

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

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## 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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- **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.

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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.

## **Australian Border Force Bill 2015**

Introduced into the House of Representatives on 25 February 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill provides the legislative framework for the establishment of the Australian Border Force, including the role of the ABF Commission and support management, from 1 July 2015.

### **Broad discretionary power**

#### **Availability of review**

#### **Clauses 25 and 54**

Pursuant to subclause 25(1) the Australian Border Force Commissioner may delegate his or her functions or powers under a law of the Commonwealth, including to Immigration and Border Protection (IBP) workers who are private contractors or consultants. As such some workers exercising statutory powers may not be classified as ‘officers of the Commonwealth’. As such it is currently unclear whether the decisions of these workers will be reviewable under the constitutional regime for judicial review deriving from s 75(v) of the Constitution. This is because the High Court has not had to definitively decide whether the definition of ‘officer of the Commonwealth’ would include private contractors and consultants. Although there is an argument that all IBP workers, including contractors, should be considered to be officers of the Commonwealth (given that they are subject to the Commissioner’s directions under clause 26) the committee is concerned that the bill does not make clear whether judicial review would be available.

In light of this situation, the committee is interested to understand whether it is intended that both ADJR Act *and* subsection 75(v) Constitutional review (available also through section 39B of the Judiciary Act) will be available for all decisions that might be made by contractors and consultants. While it is expected that the ADJR Act would presumptively apply so long as the exercise of power is considered to have a statutory source, and there is a strong argument (albeit no certainty) about judicial review under s75(v), the explanatory memorandum does not confirm this.

The committee notes the inclusion of subsection 25(7) which allows a function or power to be taken to have been performed or exercised by the ABF Commissioner. However, the explanatory memorandum does not indicate whether this is designed to address the review situation outlined above. In addition, it seems possible that subsection 25(7), which currently applies only to delegations under subsection (4), should also apply to delegations made directly to an IBP worker directly from the Australian Border Force Commissioner under subsection 25(1).

Clause 54 is effectively an identical provision dealing with delegation by the Comptroller-General of Customs, which gives rise to the same issues.

**The committee seeks the Minister's advice about the availability of review in relation to both of these clauses, and whether:**

- **subsection 25(7) should also apply to subsection 25(1); and**
- **subsection 54(6) should also apply to subsection 54(1).**

*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 and unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

### **Delegation of legislative power—exemption from Legislative Instruments Act Subclauses 26(6) and 27(4)**

Pursuant to subclauses 26(1) and (2) the Australian Border Force Commissioner may give written directions to Immigration and Border Protection workers. Subclause 26(6) provides that such directions are not legislative instruments. The explanatory memorandum (at p. 31) contains a detailed justification for what 'may amount to a substantive exemption from the Legislative Instruments Act in some circumstances':

These directions will relate to the internal workings of the Department and not to the operation of the law. In particular, they will set out the standards required for workers to safely and effectively carry out their duties, and enhance the integrity of the workforce. The directions will be essentially internal in nature.

As the directions will specify internal procedures including requirements and procedures for ongoing investigations of misconduct, integrity and criminality, their publication could undermine the proper administration of justice and efforts to protect the public by compromising the ability of the ABF Commissioner and the Department to investigate allegations of misconduct, criminality and corruption. It is therefore not considered appropriate that the directions be subject to publication and possible disallowance and sunseting.

This approach is consistent with the exemption granted to orders made under section 38 of the AFP Act, which are exempt from the operation of the Legislative Instruments Act.

The same issue also arises in relation to subclause 27(4).

**In light of this detailed justification the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—privilege against self-incrimination**  
**Subclauses 26(8) and 55(10)**

Subclause 26(8) provides that if a direction that relates to the reporting of serious misconduct or criminal activity where that affects, or is likely to affect the operations, responsibilities or reputation of the Department (see subclause 26(4)) requires a person to give information, answer a question or produce a document, they will not be excused from doing so on the basis of the privilege against self-incrimination. The explanatory memorandum (at p. 30) states that it 'is important that the Department is able to act on and undertake further investigations in relation to information obtained under these powers'.

It should, however, be noted that there is a 'use' immunity in relation to information and documents obtained under these powers which means that the material cannot be used in evidence against the IBP worker in any proceedings (see subclause 26(9)), but can be used to investigate unlawful conduct by that person and third parties.

The committee's long-standing approach to the abrogation of the privilege against self-incrimination is that it is only justified in relation to serious offences and situations where it is considered absolutely necessary. The underlying purposes of removing the privilege appear to be to limit the risk of corruption within the ABF and to enhance government and public confidence in IBP workers.

The explanatory materials do not describe why it is not possible to include a derivative use immunity along with the use immunity. A derivative use immunity means that the self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person, but can be used to investigate third parties. The inclusion of a derivative use immunity thus further minimises the consequences of the loss of liberty associated with the abrogation of the privilege.

