). For example, provisions may inappropriately delegate legislative power where they provide that important matters which should be regulated by Parliament are, in fact, to be dealt with by subordinate legislation. Public consideration, amendment (if desired) and approval of significant matters should be undertaken directly by Parliament before they come into effect and should not left to the delegated legislation disallowance process.

3.52 Certain items in this bill sought to retain provisions that were first introduced in 2012 in response to the High Court decision in the first School Chaplains Case (*Williams (No. 1)*).¹⁵ In that case the High Court held that, in most circumstances, the Commonwealth executive requires statutory authority before it can enter into contracts

14 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

15 *Williams v Commonwealth* (2012) 248 CLR 156.

with private parties and spend public money. In 2012 the committee noted that the provision inserted into the *Financial Management and Accountability Act 1997* in response to the decision would enable regulations (i.e. delegated legislation) to specify the arrangements and grants which would be authorised by the new statutory source of authority. At the time the committee highlighted its preference that important matters such as these be included in primary legislation.

3.53 As this bill retained this provision in a new Act, the committee repeated its 2012 comments and, given the important scrutiny concerns and the High Court decision affirming *Williams (No. 1)*,¹⁶ sought the minister's advice as to whether any consideration had been given to amending the provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements and grants. The committee noted that if new spending activities are not to be authorised by primary legislation it would at least be possible to provide for increased scrutiny by requiring positive approval of regulations before they come into effect, or incorporating a revised disallowance process where regulations do not come into effect until after the time provided for disallowance has passed.

3.54 The minister indicated that because some programs are brought into operation quickly, he considered that it would not be appropriate to provide for increased scrutiny through revised disallowance procedures or a requirement for positive approval in both Houses of Parliament.

3.55 The committee restated its preference that important matters, such as establishing legislative authority for arrangements and grants, should be included in primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals. In this regard the committee also expressed disappointment that the government had indicated that it considers that it would not be appropriate to provide for at least some level of increased Parliamentary scrutiny through modified disallowance procedures.

3.56 The committee also drew this matter to the attention of the Senate Regulations and Ordinances Committee as it is possible that regulations made under this provision¹⁷ may contain matter more appropriate for parliamentary enactment or individual items in the regulations may raise questions as to their relationship to a constitutional head of legislative power. The committee noted that the Regulations and Ordinances Committee had already commented on this matter in relation to a number of regulations made under this provision.

3.57 The committee intends to draw this matter to the attention of Senators under principle 24(1)(a)(iv) of the committee's terms of reference where appropriate in the future.¹⁸

16 *Williams v Commonwealth (No. 2)* (2014) 88 ALJR 701.

17 Section 32B of the *Financial Framework (Supplementary Powers) Act 1997*.

18 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2014*, 3 September 2014, pp 555–559.

Chapter 4

Future role and direction

2012 committee inquiry into its future role and direction

Background

4.2 In early 2010, in anticipation of its 30th anniversary in November 2011, the committee considered that it would be timely to conduct an inquiry into its future role and direction in order to review its work and the terms of reference in Senate standing order 24. The committee had not encountered any difficulties that significantly hindered its work and it did not hold any grave concerns about the operation of standing order 24. However, after 30 years it considered that it would be worth revisiting the framework for the scrutiny of bills to ensure that the committee remains well placed to continue to work effectively for many years into the future.

4.3 On 3 March 2011 the Senate referred the following terms of reference for the inquiry:

The committee shall inquire into and report on:

- (1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to whether its powers, processes and terms of reference remain appropriate.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.
- (3) The committee be authorised to hold public hearings in relation to this inquiry and to move from place to place.
- (4) The committee be authorised to access the records and papers of the 2010 inquiry into its future role and direction. (The 2010 inquiry lapsed due to the federal election that year.)

4.4 The committee tabled its final report on 14 May 2012.

Recommendations

4.5 In its report the committee made 14 recommendations intended to streamline the foundation for the committee's work. The full text of the recommendations is reproduced at Appendix 5. Some of the matters to which the recommendations relate include:

- reporting during non-sitting periods;
- reporting to the chamber about responsiveness to committee requests for information;
- permanent inquiry and general committee powers; and
- framework and uniform (or national scheme) legislation.

