

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No.1 of 2014

12 February 2014

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator Helen Polley (Chair)
Senator Anne Ruston (Deputy Chair)
Senator Cory Bernardi
Senator the Hon Kate Lundy
Senator the Hon Ian Macdonald
Senator Rachel Siewert

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

TABLE OF CONTENTS

Commentary on bills

• Criminal Code Amendment (Harming Australians) Bill 2013	1
• Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	3
• Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013	6
High Speed Rail Planning Authority Bill 2013	8
• Landholders' Right to Refuse (Gas and Coal) Bill 2013	9
• Marriage Equality Amendment Bill 2013	10
• Migration Amendment Bill 2013	11
Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013	17
Private Health Insurance Legislation Amendment Bill 2013	18
Tax Bonus for Working Australians Repeal Bill 2013	19
• Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013	20
• Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013	23
Commentary on amendments to bills	59
- Commonwealth Inscribed Stock Amendment Bill 2013	
- Environment Legislation Amendment Bill 2013	
Scrutiny of standing appropriations	60

Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

-
- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

Criminal Code Amendment (Harming Australians) Bill 2013

Introduced into the Senate on 11 December 2013

By: Senator Xenophon

Background

This bill amends the *Criminal Code Act 1995* to remove the commencement date for provisions under Division 115 to apply to any case before 1 October 2002 that meets the criteria specified.

Undue trespass on personal rights and liberties—retrospectivity Schedule 1, items 1 and 2

The purpose of this bill is to allow the application of offences contained in Division 115 of the *Criminal Code Act 1995* to be applied retrospectively to conduct that occurred before 1 October 2002. The offences contained in Division 115 of the Act allow for the prosecution of individuals who harm Australians outside Australia (either through murder or manslaughter or through intentional or reckless behaviour causing serious harm). These offences were introduced by legislation amending the *Criminal Code Act* in 2002, soon after the Bali bombings. As noted in the statement of compatibility with human rights, the original bill introducing these offences gave the relevant provisions retrospective effect: the bill was assented to on 14 November 2002, but the commencement date was 1 October 2002. As also noted in the statement of compatibility, '[p]resumably, this date was selected to ensure the Bali terrorist attacks, which occurred on 12 October 2002, came under the new provisions'.

The justification for extending the retrospective effect of these offences so they apply to acts committed prior to 1 October 2002 appears in the statement of compatibility, where the question of compatibility with the prohibition on retrospective criminal laws under article 15 of the *International Covenant on Civil and Political Rights* is addressed. In reaching the conclusion that the bill is compatible with the prohibition on retrospective criminal laws, the statement of compatibility emphasises the following two matters: (1) the offences, when originally enacted, were retrospective (as explained above), and (2) that the offences relate to 'the crimes of murder, manslaughter and serious harm to another person, all of which exist in other jurisdictions'.

The significance given to the first matter by the statement of compatibility appears to be that the original amendments amount to a precedent for the retrospective application of the offences (this is made explicit in the second reading speech). The significance of the second matter is that the bill should not be considered as introducing retrospective crimes (given that the crimes exist in other jurisdictions) ‘but instead extends the capacity for involvement of Australian law enforcement that this Division already provides’.

The justification for the retrospectivity of the offences when first introduced appears to be limited to a perceived need to cover conduct associated with the Bali bombings and should be understood in the context of responding to that particular atrocity, which affected many Australians. However, so considered, it is unclear to the committee why the original bill should be treated as a precedent that justifies the more general retrospective application of these offences, more than 10 years after they were originally enacted.

Further, although it may be the case that the provisions replicate offences that exist in other jurisdictions neither the explanatory memorandum nor the statement of compatibility detail the extent of the problem which the bill seeks to address. (The second reading speech briefly, and without detail, raises the circumstances of one family who lost a member to a murder before 1 October 2002.) While it is clear that this is a tragic circumstance, given the importance of the principle that individuals should normally be entitled to rely on having their criminal guilt adjudged on the basis of the law at the time of their impugned conduct, the justification offered for the approach taken in this bill is insufficiently detailed and informative. **In these circumstances, the committee seeks the Senator's further advice as to the justification for extending the retrospective application of these offences.**

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

Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013

Introduced into the Senate on 12 December 2013

By: Senator Xenophon

This bill is substantially similar to a bill introduced in the previous Parliament.