The same issue arises under subclause 55(10).

While the question of whether the purposes underlying the abrogation of the privilege against self-incrimination are appropriate may be left to the Senate as a whole, **the committee seeks the Minister's advice as to whether a derivative use immunity can also be included.**

*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.*

## **Trespass on personal rights and liberties**

### **Clause 30**

Clause 30 extends the date from which the resignation of an APS employee takes effect so any investigations into significant wrong-doing can be first completed. An extension of the date can be made in periods of up to 90 days and on more than one occasion (in specified circumstances). There is a threshold requirement that the decision-maker must 'reasonably believe' either that the employee has engaged in serious misconduct and the Secretary is considering terminating the employee's employment or that the findings of the investigation are not yet known.

The explanatory memorandum states (at p. 35) that:

The purpose of section 30, which is similar to section 30A of the AFP Act, is to address the circumstances where an APS employee is resigning in anticipation that their employment is likely to be terminated. In particular, this Part enables the Secretary and the ABF Commissioner to delay an employee's resignation in order to properly address incidences of serious misconduct, including corruption, through an investigation and subsequently to terminate an employee if serious misconduct is found to have occurred.

While this provision could significantly affect a person's personal rights and liberties, in light of the explanation provided **the committee draws the provision 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 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—important matters in rules Clauses 38 and 39**

Clause 38 provides for drug and alcohol tests and the provision of blood and body samples to be conducted in accordance with the 'rules'. Clause 39 provides that the rules may make provision in relation to a number of matters relating to alcohol and drug testing pursuant to clauses 34, 35 and 36 of the Bill.

The matters listed in clause 39, about which rules may be made, are of considerable significance. For example, the confidentiality and disclosure of test results and the keeping and destruction of records, are of considerable importance given that the rules for addressing these matters will clearly have an impact on privacy interests. In relation to some of the listed matters it is not obvious why it is impractical to deal with them in the primary legislation. **The committee therefore seeks the Minister's advice as to why it is appropriate for each of the matters to be dealt with in rules rather than incorporating these significant matters in the primary 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.*

**Trespass on personal rights and liberties—privacy**  
**Delegation of legislative power—important matters in rules**  
**Broad delegation**  
**Paragraph 44(4)(f)**

This paragraph provides that protected information, which may include personal information, can be disclosed to any person or body (in addition to those listed in paragraphs 44(4)(a)-(e)) prescribed in the rules. The explanatory memorandum emphasises that subclause 44(6) enables such disclosure to be subject to conditions imposed by the Secretary, but it does not explain *why* disclosure of protected personal information to persons or bodies, which may include non-government bodies such as advisory committees, peak bodies, industry representatives, commercial entities or community groups or community groups may be necessary. **The committee therefore seeks the Minister’s justification for the proposed approach, and if there is a sound justification for it, whether consideration can be given to providing legislative guidance or structure for the exercise of the power (such as relevant considerations, parameters etc).**

*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 and to delegate legislative powers inappropriately; and make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers in breach of principles 1(a)(i), 1(a)(ii) and 1(a)(iv) of the committee’s terms of reference.*

## Australian River Co. Limited Bill 2015

Introduced into the House of Representatives on 26 February 2015  
Portfolio: Finance

### Background

This bill provides for the transfer of the assets and any outstanding liabilities of the Australian River Co. to the Commonwealth in preparation for its voluntary deregistration under the *Corporations Act 2001*.

### **Trespass on personal rights and liberties—retrospectivity Delegation of legislative power—Henry VIII clause Clause 15**

Clause 15 is a rule making power which includes a Henry VIII clause (in which delegated legislation can override the terms of the primary act) and also provides that the rules may take effect from a date before the rules are registered under the *Legislative Instruments Act* (despite subsection 12(2) of that Act).

The explanatory memorandum contains a detailed rationale for the Henry VIII clause (at pp 7 and 8). However, the explanatory memorandum does not confirm whether any rules that would take effect retrospectively would adversely affect rights and obligations of affected persons. Given the nature of the bill it appears that retrospective rules are unlikely to have adverse consequences on rights and obligations, but the matter is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's advice about this matter.**

*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.*

## **Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Industry and Science

### **Background**

This bill amends the *Customs Act 1901* to:

- amend publication provisions for anti-dumping notices;
- consolidate lodgement provisions for anti-dumping applications and submissions;
- clarify the length of the investigation period in anti-dumping matters,
- clarify the cumulative assessment of injury and normal value provisions;
- clarify the calculation of the dumping margin and material injury determinations;
- clarify effective notice periods and the definition of a subsidy;
- amend provisions dealing with new exporters;
- clarify provisions regarding consideration of the lesser duty rule;
- implement a higher procedural and legal threshold for review to be undertaken by the Anti-Dumping Review Panel; and
- permit the Government to replace the statutory International Trade Remedies Forum with administrative business consultative arrangements.