4.6 Since the report was tabled the committee has been progressively implementing its recommendations. The table below outlines the status of each of the recommendations:

Implementation of the 2012 inquiry recommendations

Rec. number	Short description	Implemented?	Comment
1	Reporting during non-sitting periods	Yes	Process in place and implemented, relying on the provisions of standing order 38(7) (e.g. see the <i>Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014</i> tabled on 13 October 2014 and the <i>Alert Digest relating to the National Disability Insurance Scheme Bill 2012</i> tabled on 1 February 2013)
2	Notifying the Senate of a failure to respond to the committee	Yes	This recommendation reflects the committee's intention to do this if needed. The committee commenced quarterly reporting on ministerial and other responsiveness to requests for information for the period from January 2014 (see the <i>Fourth Report of 2014</i>)
3	Amending standing order 24 to reflect recommendation 2	Not needed	The committee determined that an amendment was not necessary as it could use the existing provisions of standing order 24(9).
4	Permanent inquiry powers	Yes	Standing order 24 amended with effect from 16 July 2014 (see 24(7))
5	Technical amendment relating to 'provisions of bills'	Yes	Standing order 24 amended with effect from 16 July 2014 (see the new introductory wording to 24(1)(a))
6	General committee powers – election of deputy chair	Yes	Standing order 24 amended with effect from 16 July 2014 (see 24(5))
7	General committee powers – printing and broadcasting powers	Yes	Standing order 24 amended with effect from 16 July 2014 (see 24(8A)) in relation to printing. In the event, the broadcasting power was unnecessary.

8	Framework bills – amending standing order 24	Yes	Standing order 24 amended with effect from 16 July 2014 (see 24(1)(c))
9	Framework bills – guidelines	Continuing	The committee is developing a guideline on this matter that it intends to publish in 2015
10	Considering matters relating to the delegation of legislative power	Yes (and continuing)	The committee has routinely considered matters in relation to the delegation of legislative power (as it is required to do so under standing order 24(1)(a)), but since 2012 it, and the Senate Regulations and Ordinances Committee, introduced a number of mechanisms to bring issues to the attention of each other and the Senate. These are discussed further below.
11	Uniform (or national scheme) legislation – encouraging the provision of exposure drafts	Continuing	Discussed further below
12	Considering exposure drafts	Yes	Standing order 24 amended with effect from 16 July 2014 (see 24(1)(b))
13	Referral of comments to Senate standing committees	Yes	Standing order 25 amended with effect from 16 July 2014 (see 25(2A))
14	Scrutiny information resources	Continuing	The committee is developing a number of guidelines about its work that it intends to commence publishing in 2015

Further comments on implementation

Forthcoming guidelines

4.7 The committee intends to develop guidelines in relation to following matters:

- the appropriate level of detail required in primary legislation; and
- long-standing matters of interest to the committee under each of the committee’s five scrutiny principles.

4.8 As they are completed the guidelines will be published on the committee’s website to assist in raising awareness and understanding of the committee’s work.

Uniform legislation and exposure drafts

4.9 Legislation that seeks to implement a uniform approach across multiple jurisdictions is often presented to Parliament in a finalised form following intergovernmental negotiations. This can limit the ability of the Senate and its committees to effectively scrutinise and amend such proposals.

4.10 The committee is interested to explore possible avenues which would enable proposals for uniform legislation to be scrutinised by the committee (and legislation committees and the Regulations and Ordinances Committee, where appropriate) prior to their introduction into Parliament. This could be achieved by ensuring that exposure drafts of such legislation are provided to this committee and relevant legislation committees to ensure that the proposals can be effectively scrutinised before they are finalised.

4.11 During 2014 the committee was able to comment on the exposure draft of a significant legislative proposal. While the exposure draft in question did not relate to uniform legislation, the committee considers that the process of commenting on the exposure draft prior to the bill's introduction into Parliament was very valuable.

Matters relating to the delegation of legislative power

4.12 In 2014 the committee routinely drew matters to the attention of the Regulations and Ordinances Committee that are relevant to its terms of reference. The committee will continue to do this into the future. For example, where a provision in a bill provides for important matters to be determined in delegated legislation the committee has drawn its comments to the attention of the Regulations and Ordinances Committee because delegated legislation made under the bill may contain matters more appropriate for parliamentary enactment.

