

Senate Standing Committee
for the
Scrutiny of Bills

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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 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.

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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.

Social Security and Other Legislation Amendment (Caring for Single Parents) Bill 2014

Introduced into the Senate on 17 November 2014

By: Senator Siewert

This bill is substantially similar to a bill introduced in the previous Parliament, about which the committee had no comment.

Background

This bill amends the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to enable single parents to access the parenting payment (single) until their youngest child has turned 16 years of age.

The bill also amends the *Fair Work Act 2009* to provide for an enforceable right to request flexible work arrangements for people with caring responsibilities, including single parents.

The committee has no comment on this bill.

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Introduced into the House of Representatives on 30 October 2014

Portfolio: Attorney-General

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications Act 1997* to introduce a statutory obligation for telecommunications service providers to retain for two years defined telecommunications data.

Inappropriate delegation of legislative power Insufficiently defined administrative powers Schedule 1, item 1, proposed section 187A

The purpose of the amendments in schedule 1 is to require providers of telecommunications services to retain particular data for all communications for a period of two years to facilitate access being granted to that data by specified agencies.

Subsection 187A(1) defines the data that must be retained by a telecommunication service provider as ‘(a) information of a kind prescribed by the regulations’ or ‘(b) documents containing information of that kind’ relating to any communication carried by means of the service. Subsection 187A(2) provides that the kinds of information prescribed for the purposes of paragraph 187A(1)(a) must fall into one or more of a number of categories:

- the subscriber, accounts, telecommunications devices and other relevant services relating to a relevant service (proposed paragraph 187A(2)(a));
- the source of a communication (proposed paragraph 187A(2)(b));
- the destination of a communication (proposed paragraph 187A(2)(c));
- the date, time and duration of a communication (proposed paragraph 187A(2)(d));
- the type of communication (proposed paragraph 187A(2)(e)); and
- the location of the line, equipment or telecommunications device (proposed paragraph 187A(2)(f)).

Subsection 187A(3) sets out the services to which the data retention obligations will apply. Significantly, paragraph 187A(3)(b)(iii) enables the regulations to prescribe services, beyond those specified in subsection 187A(3), to which the obligations will apply. That is, there will be a regulation making-power that can be used to expand the operation of the scheme.

Finally, it should be noted that subsection 187A(4) provides that service providers cannot be required to collect and retain the ‘contents or substance of a communication’ or information that would reveal web browsing history (explanatory memorandum, p. 44).

Definition of the scope of data

Two scrutiny concerns arise in relation to the definition of the scope of the data which must be retained under the scheme.

First, the bill does not itself contain a clear definition of the specific types of data that are covered by the data retention scheme. The types of data that must be collected, therefore, need to be specified by a regulation made pursuant to paragraph 187A(1)(a). The explanatory memorandum justifies the delegation of legislative power on the basis that this is necessary to ensure that data retention obligations remain ‘sufficiently flexible to adapt to rapid and significant future changes in communications technology’ (statement of compatibility, p. 7; see also the explanatory memorandum, p. 36).

In light of this, the committee does not consider paragraph 187A(1)(a) to be an appropriate delegation of legislative power. As noted by the Parliamentary Joint Committee on Human Rights (PJCHR) in its *Fifteenth Report of the 44th Parliament* (p. 12), a scheme which requires that data be collected on every customer ‘just in case that data is needed for law enforcement purposes is very intrusive of privacy’. Given this, it seems appropriate for Parliament (not the executive) to take responsibility for ensuring that the scheme is adequately responsive to technological change in the telecommunications industry. Although the committee accepts that regulation-making powers are in some cases justified by the necessity to build in scope for flexible regulatory responses to changing circumstances, whether this scheme—which is highly intrusive of individual privacy—should be applied in a new technological context is a matter which will raise significant questions of policy. The committee generally expects that significant matters will be included in primary legislation—they are not appropriately delegated by the Parliament to the executive government.