Background

This bill amends the *Criminal Code Act 1995* to create a new criminal offence where a person over 18 years of age misrepresents their age in online communications with a person they believe to be under 16 years of age for the purposes of encouraging a physical meeting or committing an offence.

Possible drafting error

Item 1, proposed subsection 474.42(1), provides that 'it is a defence to a prosecution of an offence against section 474.40 that the defendant believed at the time the communication was transmitted that the recipient was not under 18 years of age.' Given the offence relates to communications with persons believed to be under 16 years of age, it appears that the reference in proposed subsection 474.42(1) to '18 years of age' is an error.

Trespass on personal rights and liberties—penalties Schedule 1, item 1, proposed subsections 474.40(1) and (2)

The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. These subsections impose the possibility of significant custodial penalties (respectively 5 years and 8 years imprisonment), however, this issue is not addressed in the explanatory memorandum. **The committee therefore seeks the Senator's further advice as to the justification for the penalties imposed by these subsections.**

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

**Trespass on personal rights and liberties—burden of proof
Schedule 1, item 1, proposed subsection 474.41(2)**

This subsection provides that for the purposes of prosecuting an offence 'evidence that the recipient was represented to the sender as being under or of a particular age is, in the absence of evidence to the contrary, proof that the sender believed the recipient to be under or of that age'.

The subsection appears to introduce a presumption that a defendant believes a particular matter in certain circumstances. As such, the intended effect of the provision may be similar to that achieved by expressly placing a legal burden of proof on a defendant to disprove a particular matter in specified circumstances. Unfortunately, the explanatory memorandum simply restates the effect of this provision and does not provide information about the rationale for the approach. **The committee therefore seeks the Senator's advice as to whether this provision may be considered to undermine the common law principle that those charged of an offence have the right to be presumed innocent and, given that it appears that the provision may operate in a way that in practical effect reverses the burden of proof, the committee requests a detailed justification of the proposed approach.**

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

**Trespass on personal rights and liberties—burden of proof
Schedule 1, item 1, proposed section 474.42**

This section outlines defences against the offences in section 474.40. Reading subsections 474.42(1) and (2) together, it is a defence to prosecution that the defendant had a reasonable belief that the recipient was not under 18 years of age. Subsection 474.42(3) provides that a person is not criminally responsible if the person is a law enforcement officer acting in the course of his or her duties and the conduct of the person is reasonable in the circumstances.

Defendants bear an evidential burden in relation to the matters referred to in these defences, but the explanatory memorandum does not justify the proposed approach. **The committee therefore seeks the Senator's advice as to the rationale for reversing the burden of proof and the appropriateness of including the vague language of *reasonableness* in the circumstances defining the availability of the defences.**

Pending the Senator's advice, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013

Introduced into the Senate on 12 December 2013

By: Senator Farrell

This bill is substantially similar to a bill introduced in the previous Parliament.

Background

This bill establishes a framework that provides all non-Defence users within the Woomera Prohibited Area and industry more generally with a level of certainty over Defence activity in the area and allows users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill gives effect to recommendations in the Final Report of the Hawke Review of 3 May 2011.

Trespass on personal rights and freedoms—strict liability Schedule 1, item 3, proposed subsection 72TG(2)

This provision imposes an offence of strict liability for failure to comply with conditions placed on a permission to be at a place in the Woomera Prohibited Area. The explanatory memorandum argues that, ‘It is considered reasonable that breaching a condition of a permission should attract a strict liability offence to provide an adequate deterrent to breaching permit conditions which will attract a minor penalty of a maximum of 60 penalty units’. The committee also notes that a ‘permission...will clearly advise the conditions with which the permission holder will need to comply, including the potential consequences of non-compliance’ (explanatory memorandum, p. 7).

While the explanatory memorandum does provide information about the rationale, the committee is not persuaded that strict liability will significantly enhance the enforcement of the regime. Perhaps the appropriateness of strict liability may depend on the nature of the conditions; however, the explanatory memorandum does not address these issues. **The committee therefore seeks a more detailed justification from the Senator as to the possible scope of any conditions and the appropriateness of the use of strict liability.**

Pending the Senator's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

High Speed Rail Planning Authority Bill 2013

Introduced into the House of Representatives on 9 December 2013

By: Mr Albanese

Background

This bill seeks to establish an Authority to continue work towards establishing high speed rail on the east coast of Australia.