4.13 The committee also worked closely with the Regulations and Ordinances Committee in relation to issues of mutual interest, such as the new practice of including a general instrument-making power in bills for principal Acts.¹

Focus for 2015

4.14 In addition to building on its general scrutiny work and the process and information enhancements implemented in 2014, the committee has an interest in focusing its attention in a number of areas that it expects should support an increased awareness of, and access to, its work.

4.15 In particular, the committee is planning to:

- update its website, including a new information resources section (which will contain practical information about the committee's work and expectations, such as the guideline on framework bills referred to above);
- continue to liaise with other committees, including Senate standing committees and the other legislative scrutiny committees (the Senate Regulations and Ordinances Committee and the Parliamentary Joint

1 For further information in relation to this issue see pages 17–20.

Committee on Human Rights, which are supported by secretariats working cooperatively in the Senate Legislative Scrutiny Unit); and

- undertake a project that will emphasise the importance of providing comprehensive explanatory material to accompany the introduction of a bill. The aim of the project will be to assist with the effective drafting of explanatory memoranda.

Senator Helen Polley

Chair

Appendix 1

The committee's scrutiny principles in detail

Provisions which *trespass unduly* upon personal rights and liberties

Application of criterion set out in standing order 24(1)(a)(i)

The committee is required to report on whether the provisions of proposed legislation could '*trespass unduly* on personal rights and liberties' (emphasis added). For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as 'legislation by press release');
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law onus of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers;
- equipping officers with oppressive powers, especially for use against a vulnerable group of people; or
- taking away Parliament's right to obtain information from the executive.

These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, standing order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples are discussed below.

Retrospectivity

Legislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation itself was enacted. Criticism of this practice is longstanding. For example, in 1651 Thomas Hobbes in *Leviathan* observed that 'No law, made after a Fact done, can make it a Crime', and also that 'Harme inflicted for a Fact done before there was a Law that forbad it, is not Punishment, but an act of

Hostility'.¹ This view was expounded upon further in 1765 by Sir William Blackstone in his *Commentaries*. He referred to the problem of making laws, but not publicly notifying those subject to them and then went on to say:

There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.²

The committee endorses the view that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected.

For examples, see the committee's comments concerning the:

- Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (*Seventh and Ninth Reports of 2014*);
- Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (*Thirteenth Report of 2014*); and
- Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (*Fifteenth Report of 2014*).

Abrogation of the privilege against self-incrimination

At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties for the community. The committee accepts that in some circumstances good administration might necessitate access to information that can only be obtained, or can best be obtained, by forcing a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

1 Hobbes, T. *Leviathan*, as referred to in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687 (Toohey J).

2 Blackstone, W. *Commentaries on the Laws of England*, Book 1 (1965, Clarendon Press, Oxford), pp 45–46 as referred to in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ).

The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct or indirect uses of the information beyond the purpose for which it is being obtained.

To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are generally understood and they are usually included bills that seek to abrogate the privilege against self-incrimination.

For examples see the committee's comments concerning the:

- Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (*Fourth Report of 2014*);
- Building and Construction Industry (Improving Productivity) Bill 2013 (*Fourth Report of 2014*); and
- Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (*Alert Digest No. 16 of 2014*).

Reversal of the onus of proof

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this onus and require the person charged with an offence to prove, or disprove, a matter in order to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

The committee usually comments adversely on a bill that places the onus on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly and adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in the committee's Alert Digests and in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011),³ which states in relation to a provision which reverses the onus of proof (often drafted, in effect, as a defence):

3 Released by the Commonwealth Attorney-General and available at <http://www.ag.gov.au/>.

However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.

Creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.⁴

For examples, see the committee's comments concerning the:

- Business Services Wage Assessment Tool Payment Scheme Bill 2014 (*Tenth Report of 2014*);
- Fair Work (Registered Organisations) Amendment Bill 2014 (*Ninth Report of 2014*); and
- Quarantine Charges (Collection) Bill 2014 (*Fifth Report of 2014*).

Strict and absolute liability offences

The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

For examples, see the committee's comments concerning the:

- Clean Energy Legislation (Carbon Tax Repeal) Bill 2014 (*Alert Digest No. 10 of 2014*);
- Environment Legislation Amendment Bill 2013 (*First Report of 2014*);
- Fair Work (Registered Organisations) Amendment Bill 2013 (*Fourth Report of 2014*); and
- Stop Dumping on the Great Barrier Reef Bill 2014 (*Seventeenth Report of 2014*).