A related concern is that the category of services that will be subject to the data retention obligations can be expanded by regulation, pursuant to subparagraph 187A(3)(b)(iii). The explanatory memorandum suggests that this power to expand the application of the obligations through delegated legislation is appropriate on the basis that:

The telecommunications industry is highly innovative and increasingly converged. Sophisticated criminals and persons engaged in activities prejudicial to security are frequently early adopters of communications technologies that they perceive will assist them to evade lawful investigations. As such, a regulation-making power is required to ensure the data retention regime is able to remain up-to-date with rapidly changes to communications technologies, business practices, and law enforcement and national security threat environments (explanatory memorandum, p. 43).

Again, although the committee accepts that regulation-making powers are in some cases justified by the necessity to build in scope for flexible regulatory responses to changing circumstances, how this scheme—which is highly intrusive of individual privacy—should be applied in a new technological context is a matter which will raise significant questions of policy that are not appropriately delegated by the Parliament to the executive government.

For the above reasons, the committee considers paragraph 187A(1)(a) and subparagraph 187A(3)(b)(iii) to inappropriately delegate legislative power.

In light of the above comments, the committee recommends that consideration be given to amending the bill to provide that these important matters are dealt with in the primary legislation rather than allowing for expansion of the scope of obligations by delegated legislation.

If the bill is not so amended, the committee seeks the Attorney-General's advice as to the rationale for the proposed approach in light of the above comments, including more detailed information about the appropriateness of this delegation of power and whether the disallowance process can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*).**

Pending the Attorney-General'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.

Second, although the bill excludes 'content' from the operation of the scheme (subsection 187A(4)), the bill does not clearly define what constitutes the 'content' of a communication for the purposes of the data retention scheme. For this reason there is a real risk that personal rights and liberties will be unduly dependent on insufficiently defined administrative powers.

The committee therefore recommends that consideration be given to amending the bill to provide a clear definition of 'content' in the primary legislation. If the bill is not so amended, the committee seeks the Attorney-General's advice as to why the bill should not be amended to include a clear definition of 'content' so the scope of the provision, and the extent of its impact on personal rights and liberties, can be assessed.

Pending the Attorney-General'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.

Inappropriate delegation of legislative power—expanding the meaning of 'criminal law-enforcement agency' and 'enforcement agency'

Schedule 2, item 3, proposed section 110A

Schedule 2, item 4, proposed section 176A

Proposed subsection 110A(3) empowers the minister to declare, by legislative instrument, further authorities or bodies to be a 'criminal enforcement agency' thereby enabling agencies beyond those listed in subsection 110A(1) to access metadata under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). Proposed subsection 176A(3) similarly empowers the minister to expand the meaning of 'enforcement agency'.

Before making a declaration to expand the meanings of 'criminal law-enforcement agency' and 'enforcement agency', the minister must consider a number of listed factors, including:

- whether the agency undertakes investigative or public protection responsibilities which would necessitate access to data;
- whether the agency has processes and procedures that would satisfy the minister that the information accessed would be used in a manner which seeks to minimise the privacy impacts on the persons to whom it relates or is of relevance; and
- whether the declaration would be in the public interest.

The statement of compatibility suggests that the ‘ministerial declaration scheme reinforces the right to privacy in that it ensures that enforcement agency access to telecommunications data is strictly circumscribed and subject to ministerial scrutiny’ (at p. 21).

However, given the highly intrusive nature of the scheme, it may be considered that any expansion of the agencies that can access telecommunications data should be determined by Parliament not legislative instrument. **In light of these observations, the committee seeks further advice from the Attorney-General to explain why the number of agencies who may access data under the scheme should be able to be enlarged through ministerial declaration, rather than including this important measure in primary legislation.**

If the proposed approach is to be retained, the committee seeks the Attorney-General’s advice as to whether the disallowance process can be amended to provide for increased Parliamentary oversight. The committee notes that this could be achieved by:

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*).**

Pending the Attorney-General’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.

Undue trespass on personal rights and liberties—abrogation of privilege against self-incrimination
Schedule 3, item 7, proposed section 186D

In light of the detailed explanation (explanatory memorandum, pp 88–90) for the abrogation of the privilege against self-incrimination in relation to the Ombudsman’s oversight of the operation of the data retention and access scheme, the committee makes no further comment on this section of the bill.

