

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No. 13 of 2014

1 October 2014

ISSN 1329-668X

Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Kate Lundy	ALP, Australian Capital Territory
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Gerry McNally, Acting 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

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 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.

TABLE OF CONTENTS

Commentary on bills

Aged Care and Other Legislation Amendment Bill 2014	1
• Australian Education Amendment Bill 2014	2
Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014	5
Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014	6
Automotive Transformation Scheme Amendment Bill 2014	7
Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014	8
Migration Amendment (Humanitarian Visa Intake) Bill 2014	9
National Water Commission (Abolition) Bill 2014	10
Private Health Insurance Amendment Bill (No. 1) Bill 2014	11
Racial Discrimination Amendment Bill 2014	12
Rural Research and Development Legislation Amendment Bill 2014	13
• Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014	14
Commentary on amendments to bills	19
- Business Services Wage Assessment Tool Payment Scheme Bill 2014	
- Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014	
Scrutiny of standing appropriations	20

Senate Standing Legislation Committee Inquiries

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

Aged Care and Other Legislation Amendment Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Social Services

Background

This bill seeks to amend legislation relating to aged care and includes:

- consequential amendments to the *Aged Care Act 1997* to remove the workforce supplement from the list of primary supplements that may be provided by the Subsidy Principles;
- amendments to the *Healthcare Identifiers Act 2010* to support the implementation of a centralised online information portal known as My Aged Care; and
- minor clarifying and technical amendments arising from recent changes to aged care.

The committee has no comment on this bill.

Australian Education Amendment Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Education

Background

This bill seeks to amend the *Australian Education Act 2013* to:

- allow payment of additional funding in 2014 to schools with large numbers of Indigenous boarding students from remote areas to meet an identified resourcing shortfall;
- ensure transitional funding to students with disabilities and to other students in some independent special schools and special assistance schools; and
- corrects a number of errors and omissions in the Act.

Retrospective commencement

Schedule 2

The explanatory memorandum explains that the amendments in Schedule 2 will ‘correct errors and omissions that have become apparent since the introduction of the Act’ and will ‘ensure significant errors in relation to the calculation of Commonwealth funding entitlements for certain approved authorities are corrected’ (at p. 14). The items in this schedule will commence retrospectively, from 1 January 2014.

The explanatory memorandum (at p. 14) argues that retrospective commencement is ‘necessary to ensure that the correct Commonwealth funding entitlements for 2014 are calculated for approved authorities for participating schools, including by ensuring that:

- the Commonwealth is only required to pay its share of the total public funding for approved authorities for participating schools that receive funding above the schooling resource standard
- the correct pro-rating of Commonwealth funding entitlements can be calculated for, as an example, approved authorities that have had one or

more participating schools cease to provide primary or secondary education during 2014

- participating schools that move between approved authorities during 2014 are not financially advantaged or disadvantaged.’

The explanatory memorandum explains in detail the nature of the errors and omissions that the bill seeks to correct and the impact that the proposed changes will have on the complex funding arrangements under the *Australian Education Act 2013*. Although the proposed retrospectivity of the changes does not appear to produce unfairness, in light of the manifest complexity of the funding arrangements, **the committee seeks the Minister's advice as to whether the proposed amendments may produce unfair outcomes for approved authorities or participating schools, who may have reasonably relied on the existing provisions of the legislation.**

Pending the Minister'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.

Delegation of legislative power

Schedule 1, item 19, proposed section 69A

This item will insert a new section into the Act, the purpose of which is to provide for the establishment of funding programs for schools by regulation under the Act. The explanatory memorandum notes (at p. 9) that the Government intends only to introduce one such program for 2014, the Indigenous Boarding Initiative. It is also noted that the regulations facilitating this program will be made before the end of 2014.

The explanatory memorandum also notes that parliamentary oversight of funding programs established under the proposed new section 69A will be facilitated, as various subsections of section 69A require the details of the program to be determined by the regulations. Nevertheless, there is no explanation as to why these additional funding requirements, including eligibility requirements, to be prescribed for the purposes of subsection 69A(1), are to be determined by regulations. As there is no justification as to why these significant issues cannot be dealt with in the primary legislation, **the committee seeks the Minister's further advice as to the justification for the proposed approach.**

Pending the Minister'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.

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014

Introduced into the House of Representatives on 24 September 2014

Portfolio: Justice

Background

This bill seeks to amend the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Act 2011* to alter the current arrangement for industry contribution and is capped at twice the budgeted appropriation for AUSTRAC in a financial year.

The committee has no comment on this bill.