⁴ *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), p. 50.

Powers of search and seizure without warrant

The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum).

For examples see the committee's comments concerning the:

- Building and Construction Industry (Improving Productivity) Bill 2013 (*Fourth Report of 2014*); and
- National Security Legislation Amendment Bill (No. 1) 2014 (*Twelfth and Thirteenth Reports of 2014*).

Insufficiently defined administrative powers

Application of criterion set out in standing order 24(1)(a)(ii)

Legislation may contain provisions which make rights and liberties unduly dependent upon insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers;
- delegate power to 'a person' without any further qualification as to who that person might be; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

Ill-defined and wide powers

Since its establishment in 1981, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. The committee sees a number of approaches that are of concern from year to year, though it is also always alert to identifying novel ways in which this issue may arise.

As is often the case, if a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate.

For examples, see the committee's comments concerning the:

- Australian Citizenship and Other Legislation Amendment Bill 2014 (*Seventeenth Report of 2014*); and

- National Security Legislation Amendment Bill (No. 1) 2014 (*Thirteen and Fourteenth Reports of 2014*).

Delegation of power to ‘a person’ or to a wide class of persons

The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as ‘a person’) or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers might be delegated. The committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad.

For examples, see the committee’s comments concerning the:

- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (*Fourteenth and Sixteenth Reports of 2014*); and
- Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (*Fifteenth Report of 2014*).

Undue dependence upon non-reviewable decisions

Application of criterion set out in standing order 24(1)(a)(iii)

Legislation may contain provisions which make ‘rights, liberties or obligations unduly dependent upon non-reviewable decisions’. Relevantly, a bill may seek to:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision; or
- provide that reasons need not be given for a decision.

Excluding merits and judicial review

The committee is of the view that, where a decision may have a substantial impact on a person’s rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review.

The committee routinely draws attention to bills that seek to deny the opportunity for effective review. However, the committee also accepts that there are circumstances in which review is not, or may not be, necessary. The committee is assisted to come to

this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach.

For examples, see the committee's comments concerning the:

- Australian Citizenship and Other Legislation Amendment Bill 2014 (*Seventeenth Report of 2014*);
- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (*Fourteenth and Sixteenth Report of 2014*); and
- Environment Protection And Biodiversity Conservation Amendment (Cost Recovery) Bill 2014 (*Eighth and Tenth Reports of 2014*).

Inappropriate delegation of legislative power

Application of criterion set out in standing order 24(1)(a)(iv)

Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which are so important that they should be regulated by Parliament but are, in fact, to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

Henry VIII clauses

A Henry VIII clause is an express provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Once again, a clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate.

For examples, see the committee's comments concerning the:

- Farm Household Support Bill 2014 (*Fifth Report of 2014*);
- Farm Household Support (Consequential and Transitional Provisions) Bill 2014 (*Fifth Report of 2014*); and
- Public Governance, Performance and Accountability Amendment Bill 2014 (*Tenth Report of 2014*).

Determining important matters by delegated legislation

The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process.

For examples, see the committee's comments concerning the:

- Business Services Wage Assessment Tool Payment Scheme Bill 2014 (*Tenth Report of 2014*);
- Higher Education and Research Reform Amendment Bill 2014 (*Thirteenth Report of 2014*); and
- Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (*Tenth Report of 2014*).

Setting the rate of a 'levy' by regulation

The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

For examples, see the committee's comments concerning the:

- Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014 (*Eighth and Tenth Reports of 2014*); and
- Quarantine Charges (Imposition—General) Bill 2014, Quarantine Charges (Imposition—Customs) Bill 2014 and Quarantine Charges (Imposition—Excise) Bill 2014 (*Fifth Report of 2014*).

Appropriate parliamentary scrutiny of legislative power

Application of criterion set out in standing order 24(1)(a)(v)

Whenever Parliament delegates power to legislate it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make delegated legislation that is not to be tabled in Parliament, or which is to be tabled, but is not disallowable;
- require delegated legislation to be tabled and disallowable, but with a disallowance period so short that Parliament may not be able to scrutinise it properly;
- provide that legislative instruments to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time; or
- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance.