The committee has no comment on this bill.

Landholders' Right to Refuse (Gas and Coal) Bill 2013

Introduced into the Senate on 9 December 2013

By: Senator Waters

Background

This bill provides landholders with the right to refuse gas and coal mining activities on food producing land.

Trespass on personal rights and liberties—burden of proof Subclause 9(3)

This subclause provides for a defence to the offence for constitutional corporations to enter or remain on food producing land for the purpose of engaging in gas or coal mining activity or to actually engage in such activity if the corporation does not own that land. The defence applies if the corporation has prior written authorisation from each person with an ownership interest in the land to engage in the impugned activity. Although the defendant bears an evidential burden of proof an acceptable rationale is provided in the explanatory memorandum. As indicated in the explanatory memorandum, the evidential burden is appropriate 'given that it is a straightforward matter for the corporation to produce a written authorisation if they do indeed have one'—such a matter may be said to be peculiarly within the knowledge of the defendant.

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

Marriage Equality Amendment Bill 2013

Introduced into the Senate on 12 December 2013

By: Senator Hanson-Young

This bill is substantially similar to a bill introduced in the previous Parliament.

Background

This bill amends the *Marriage Act 1961* to remove all discrimination to ensure that two people, regardless of their sex, sexual orientation or gender identity have the opportunity to marry.

Inappropriate delegation of legislative power Schedule 1, subitem 10(1)

Subitem 9(1) of Schedule 1 enables regulations to be made which amend 'Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act'. This enables regulations to amend Acts of the Parliament. **The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum and the committee therefore seeks the Senator's rationale for the proposed approach.**

Pending the Senator's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Migration Amendment Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Immigration and Border Protection

Background

This bill amends the *Migration Act 1958* (the Migration Act) to:

- put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder;
- clarify the operation of the statutory bar on making a further protection visa application; and
- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) and associated measures.

Insufficiently defined administrative powers

Schedule 2

The effect of the amendments in Schedule 2 is that applicants who have been refused a protection visa on the basis of an application which relies on one of multiple criteria on which a visa may be issued are no longer entitled to reapply on the basis that an alternative criterion for the grant of a protection visa is applicable.

The stated purpose of the schedule is to clarify that:

...a non-citizen should not be able to make a further protection visa application...after a previous protection visa application has been refused or a protection visa held by the person has been cancelled, irrespective of the grounds on which their earlier protection visa application was refused or the grounds on which the cancelled visa was originally granted, and whether or not the grounds or criteria existed earlier' (explanatory memorandum, p. 2).

As indicated in the statement of compatibility, the amendments in this schedule will only affect persons who have made an application in relation to so-called complementary protection claims before 24 March 2012. This is because amendments to the Act required that protection visa applications made after that date be ‘automatically assessed under the complementary protection provisions of the *Migration Act*’ (statement of compatibility, p. 5).

However, in relation to claims for complementary protection in cases in which a protection visa was refused or cancelled prior to 24 March 2012, the result of these amendments is that these claims cannot be considered under the *Migration Act* (except if the Minister exercises his non-compellable powers, under section 48B of the Act to allow a person who has been refused a protection visa in circumstances where it is in the public interest to do so or to exercise a non-compellable power to grant a visa to a non-citizen in the public interest).

Rather, the statement of compatibility indicates that a person who is being ‘removed from Australia will be assessed for any possible risks that might arise under the CAT and ICCPR as a consequence of their removal from Australia’ and the complementary protection claim would therefore be considered by way of a non-statutory administrative process (noting that if a matter is referred to the Minister for consideration part of the process could be to exercise his statutory powers). The statement of compatibility does not give any details about this administrative process (though the committee notes the response provided by the Minister to its recent request for further information in relation to a similar matter – discussed further below).

The statement of compatibility argues that the purpose of the amendments in Schedule 2 is to respond to an increase in the number of repeat applications for protection visas (in circumstances in which the applicant does not have legitimate complementary protection claims) and that can have significant resource implications for the relevant department, the Refugee Review Tribunal and the courts. While the committee notes this argument, it also notes that the number of potential applicants is limited to those who made claims made prior to 24 March 2012.