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

Trespass on personal rights and liberties
Various

The committee notes the comments the Parliamentary Joint Committee on Human Rights (PJCHR) made about this bill in its *Fifteenth Report of the 44th Parliament* and its continuing consideration of this issue. Some of these issues are also of relevance to the Scrutiny of Bills Committee’s term of reference. The Scrutiny of Bills Committee will continue to monitor these matters and comment as appropriate. In particular the committee notes the following comments by the PJCHR:

Two year retention period

- Schedule 1 would require data retention for a period of two years. The statement of compatibility justifies the period of retention on the basis that law enforcement and national security agencies ‘advise that a data retention period of two years is appropriate to support critical investigative capabilities’ (explanatory memorandum, p. 19). The PJCHR has sought advice from the Attorney-General as to whether the two year retention period is necessary and proportionate in pursuit of a legitimate objective (PJCHR, *Fifteenth Report of the 44th Parliament*, p. 15).

Limiting the disclosure of retained data

- The PJCHR noted that there appears to be no significant limits on the type of investigation to which a valid disclosure authorisation for existing data may apply—i.e. there is no requirement that the data

disclosure be related to a serious crime. The PJCHR therefore recommended that the bill, so as to avoid the disproportionate limitation on the right to privacy that would result from disclosing telecommunications data for the investigation of any offence, be amended to limit disclosure authorisation for existing data to where it is ‘necessary’ for the investigation of specified serious crimes, or categories of serious crimes (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraph 1.49).

- Insufficient safeguards to protect against data that is being disclosed for an authorised purpose to be used for unrelated purposes—the PJCHR recommended that the bill be amended to restrict access to retained data on defined objective grounds (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraph 1.51).
- Obligations of professional secrecy e.g. legal professional privilege—the PJCHR has sought the advice of the Attorney General as to whether retained data could, in any circumstances, impact on legal professional privilege, and if so, how this is proportionate with the right to privacy (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraph 1.54).

Oversight and accountability

- Mechanisms for prior review of warrant decisions—the PJCHR noted that the proposed oversight mechanisms in the bill are directed at reviewing access powers after they have been exercised. However, the statement of compatibility does not address the question of why access to metadata under the scheme should not be subject to prior review through a warrant system, as is the case for access to other forms of information under the TIA Act. The PJCHR therefore recommended that the bill be amended to provide that access to retained data be granted only on the basis of a warrant approved by a court or independent administrative tribunal, taking into account the necessity of access for the purpose of preventing or detecting serious crime (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraphs 1.55–1.59).
- Oversight of prior review—the PJCHR considered that there should also be close oversight of the above recommended warrant process for access to retained metadata to ensure impartial assessment of the

content and sufficiency of a warrant application (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraphs 1.60–1.61).

Right to freedom of opinion and expression and right to an effective remedy

- The PJCHR noted that under the proposed data retention scheme data would be retained and could subsequently be used without the user or individual ever being informed. The PJCHR stated that this may have a ‘chilling’ effect on people’s freedom and willingness to communicate via telecommunications services because undisclosed retention and use of metadata could lead people to ‘self-censor’ their views expressed via telecommunication services. The PJCHR therefore recommended that consideration be given to amending the proposed scheme to provide a mechanism to guarantee that access to data is sufficiently circumscribed by, for example:
 - ensuring that individuals are notified when their telecommunications data is subject to an application for authorisation for access or once it has been accessed (noting that there may be circumstances where delayed notification would be appropriate, such as in the context of investigating a serious crime); and
 - ensuring that there is a process to allow individuals to challenge such access (noting that exemptions may need to be available for continuing investigations of, for example, a serious crime). (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraphs 1.70–1.74)
- The PJCHR also noted that it would be impossible for an individual to seek redress for breach of their right to privacy if they did not know that data pertaining to them had been subject to an access authorisation. The PJCHR has therefore requested the Attorney-General’s advice in relation to this matter. (PJCHR, *Fifteenth Report of the 44th Parliament*, paragraphs 1.75–1.77)

COMMENTARY ON AMENDMENTS TO BILLS

Carbon Farming Initiative Amendment Bill 2014

[Digest 7/14 – Reports 9, 10 and 11/14]

On 30 October 2014 the Senate agreed to seven Government, 17 Palmer United Party and eight Independent (Xenophon) amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum and the bill was read a third time.