Not tabled or not subject to disallowance

When a provision specifies that an instrument is *not* a legislative instrument the committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the committee expects to see a full explanation outlined in the explanatory memorandum justifying the need for the exemption.

For examples, see the committee's comments concerning the:

- Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (*Fifteenth Report of 2014*); and
- Veteran's Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013 (*Second and Fifth Reports of 2014*).

Incorporating material 'as in force from time to time'

The *Legislative Instruments Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to

be incorporated ‘as in force from time to time’. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

Allowing material to be incorporated ‘as in force from time to time’ is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament’s knowledge and without the opportunity for Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material ‘as in force from time to time’ will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.

In some instances the committee noted that a bill sought to incorporate material ‘as in force from time to time’, but acknowledged that an appropriate explanation was provided in the explanatory memorandum.

For example, see the committee’s comments concerning the:

- Carbon Farming Initiative Amendment Bill 2014 (*Eleventh Report of 2014*).

Standing Appropriations

In the committee’s *Fourteenth Report of 2005*, the committee stated that:

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. (p. 272)

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies.

For examples, see the committee’s comments concerning the:

- Fair Entitlements Guarantee Amendment Bill 2014 (*Fourteenth Report of 2014*); and
- Trade Support Loans Bill 2014 (*Tenth Report of 2014*).

Appendix 2

**Extract from the Procedure Committee's
*First Report of 2014***

Extract from the Procedure Committee's *First Report of 2014*

Matters referred by the Scrutiny of Bills Committee

By letter dated 24 March 2014, the President of the Senate referred to the committee, pursuant to standing order 17(3), a matter raised by the Chair of the Scrutiny of Bills Committee, Senator Polley, arising from that committee's 2012 inquiry into its future role and direction. The Scrutiny of Bills Committee sought the committee's consideration of various changes to its standing orders. Details of the changes are included at Attachment A. Proposed amendments of standing orders that would give effect to these changes are at Attachment B.

The committee draws these matters to the attention of the Senate, but leaves it to the Scrutiny of Bills Committee to consider and initiate the necessary amendments.

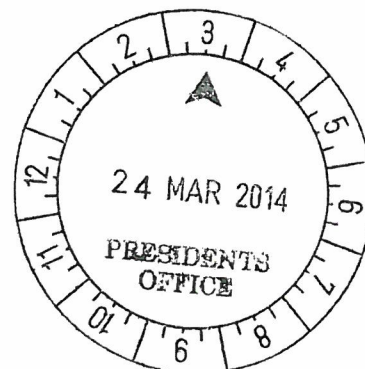


STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

24 March 2014

Senator the Hon John Hogg
President of the Senate
Parliament House
CANBERRA ACT 2600

refer to Procedure Cttee
JH
24.3.14



Dear Mr President

The Scrutiny of Bills Committee conducted an inquiry into its future role and direction and reported about it to the Senate in May 2012. The inquiry made fourteen recommendations, which the committee has been progressively implementing.

A number of the recommendations relate to possible amendments to the standing orders. Therefore, pursuant to SO 17(3), I ask that you refer the following matters to the Procedure Committee for its consideration of the operation of the standing orders on the role and work of the Scrutiny of Bills Committee in relation to:

1. a permanent public inquiry power;
2. consideration of provisions of bills;
3. general committee powers;
4. framework bills;
5. uniform (or national scheme) legislation; and
6. comments on bills.

I have attached an extract of the relevant recommendations and some supporting information about them as well as a copy of the 2012 inquiry report.

Yours sincerely

Senator Helen Polley
Chair

Extract information for the Procedure Committee relating to implementation of the recommendations of the Scrutiny of Bills Committee report into its future role and direction

PERMANENT PUBLIC INQUIRY POWERS

Recommendation 4

4.22 That Senate standing order 24 be amended to provide the committee with permanent public inquiry powers in line with the relevant paragraphs of Senate standing order 25 relating to legislative and general purpose standing committees.

The committee noted in the report that it would be desirable for it to undertake more inquiries into matters of principle. The committee therefore formed the view that a permanent inquiry power is also desirable. Several submitters noted that the inquiry power may not be needed frequently, but that having such a power would add flexibility to the committee's proceedings.

The committee notes that implementing this recommendation would require amendment to the standing orders and welcomes any comments on the proposal.