The committee notes that the Minister's further information about the administrative process provided in response to a request for information about another bill is also relevant to this bill (see the *First Report of 2014* for the response and the committee's further views). However, despite this additional

information, it appears that there are areas in which further information would be useful in order to understand the detail of the process. For example, while the committee notes that Ministerial guidelines will be made publicly available, it is not aware that the content is yet publicly available. It is also not clear who the relevant decision-makers for the administrative assessment process will be and whether the Minister is necessarily going to consider every case referred by these decision-makers. **However, in light of the information provided by the Minister, the committee draws these matters to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

**Trespass on personal rights and freedoms—personal liberty
Rights and liberties unduly dependent on non-reviewable
decisions—adequacy of merits review rights
Schedule 3, item 1, proposed new subsection 36(1A) and (1B)**

This item amends section 36 of the *Migration Act* by introducing a specific criterion for the grant of a protection visa: namely, the absence of an adverse security assessment issued by ASIO that the applicant is a direct or indirect risk to national security. The amendment is in response to the High Court's decision in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, which invalidated delegated legislation provisions that provided for an identical criterion for the grant of a protection visa.

In addition, items 2 to 6 seek to amend paragraphs 411(1)(c) and (d) and section 500 of the *Migration Act* to remove the ability for the Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT) and the AAT to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

The statement of compatibility accepts (at p. 9) that the result of these provisions, in the context of the mandatory detention regime established by the Act, may be that an applicant for a protection visa in relation to whom

Australia has non-refoulement obligations and who has received an adverse security assessment will remain in detention indefinitely.

The statement of compatibility argues that these provisions are consistent with article 9(1) of the ICCPR which provides for a right to liberty and security of the person. The key points of justification for the approach are that:

- (1) the policy of detention of persons who unlawfully enter Australia on the basis of an adverse security assessment is a reasonable measure taken to control immigration and to protect national security. In particular, the statement of compatibility concludes that ‘taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) are considered reasonable, necessary and proportionate to the security risk that they are found to pose’ (at pp 9 and 10); and
- (2) the existence of arrangements for ‘independent review of the initial issue of and continuing need for an adverse security assessment’ (at p. 10). Here the statement of compatibility is referring to the administrative arrangements for review by the Independent Reviewer of Adverse Security Assessments. (See Attorney-General, *Independent Review Function—Terms of Reference*, October 2012.)

The proposed approach gives rise to the question of whether the liberty interests of an asylum seeker who has received an adverse security assessment has been appropriately balanced against the broader interests of the public in maintaining national security. The committee's view is that the result of these amendments, which is that affected persons may be indefinitely detained, is a significant issue which might be seen to trespass unduly on personal rights and liberties. **Nevertheless, in light of the information available in the material accompanying the bill, which will assist individuals to assess the proposed approach, the committee draws its concerns to Senators and leaves to the Senate as a whole the question of the acceptability of detaining persons indefinitely on the basis of an adverse security assessment, in circumstances where, in practice, they cannot be removed from Australia.**

However, the committee is interested to seek further information from the Minister about the arrangements for independent review of adverse security

assessments (instead of review by the RRT, MRT and AAT, discussed above). These arrangements are not explained in any detail in the material accompanying the bill, though the statement of compatibility does note that the work of the Independent Reviewer commenced on 3 December 2012 and that the:

Reviewer's role is to review ASIO adverse security assessments given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the Department to 'engage Australia's protection obligations under international law, and not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled' (at p. 12).

After noting these matters, the statement of compatibility concludes that 'existing avenues for merits review' are not affected.

A number of scrutiny issues of concern arise in relation to the existence of independent review as a justification for the proposed amendments. First, the role of the Independent Reviewer of Adverse Security Assessments is not established by statute. As such there are no statutory guarantees of independence. Indeed, the scheme is subject to administrative alteration or abolition at any time.

Second, the adequacy of the review process is not clear. Although the Terms of Reference (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012) state that 'ASIO will provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the Reviewer on the basis that it will be provided to the eligible person', it is also stated that the 'reasons will include information that can be provided to the eligible person to the extent able without prejudicing the interests of security'. This process appears to allow ASIO to determine how much of a person's case to disclose, without either the affected person or the independent reviewer being in a position to challenge the decision. Clearly, an affected person's ability to make submissions to the independent reviewer will be compromised if insufficient details of the case against them are disclosed.