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014

Introduced into the House of Representatives on 24 September 2014

Portfolio: Justice

Background

This bill seeks to amend the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Act 2011* to provide for:

- operational arrangements to administer the industry contribution; and
- a requirement for an independent review of the operation of the levy as soon as possible after the fourth anniversary of the commencement of the Collection Act.

The committee has no comment on this bill.

Automotive Transformation Scheme Amendment Bill 2014

Introduced into the House of Representatives on 24 September 2014

Portfolio: Industry

Background

This bill seeks to amend the *Automotive Transformation Scheme Act 2009* to:

- reduce the Automotive Transformation Scheme (ATS) over the financial years 2014-15 to 2017-18; and
- terminate the ATS on 1 January 2018.

The committee has no comment on this bill.

Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Social Services

Background

This bill seeks to amend the *Health and Other Services (Compensation) Care Charges Act 1995* to remove an anomaly by bringing the capacity to recover past care costs for home care into line with the existing arrangements for residential care.

The committee has no comment on this bill.

Migration Amendment (Humanitarian Visa Intake) Bill 2014

Introduced into the Senate on 25 September 2014

By: Senator Hanson-Young

Background

This bill seeks to amend the *Migration Act 1958* to ensure that the Minister of the day is unable to grant fewer than 20,000 humanitarian visas per financial year.

The committee has no comment on this bill.

National Water Commission (Abolition) Bill 2014

Introduced into the Senate on 25 September 2014

Portfolio: Environment

Background

This bill seeks to abolish the National Water Commission with effect from 1 January 2015.

The committee has no comment on this bill.

Private Health Insurance Amendment Bill (No. 1) Bill 2014

Introduced into the House of Representatives on 24 September 2014

Portfolio: Health

Background

This bill seeks to amend the *Private Health Insurance Act 2007* to pause the income thresholds which determine the tiers for the Medicare levy surcharge and the Australian Government Rebate on private health insurance at 2014-15 rates for three years.

The committee has no comment on this bill.

Racial Discrimination Amendment Bill 2014

Introduced into the Senate on 25 September 2014

By: Senators Day, Bernardi, Leyonhjelm and Smith

Background

This bill seeks to amend paragraph 18C(1)(a) of the *Racial Discrimination Act 1975* to omit the words "offend" and "insult".

The committee has no comment on this bill.

Rural Research and Development Legislation Amendment Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Agriculture

Background

This bill seeks to provide for cost recovery of membership fees to international commodity organisations and regional fisheries management organisations from the matching amounts paid to rural research and development corporations.

The committee has no comment on this bill.

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Introduced into the House of Representatives on 25 September 2014

Portfolio: Social Services

Background

This bill seeks to amend the *Social Security (Administration) Act 1999* and the *Social Security Act 1991* to:

- suspend income support payment for failing to attend a regular appointment with an employment provider without a reasonable excuse from 1 July 2015;
- allow job seekers who are 55 years or older and have a full time mutual obligation requirement to meet that requirement by undertaking part-time voluntary work or paid work; and
- allow cohorts of job seekers who are specified in a legislative instrument to be precluded from these provisions.

Breadth of discretionary power

Schedule 1, items 4, 5 and 6

These items propose amendments to give effect to a purpose of this bill to provide that, from 1 January 2015, where a job seeker's payment is suspended following a failure to attend an appointment it would not be restored until the job seeker actually attends (as opposed to indicates an intention to attend) their next appointment. On attendance, the job seeker would receive full back pay.

The explanatory memorandum (at p. 12) notes that the power to issue 'reconnection requirements' has been delegated to employment providers so that they, not the Department of Human Services, can directly arrange a suitable time with the job seeker to enable the job seeker to attend an appointment with the result of reinstating their entitlement. As further noted, however, 'in some cases it may not be possible for a job seeker to be issued with a reconnection appointment promptly, for example because an

employment provider is not available for an appointment'. In relation to these problems, the explanatory memorandum points to the existing power of the Secretary (which would be unchanged by the bill), under paragraph 42SA(2)(b), to reinstate payment at an earlier date where this is deemed appropriate.

The committee notes that the power to issue reconnection requirements and schedule appointments is held by employment service providers and as such, the Department will not have direct control over their administration. Furthermore, given the changes are justified by reference to the fact that job seekers will have the practical means to remedy failures which result in the suspension of their entitlement, **the committee seeks the Minister's advice as to whether consideration has been given to an amendment which would require (rather than enable) the Secretary to reinstate payment when a job seeker is unable to be issued with a reconnection appointment within two business days from the date the person contacted their employment provider.**

Pending the Minister's reply, 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.