TECHNICAL AMENDMENT RELATING TO 'PROVISIONS OF BILLS'

Recommendation 5

4.29 That Senate standing order 24(1)(a) be amended to include a reference to the committee reporting in respect of the 'provisions of bills introduced in the Parliament'.

In her submission to the committee, the Clerk of the Senate suggested an amendment to standing order 24 to address a technical issue in relation to the ability of the committee to consider bills after they have been introduced in the House of Representatives, but before they are received in the Senate. This mechanism is already utilised by the committee to avoid unnecessary delay in its consideration of bills. However, as the Clerk noted, making a technical change so that the standing order refers to 'provisions of bills introduced in the Parliament' would make the reference and reporting functions of the committee, and their timing, more transparent.

The committee notes that implementing this recommendation would require amendment to the standing orders and welcomes any comments on the proposal.

GENERAL COMMITTEE POWERS

Recommendation 6

4.31 That Senate standing order 24 be amended to provide that the Scrutiny of Bills Committee deputy chair is elected rather than appointed (in line with Senate standing order paragraphs 25(9)(a) and 25(9)(b)).

Recommendation 7

4.32 That Senate standing order 24 be amended in line with Senate standing orders 25(16) in relation to printing and 25(19) in relation to broadcasting.

During the inquiry differences between the relevant standing orders relating to the general powers of standing committees and the general powers of the scrutiny committees became apparent. The matters that the committee considered should be addressed in this regard were the discretionary appointment of deputy chairs (rather than their election – c.f. standing order 25 paragraphs (9)(a) and (b)), the power to print documents and evidence (c.f. standing order 25(16)), and the power to authorise the broadcasting of proceedings (c.f. standing order 25(19)).

The committee notes that implementing these recommendations would require amendments to the standing orders and welcomes any comments on the proposal.

FRAMEWORK BILLS

Recommendation 8

5.15 That Senate standing order 24 be amended to specifically include the scrutiny of bills which excessively rely on delegated legislation for their operation.

The committee has a long-standing view that it prefers that important information is included in primary legislation unless there is a principled reason for including it in delegated legislation. To this end, the committee has regularly highlighted instances in which primary legislation may excessively rely on delegated legislation for its operation. The committee has done so under the general principle 1(a)(iv) – 'inappropriately delegated legislative powers'.

In the report, the committee noted that the Procedure Committee has stated that it:

...sees merit in encouraging legislation committees in their examination of bills to be alert for cases in which the absence of draft regulations hinders adequate scrutiny of a bill, and to frame recommendations accordingly.' [Procedure Committee, *First report of 2010*, April 2010, p. 1.]

This accorded with the suggestion of the Clerk of the Senate that:

...one new area in which the committee may be able to assist the Senate is in identifying bills which appear to rely significantly for their operation on the making of regulations, the detail of which is not available for the Senate's consideration while the bill is before it.

The committee endorsed this proposal in the report. The committee, noting the increasing prevalence of framework bills and the importance of ensuring they are subject to effective scrutiny, recommended that the committee's terms of reference be amended to include specific reference to this task. It is also noted that the *Williams* 2012 High Court decision has had a significant impact on the use of delegated legislation, the ramifications of which are still evolving.

The committee notes that implementing recommendation 8 would require amendment to the standing orders.

UNIFORM (OR NATIONAL SCHEME) LEGISLATION

Recommendation 12

6.19 That standing order 24 be examined to confirm whether the Scrutiny of Bills Committee is empowered to consider, advise and report on exposure drafts and, if it is not, that standing order 24 be amended to allow the committee to do so.

In the report the committee noted that scrutiny concerns in relation to uniform legislation are not new and were stated clearly in a discussion paper prepared by a working party of the chairs of Australian scrutiny committee in July 1995. The working party stated that:

...in relation to uniform legislation no changes are permitted. Committees are often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance....This is also the case with subordinate legislation. As a result, Scrutiny Committees are restricted from carrying out their roles in relation to uniform legislation. Practically speaking, it is fair to say that there is effectively no parliamentary scrutiny of national scheme legislation.

The committee suggested that, in order to encourage the practice of providing exposure drafts, the Senate could consider deferring the passage of any uniform or national scheme legislation unless adequate opportunity to scrutinise it, and negotiate any amendments, is provided.