Third, it should be emphasised that the Independent Reviewer's powers are limited to issuing a non-binding 'opinion' and to providing 'such opinion to the Director-General, including recommendations as appropriate' (Attorney-General, *Independent Review Function—Terms of Reference*, October 2012, p. 1). These arrangements for review thus clearly fall short of what is normally involved with independent merits review by tribunals such

as the RRT, MRT and AAT, which all typically exercise determinative powers.

In light of the above issues, and given the possible consequences of these amendments for the liberty of affected persons, the committee seeks further advice from the Minister as to the adequacy of the review mechanisms for adverse security assessments and why it would not be more appropriate for an 'independent review process' to be placed on a statutory basis. In seeking such advice the committee is aware that judicial review remains open to affected persons (this is emphasised in the statement of compatibility (at p. 12)). However, the committee is aware that it is unlikely that judicial review will in practice provide meaningful review. First, in the absence of more robust disclosure of reasons requirements, it may be difficult to argue grounds of review other than a breach of procedural fairness. Second, the normal requirements of procedural fairness may be overridden by national security interests.

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

Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013

Introduced into the Senate on 9 December 2013

By: Senator Hanson-Young

Background

This bill amends the *Migration Act 1958* to allow legislative instruments designated under Section 85 (limit on visas) to be disallowed.

The committee has no comment on this bill.

Private Health Insurance Legislation Amendment Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Health

Background

The bill amends the *Private Health Insurance Act 2007* (the PHI Act) to clarify that a single rebate adjustment factor, to be determined in accordance with the *Private Health Insurance (Incentives) Rules* made under section 333-20 of the PHI Act, will be applied to all Rebates.

This bill also makes minor amendments to clarify the current definition of a restricted access group in subsection 126-20(7) of the PHI Act.

The committee has no comment on this bill.

Tax Bonus for Working Australians Repeal Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Treasury

Background

This bill repeals the *Tax Bonus for Working Australians Act (No. 2) 2009* to ensure that the Commissioner of Taxation does not make any further tax bonus payments.

The committee has no comment on this bill.

Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Health

This is an amended version of a bill previously introduced into the Parliament and considered by the committee in *Sixth Report of 2013*. The committee raised concerns about two matters, and received a response from the then Parliamentary Secretary which was reported in *Sixth Report of 2013*. This information appears to have been taken into account in the current form of the bill and explanatory material.

Background

This bill amends the *Therapeutic Goods Act 1989* to:

- provide the Minister with the power to make legislative instruments excluding identified goods, or excluding identified goods if the goods are used, advertised or presented for supply in a particular way, from the definition of ‘therapeutic goods’;
- include an offence and a civil penalty provision for providing information that is false or misleading in a material particular in connection with a request to vary an existing entry in the Register for therapeutic goods or in response to requests for information about registered therapeutic goods such as prescription and over-the-counter medicines as well as therapeutic devices;
- include amendments to support the current up-classification process for certain hip, knee and shoulder joint implants from Class IIb medical devices to Class III;
- provide that the Secretary may cancel the registration or listing of therapeutic goods where the presentation of the goods is not acceptable or, in the case of listed goods, is unacceptable;
- provide that the Secretary may cancel the registration or listing of therapeutic goods where a sponsor does not respond to a request from the Secretary under section 31 of the Act to provide specified information or documents about those goods; and

- clarify arrangements relating to the approval by the Secretary of product information for medicines accepted for registration in the Register.

Broad delegation of legislative power

Schedule 3, items 1 and 2 of proposed section 7AA

The bill proposes a broad delegation of power, the effect of which is to allow the Minister to exclude from the legislative definition of ‘therapeutic goods’ goods which have been determined by the Minister in a legislative instrument to be goods that are not therapeutic goods or not therapeutic goods when used, advertised or presented for supply in a specified way. The consequence of excluding a particular good from the definition of ‘therapeutic goods’ is that it would no longer be regulated in accordance with the requirements of the Act.

A similar power was proposed in the 2013 version of this bill and in its *Sixth Report of 2013* the committee considered the then Parliamentary Secretary’s useful explanation of the appropriateness of the broad delegation of legislative power in proposed section 7AA and concluded that the approach could be left to the Senate as a whole.