Xenophon amendment (2) on sheet 7587, section 22XF of the National Greenhouse and Energy Reporting Act 2007

This new section creates a duty on the responsible emitter for a facility to ensure that an ‘excess emissions situation’ does not exist. Paragraphs 22XF(1)(e) and (f) create a civil penalty of up to ‘one-fifth of the prescribed number of penalty units’ for an individual and up to ‘the prescribed number of penalty units’ otherwise. Subsection 22XF(2) provides that ‘prescribed number’ for this purpose ‘means the number prescribed by the regulation’.

While subsection 22XF(3) provides that the minister must have regard to ‘the principle that a responsible emitter must not be allowed to benefit from non-compliance, having regard to the financial advantage the responsible emitter could reasonably be expected to derive from an excess emissions situation’ there appears to be no other limit on the exercise of this regulation-making power.

The *Guide to framing Commonwealth offences, infringement notices and enforcement powers* provides that regulations should not be authorised to impose fines exceeding 50 penalty units for an individual or 250 penalty units for a body corporate (pp 44–45). This principle is to ensure that there is the opportunity for full Parliamentary scrutiny of more serious offences and higher level penalties and is therefore equally relevant to the level of penalty for civil penalties.

In this case, the explanatory notes to the amendments do not provide any detailed rationale for the approach. **The committee recognises that this provision originated as a non-government amendment, however as it will now form part of the Act the committee seeks the minister’s advice as to the rationale for providing for the level of penalty in delegated legislation**

rather than in the primary legislation. In particular, the committee seeks advice in relation to:

- whether consideration has been given to providing for the number of penalty units that may be prescribed under the provision in the primary legislation; and
- if the number of penalty units is not to be determined in the primary legislation—the committee is interested in how the regulation-making power will be administered, for example, will any guidelines or policies ensure that the determination of the number of penalty units is conducted in a public and transparent manner (which would, in turn, assist in Parliamentary scrutiny of any relevant regulation)?

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 *[Digest 14/14 – Report 14/14]*

On 28 October 2014 the Senate agreed to 21 Government amendments, the Assistant Minister for Health (Senator Nash) tabled a replacement explanatory memorandum and the Attorney-General (Senator Brandis) tabled a supplementary explanatory memorandum. On 29 October 2014 the Senate agreed to 58 Government amendments and the bill was read a third time. On the same day the House of Representative also passed the bill.

The committee notes that the government amendments to this bill largely sought to implement recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

In the committee's previous comments on this bill the committee noted that several of the recommendations of the PJCIS, if implemented, would lessen the committee's scrutiny concerns in relation to the bill. The relevant recommendations of the PJCIS related to:

- *Authorisation of coercive powers:* The Scrutiny committee's consistent preference is that the power to issue warrants to enter and search premises only be conferred upon judicial officers, however the original provision in the bill would have allowed members of the AAT (including a part-time senior member) to issue the warrants (see pp 787–789 of the committee's *14th Report of 2014*). These amendments

limit the categories of AAT members who can be authorised to issue a delayed notification search warrant to the Deputy President and full-time senior members (who have been enrolled as a legal practitioner for at least five years). [PJCIS recommendation 1, government amendments 11–13]

- *Breadth of offence provision:* The Scrutiny committee noted that the offence for unauthorised disclosure of information relating to a delayed notification search warrant did not include an exception relating to the disclosure of misconduct (see pp 790–791 of the committee’s *14th Report of 2014*). New paragraph 3ZZHA(2)(da) inserted by this amendment provides for an exception to the offence for the disclosure of information by anyone to the Ombudsman. [PJCIS recommendation 3, government amendment 16]
- *Review and sunseting:* The Scrutiny committee noted that it would be appropriate for the new powers and the new ‘declared area’ offence introduced by the bill (given their potential to impact on personal rights and liberties) to be subject to review by the Independent National Security Legislation Monitor and the PJCIS. The committee also noted that a shortened sunset clause would be appropriate (see pp 776–779, 797–800 and 805–807 of the committee’s *14th Report of 2014*). These amendments largely implemented this recommendation, including by expanding the functions of the PJCIS and sunseting the relevant provisions on 7 September 2018. [PJCIS recommendations 13 and 20–21, governments amendments 6, 8–10, 26–27, 31–32, 40 and 50–51]
- *Broad scope of the new ‘declared area’ offence:* The Scrutiny committee commented about the broad scope of the new ‘declared area’ offence, including in relation to the fact that the offence applies despite any intentional wrongdoing and the ‘legitimate purpose’ exception is quite limited (pp 805–807 of the committee’s *14th Report of 2014*). These amendments removed a provision which provided for a declaration to be made over an entire country and provided for the PJCIS to conduct a review of each declaration before the end of the relevant disallowance period. [PJCIS recommendations 18–19, government amendments 41–42]