The committee notes that implementing these recommendations may require amendment to the standing orders and welcomes any comments on the proposal.

COMMENTS ON BILLS

Recommendation 13

7.11 That the Senate refers to the Procedure Committee the Scrutiny of Bills committee's request that standing order 24 be amended to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills.

In her submission to the inquiry, the Clerk of the Senate noted that the committee regularly provides its comments on bills to legislation committees. In this regard the Clerk made a practical suggestion for the committee to seek to arrange for the practice to become part of the committee's operating framework:

I note the recent innovation of the committee in forwarding its initial comments on bills to legislation committees examining those bills. The committee may wish to formalise this arrangement by seeking a change in standing order 24 (or standing order 25 covering the legislation committees) to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills. This is an issue that could be referred to the Procedure Committee to follow up should the committee see merit in it.

In the report, the committee endorsed the proposal from the Clerk of the Senate and accordingly recommended that this matter be referred to the Procedure Committee for consideration.

The committee notes that implementing these recommendations may require amendment to the standing orders and welcomes any comments on the proposal.

PROCEDURE COMMITTEE

AMENDMENTS REQUIRED TO IMPLEMENT CHANGES TO STANDING ORDERS PROPOSED BY
THE SCRUTINY OF BILLS COMMITTEE1. *A permanent public inquiry power*

Standing order 24(7), omit "in private session", substitute "and transact business in public or private session".

2. *Ability to report on provisions of bills*

Standing order 24(1)(a), after "Senate", insert "or the provisions of bills not yet before the Senate".

3. *Election of deputy chair – adoption of standard committee provisions*

Omit standing order 24(5), substitute:

The committee shall elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate, and the member so elected shall act as chair of the committee when there is no chair or the chair is not present at a meeting of the committee.

4. *Authority to print documents and evidence*

After standing order 24(8), insert:

(8A) The committee shall be empowered to print from day to day any of its documents and evidence. A daily Hansard shall be published of public proceedings of the committee.

5. *Power to authorise broadcasting of public proceedings*

Amendment of standing order 24 is not necessary. The power is already contained in the broadcasting resolutions.

6. *Explicit reference to bills that rely "excessively" on delegated legislation*

At the end of standing order 24(1), add:

- (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.

7. *Scrutiny of national scheme legislation – explicit reference to exposure drafts*

Omit standing order 24(1)(b), substitute:

- (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.

8. *Standing reference of committee comments to legislation committees considering bills*

After standing order 25(2), insert:

- (2A) The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

Appendix 3

Extract from the *Journals of the Senate* of 15 July 2014

Extract from the *Journals of the Senate* of 15 July 2014

17 SCRUTINY OF BILLS—STANDING COMMITTEE—STANDING ORDERS 24 AND 25— AMENDMENT

The Chair of the Standing Committee for the Scrutiny of Bills (Senator Polley), pursuant to notice of motion not objected to as a formal motion, moved general business notice of motion no. 345—That the amendments to standing orders set out in Attachment B of the Procedure Committee’s *First report of 2014* be adopted, with effect from the next day of sitting.

Question put and passed.

Accordingly, standing orders 24 and 25 were amended, as follows, with effect from the next day of sitting:

Standing order 24(1)(a), after “Senate”, insert “or the provisions of bills not yet before the Senate”.

Omit standing order 24(1)(b), substitute:

- (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.

At the end of standing order 24(1), add:

- (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.

Omit standing order 24(5), substitute:

- (5) The committee shall elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate, and the member so elected shall act as chair of the committee when there is no chair or the chair is not present at a meeting of the committee.

Standing order 24(7), omit “in private session”, substitute “and transact business in public or private session”.

After standing order 24(8), insert:

- (8A) The committee shall be empowered to print from day to day any of its documents and evidence. A daily Hansard shall be published of public proceedings of the committee.

After standing order 25(2), insert:

- (2A) The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

Appendix 4

Standing Orders 24 and 25(2A)

[with provisions amended or added in 2014 underlined]

Standing Orders 24 and 25(2A) **[provisions amended or added in 2014 underlined]**

24 Scrutiny of Bills

- (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.
- (2) (a) The committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in

the Senate or by any minority groups or independent senators.