In relation to the current provision, the committee notes that it now includes (see proposed subsection 7AA(3)) a new requirement that before making a determination to exclude a good from the definition of therapeutic goods the Minister must have regard to three specified considerations. To an extent this subsection operates to structure the otherwise broad exercise of the discretionary power. In addition, the explanatory memorandum (at pp. 19 to 22) contains a detailed explanation for the approach which contains similar information to that contained in the response from the then Parliamentary Secretary to the committee’s concerns expressed in *Alert Digest No. 5 of 2013*. **In the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

In the circumstances, the committee makes no further comment on this provision.

Trespass on personal rights and liberties—strict liability offence

Schedule 11, item 1

The bill also includes the introduction of a strict liability offence, through proposed subsection 9G(2). The offence is for providing false and misleading

information in relation to a request under section 9D of the Act to vary an entry for therapeutic goods on the Register where the information relates to goods that, if used, would be likely to result in harm or injury to any person. The maximum penalty is 2000 penalty units, which is well above the maximum penalty recommended by the *Guide to Framing Commonwealth Offences* (60 penalty units for an individual and 300 units for a body corporate).

When this issue was previously considered (see the *Sixth Report of 2013*) the committee thanked the then Parliamentary Secretary for the detailed and useful explanation he provided and made no further comment. This material has been incorporated into the current explanatory memorandum (at pp. 45 to 47) and the statement of compatibility (at pp. 5 to 7). In light of the approach taken in the current bill and explanatory material, the committee makes no further comment on this matter.

In the circumstances, the committee makes no further comment on this provision.

Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013

Introduced into the House of Representatives on 12 December 2013

Portfolio: Veterans' Affairs

Background

This bill amends Veterans' Affairs and other portfolio legislation to:

- clarify arrangements for the payment of travel expenses for treatment under the Veterans' Entitlements Act and the Australian Participants in British Nuclear Tests (Treatment) Act;
- provide for the more timely provision of special assistance by way of a legislative instrument in place of the current arrangement requiring a regulation;
- ensure that the debt recovery provisions will be applicable to all relevant provisions of the Veterans' Entitlements Act, the regulations and any legislative instrument made under the Veterans' Entitlements Act;
- make technical amendments to provisions in the Military Rehabilitation and Compensation Act that refer to legislative instruments;
- amend the Military Rehabilitation and Compensation Act to replace obsolete references to pharmaceutical allowance and telephone allowance with references to the MRCA supplement;
- rationalise the maintenance income provisions of the Veterans' Entitlements Act by repealing the redundant definitions and operative provisions and aligning the remaining definitions with those used in the social security law; and
- make minor technical amendments.

**Legislative Instrument
Schedule 1, item 20**

The bill makes a number of amendments, which are consequential to the enactment of the *Legislative Instruments Act 2003*. Item 20 relates to the power for the Military Rehabilitation and Compensation Commission to require a person to undergo a medical examination.

Subsection 328(6) provides that the Minister may, by notice in writing, set a limit on the frequency of examinations. Current subsection 328(7), which is being repealed as it is obsolete, provides that a subsection (6) notice is a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

It appears to the committee that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a subsection (6) notice is disallowable and this is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's clarification as to whether a subsection (6) notice will remain disallowable. If so, the committee requests that the bill be amended to clarify this.**

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

Commentary on amendments to bills

Commonwealth Inscribed Stock Amendment Bill 2013

[Digest 8/13 – no comments]

During sittings in December a message from the House of Representatives, and additional amendments, were considered by the Senate. On 9 December 2013 the House agreed to the Senate request for an amendment in place of amendment disagreed to, and agreed to 2 further amendments made by the Senate. The bill received the Royal Assent on 10 December 2013. The committee has no comment on this additional material.

Environment Legislation Amendment Bill 2013

[Digest 8/13 – Report 1/14]

On 9 December 2013 the House of Representatives agreed to two Government amendments and the Minister for the Environment (Mr Hunt) tabled a supplementary explanatory memorandum, and the bill was then read a third time. The committee has considered this amendment in the context of the Minister's response to questions the committee raised in relation to the bill, which information can be found in the committee's *First Report of 2014*.

Scrutiny of Standing Appropriations

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

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

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

Bills introduced with standing appropriation clauses in the 44rd Parliament since the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills

Nil