- *Delegation of administrative power to suspend a person's travel documents:* The Scrutiny committee noted that the original provision in the bill would have allowed the Minister to delegate (to 'an officer') the power to suspend a person's Australian travel documents under new section 22A (pp 753–756 of the committee's *14th Report of 2014*). This amendment limits this delegation by ensuring that the Minister can only delegate the power to the Secretary of the Department of the Foreign Affairs and Trade. [PJCIS recommendation 27, government amendment 5]
- *Broad discretionary power in relation to the cancellation of welfare payments:* The Scrutiny committee expressed concern that the decision to cancel welfare payments appeared to be based on discretionary judgments by ministers (pp 811–813 of the committee's *14th Report of 2014*). These amendments ensure that the Attorney-General must have regard to the extent that any welfare payments are being (or may be) used for a purpose that might prejudice national security, and the likely effect of welfare cancellation on the individual's dependants. [PJCIS recommendation 29, government amendments 55, 60 and 65]
- *Detention by Customs without notification:* The Scrutiny committee noted that the bill sought to increase the time that a person may be detained by Customs without anyone being notified of their detention, from 45 minutes to *four* hours (pp 819–820 of the committee's *14th Report of 2014*). These amendments instead increase the relevant timeframe from 45 minutes to *two* hours. [PJCIS recommendation 32, government amendments 68–69]
- *Ability to prescribe additional personal identifiers by regulation:* The Scrutiny committee noted that the sensitive nature of biometric information that may be collected and stored under this provision raised potentially significant policy questions and therefore it may be more appropriate to require that any additional 'personal identifiers' be added by primary legislation (pp 830–831 of the committee's *14th Report of 2014*). These amendments remove the ability to prescribe the collection of additional categories of biometric information by regulation. [PJCIS recommendation 35, government amendments 71–79]

The committee also notes that the revised explanatory memorandum included further explanatory detail in a number of areas as requested by this committee and the PJCIS. For example, in its *14th Report of 2014* the Scrutiny committee noted that the definition of ‘advocates’ for the purpose of the new offence of ‘advocating terrorism’ is broad and may therefore amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits (pp 795–797). Further detail in relation to this matter has been provided at pages 126–127 of the revised explanatory memorandum. This further explanation confirms that it is intended that the terms ‘have their ordinary meaning’ and that ‘it is important that [the relevant terms] be interpreted broadly to ensure a person who advocates terrorism does not escape punishment by relying on a narrow construction of the terms’ (p. 127 of the revised explanatory memorandum).

The Scrutiny committee also sought advice as to rationale for expanding the definition of ‘serious Commonwealth offence’ for the purposes of the Customs detention powers in section 219ZJB of the *Customs Act 1901* (pp 816–817 of the committee’s *14th Report of 2014*). Some further detail in relation to this matter was provided in the revised explanatory memorandum (at p. 198). This further information emphasised that the detention power is ‘only a temporary power’. It also confirmed that, in addition to being relevant to addressing national security threats, the ‘enhanced detention powers will also assist law enforcement agencies more generally in relation to the detection and investigation of serious Commonwealth offences’.

The committee welcomes the implementation of the above recommendations of the PJCIS through these amendments to the bill and the explanatory memorandum. However, the new powers and offences introduced by the bill still have the potential to impact on personal rights and liberties. The committee therefore repeats its view about the importance of ensuring that the new powers and offences are subject to thorough public scrutiny prior to any proposed extension of the sunset clauses or other amendments that will broaden their scope.

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 44th Parliament.

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

Nil

Other relevant appropriation clauses in bills

Nil