- (b) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and any minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the committee shall be determined by the Senate.
- (3) The committee may appoint sub-committees consisting of 3 or more of its members, and refer to any such sub-committee any matters which the committee is empowered to consider.
- (4) The committee shall elect as chair a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate.
- (5) The committee shall elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate, and the member so elected shall act as chair of the committee when there is no chair or the chair is not present at a meeting of the committee.
- (6) When votes on a question before the committee are equally divided, the chair, or the deputy chair when acting as chair, shall have a casting vote.
- (7) The committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.
- (8) The committee may appoint with the approval of the President counsel to advise the committee.
- (8A) The committee shall be empowered to print from day to day any of its documents and evidence. A daily Hansard shall be published of public proceedings of the committee.
- (9) The committee may report from time to time its proceedings and evidence and any recommendations, and shall make regular reports of the progress of the proceedings of the committee.

25 Legislative and general purpose

After paragraph (2), insert:

- (2A) The legislation committees, when examining bills or draft bills, shall take into account any comments on the bills published by the Standing Committee for the Scrutiny of Bills.

Appendix 5

Recommendations from the 2012 report into the committee's future role and direction

Recommendations

Chapter 3

Reporting during non-sitting periods

Recommendation 1

3.35 That the committee should consider and publish its comments during non-sitting periods in appropriate cases.

Chapter 4

Notifying the Senate of a failure to respond to the committee

Recommendation 2

4.11 That the committee should, in appropriate cases, after a reasonable period of time and after advising the relevant minister of its intention, notify the Senate of any instance of a failure to respond to a request for information relevant to Senate standing order 24(1).

Recommendation 3

4.12 That Senate standing order 24(1) be amended to confirm that the committee should take the action described in the preceding recommendation.

Permanent inquiry powers

Recommendation 4

4.22 That Senate standing order 24 be amended to provide the committee with permanent public inquiry powers in line with the relevant paragraphs of Senate standing order 25 relating to legislative and general purpose standing committees.

Technical amendment relating to 'provisions of bills'

Recommendation 5

4.29 That Senate standing order 24(1)(a) is amended to include a reference to the committee reporting in respect of the 'provisions of bills introduced in the Parliament'.

General committee powers

Recommendation 6

4.31 That Senate standing order 24 be amended to provide that the Scrutiny of Bills Committee deputy chair is elected rather than appointed (in line with Senate standing order paragraphs 25(9)(a) and 25(9)(b)).

Recommendation 7

4.32 That Senate standing order 24 be amended in line with Senate standing orders 25(16) in relation to printing and 25(19) in relation to broadcasting.

Chapter 5

Framework bills

Recommendation 8

5.15 That Senate standing order 24 be amended to specifically include the scrutiny of bills which excessively rely on delegated legislation for their operation.

Recommendation 9

5.16 That Scrutiny of Bills Committee develops guidelines in relation to the appropriate level of detail required in primary legislation.

Recommendation 10

5.27 That the Senate Committee for the Scrutiny of Bills and the Regulations and Ordinances Committee consider issues relating to the scrutiny of delegated legislation discussed in this report, including the scrutiny of draft delegated legislation, to develop a response to these matters.

Chapter 6

Uniform (or national scheme) legislation

Recommendation 11

6.18 The committee recommends that where there is a proposal for uniform legislation, amendments to uniform legislation or delegated legislation and the nature of the proposal means that the ability of the Senate and its committees to effectively scrutinise and amend the relevant proposal is limited, exposure drafts should be provided as soon as practicable to this committee, the relevant legislative and general purpose standing committee, and the Senate Regulations and Ordinances Committee if the proposal includes delegated legislation. All relevant information about the proposal, including any formal agreements or correspondence should also be provided to the committees to assist in their consideration of the exposure drafts.

Recommendation 12

6.19 That standing order 24 be examined to confirm whether the Scrutiny of Bills Committee is empowered to consider, advise and report on exposure drafts and associated information and, if it is not, that standing order 24 be amended to allow the committee to do so.

Chapter 7

Comments on bills

Recommendation 13

7.11 That the Senate refers to the Procedure Committee the Scrutiny of Bills committee's request that standing order 24 be amended to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills.

*Scrutiny resources***Recommendation 14**

7.25 That the committee develop checklists, guidelines and other supporting documents as appropriate and continues to implement improvements to its use of technology in raising awareness of the committee's work.