Breadth of discretionary power Schedule 1, item 8

A similar issue arises in relation to this item. The explanatory memorandum (at p. 14) explains the effect of this item is that more of a person's payment may be withheld than is currently the case and thus that there is 'a greater financial incentive for job seekers to re-engage quickly with their employment provider'. The explanatory memorandum adds that 'it is intended that in practice flexible arrangements would be put in place to ensure that these amendments would not result in a job seeker experiencing any undue delay in receiving payment.' Given the potentially significant impact of this item, **the committee seeks clarification from the Minister about these 'flexible arrangements' (including whether the Department or employment service providers will be responsible for their implementation) and also asks whether consideration has been given to including protections against undue delay in the legislation.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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.

Merits review

Items 10 and 11

These items have the effect that internal and merits review are not available for decisions under subsections 42SA(1) or (2A).

The justification provided for this approach is as follows:

[I]n practice it would be appreciably easier for a person to attend a reconnection appointment with their employment provider than seek review of the decision to suspend their payment. For this reason, the Bill would also mean that a decision to suspend a person's payment for certain failures would not be subject to review, either by the Secretary or the Social Security Appeals Tribunal' (explanatory memorandum, p. 6).

Noting the above concerns raised about ensuring that job seekers are in practice able to arrange reconnection appointments promptly, **the committee draws the issue to the attention of Senators and leaves the appropriateness of not providing for merits review of these decisions to 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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Delegation of legislative power

Items 13-19

The explanatory memorandum (at p. 16) explains that these items would make amendments in relation to the circumstances in which relief would be available for certain job seekers from the activity test (for people on newstart

allowance and special benefit) or suitable paid work requirements (for people on parenting payment with participation requirements).

Currently, job seekers on newstart allowance or special benefit who are aged 55 or over are taken to satisfy the activity test if they are engaged in at least 30 hours per fortnight of approved voluntary work, paid work (including self-employment), or a combination of these in a fortnight – unless the Secretary considers that they should not be exempt from the activity test due to the opportunities for employment available to the person. There are also, currently, similar provisions regarding parenting payment recipients aged 55 or over with participation requirements.

The amendments will empower the Secretary to make a legislative instrument that specifies a class of persons to whom these provisions (i.e. those which provide that in certain circumstance job seekers aged over 55 are taken to satisfy the activity test) do not apply.

The explanatory memorandum (at p. 8) indicates that the government's present intention is that an instrument will be made that will specify job seekers aged 55-59 who are receiving services from Job Services Australia for the purpose of this provision. It appears that the result of implementing this intention may, in practical effect, be that the age threshold for exempting older job seekers from requirements associated with the activity test in limited circumstances will be raised from 55 (as set in the primary legislation) to 60 (as a result of the legislative instrument).

This change is of considerable significance in terms of the operation of the legislation and, in general the committee would therefore expect that it be achieved through an amendment to the primary legislation rather than through a legislative instrument.

The explanatory memorandum suggests that it is appropriate that the policy change be made through a legislative instrument on the basis that this will 'provide greater flexibility to take account of continuing adjustments in Government policy and the use of trial programmes to test new approaches' (at p. 17). Further, it is suggested that the use of a legislative instrument will also 'avoid unnecessarily adding to the length or complexity of the SS Act' and that the 'approach is consistent with the SS Act as a whole, which makes provision for many legislative instruments'.

The committee considers that none of these factors provide strong reasons for implementing an important policy decision (i.e. raising the age requirement for a significant concession to older job seekers) through delegated legislation. The rationale for the approach based on flexibility and the possible use of trial programs is not developed in the explanatory memorandum. The nature of the policy change being contemplated would not, on its face, appear to require lengthy or complex amendments. Finally, although social security legislation does authorise the making of many legislative instruments, it is to be hoped that in most instances significant policy questions will be settled in the primary legislation by the Parliament.

For the above reasons, the committee requests further advice from the Minister as to why such a potentially significant policy change could not be included in primary, rather than secondary, legislation.

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

COMMENTARY ON AMENDMENTS TO BILLS

Business Services Wage Assessment Tool Payment Scheme Bill 2014

[Digest 6/14 – Report 10/14]

On 22 September 2014 the Minister for Veterans' Affairs (Senator Ronaldson) tabled an addendum to the explanatory memorandum.

The committee thanks the Minister for tabling this addendum which adds information to the explanatory memorandum as requested by the committee in its *Tenth Report of 2014*.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

[Digest 7/14 – Report 10/14]

On 22 September 2014 the Minister for Veterans' Affairs (Senator Ronaldson) tabled an addendum to the explanatory memorandum.

The committee thanks the Minister for tabling this addendum which adds information to the explanatory memorandum as requested by the committee in its *Tenth 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 43rd Parliament since the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills

Nil