*The committee has no comment on this bill.*

## **Customs and Other Legislation Amendment (Australian Border Force) Bill 2015**

Introduced into the House of Representatives on 25 February 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill will:

- repeal the *Customs Administration Act 1985*;
- amend the *Customs Act 1901* as a consequence of the repeal of the Customs Administration Act;
- amend other Acts associated with the administration of Customs matters;
- amend several other Commonwealth Acts that refer to the Australian Customs and Border Protection Service and the Chief Executive Officer of Customs;
- amend the *Migration Act 1958* to enable the Australian Border Force Commissioner to exercise certain powers under that Act; and
- make other amendments associated with the commencement of the Australian Border Force in the Department of Immigration and Border Protection on 1 July 2015.

*The committee has no comment on this bill.*

## **Customs Tariff (Anti-dumping) Amendment Bill 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Industry and Science

### **Background**

This bill amends the *Customs Tariff (Anti-Dumping) Act 1975* to:

- simplify publication provisions for anti-dumping notices;
- clarify provisions regarding consideration of the lesser duty rule; and
- clarify the operation of exemption provisions.

*The committee has no comment on this bill.*

## **Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015**

Introduced into the Senate on 4 March 2015

By: Senator Ludlam

A similar bill was introduced into the House of Representatives on 23 June 2014 by Mr Bandt, and into the Senate on 17 July 2014 by Senator Ludlam. The committee made no comment on the bills in *Alert Digest Nos. 8 and 10 of 2014*.

### **Background**

The bill seeks to amend the *Defence Act 1903* to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of Parliament.

*The committee has no comment on this bill.*

## Defence Trade Controls Amendment Bill 2015

Introduced into the House of Representatives on 26 February 2015

Portfolio: Defence

### Background

This bill amends the *Defence Trade Controls Act 2012* to:

- delay the commencement of offence provisions by 12 months to ensure that stakeholders have sufficient time to implement appropriate compliance and licensing measures;
- require approvals only for sensitive military publications and remove controls on dual-use publications;
- require permits only for brokering sensitive military items and remove controls on most dual-use brokering (subject to international obligations and national security interests); and
- provide for a review of the Act two years after the commencement of section 10 and for the Minister to table a copy of the review report in each House of Parliament.

### Trespass on personal rights and liberties—burden of proof Schedule 1, items 17, 21, 32 and 41

**Item 17** introduces a new exception to the offence for supplying DSGL technology from Australia to a place outside of Australia without a permit or in contravention of a condition of a permit. The exception applies where the supply is made orally and is not the provision of access to DSGL technology and is not for a military end-use in a Weapons of Mass Destruction program.

The statement of compatibility (at p. 44) justifies the placing of an evidential burden of proof on defendants in relation to this exception on the basis that circumstance related to an oral supply will be clearly, and may be solely, within the defendant's personal knowledge. It is further noted that 'the purpose of the supply, to whom the oral supply is made, and the intended use of the DSGL technology will also be clearly within the defendant's personal knowledge'.

**Item 21** introduces an additional exception to the offence for supplying where dual-use (Part 2) DSGL technology is being supplied and the supply is preparatory to the publication of the DSGL technology (and the publication has not been prohibited).

The statement of compatibility (at p. 44) justifies the placing of an evidential burden of proof on defendants in relation to this exception on the basis that ‘it is reasonable that a defendant relying on this exception be required to provide evidence that a supply is preparatory to a publication as this information will be solely within the knowledge of the defendant’. The statement of compatibility continues, ‘it would be more practical and less burdensome for the defendant to establish that the supply was preparatory to publication than it would be for the prosecution to establish that the supply was not preparatory to a publication’ (at p. 44).

The same approach has been taken in relation to items 32 and item 41 and the statement of compatibility sets out justifications for them, both at p. 44.

The justifications referred to above appear to be consistent with principles in the *Guide to Framing Commonwealth Offences*. However, other elements of the exceptions to these offences (such as item 41 (subsection 15(4)) appear not to be consistent with the Guide. **The committee therefore draws these provisions to the attention of Senators and leaves the question of whether each element appropriately places the burden of proof on the defendant to the Senate as a whole.**

*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.*

### **Delegation of legislative power—important matters in regulations Schedule 1, item 51, proposed section 25A**

This item adds a new provision which requires the Minister, a delegate of the Minister, or the Secretary, when deciding whether an activity will prejudice the security, defence or international relations of Australia, to have regard to criteria prescribed by regulations. Proposed paragraph 25A(b) provides that regard may also be had to ‘other matters that the Minister, delegate of the Minister or Secretary considers appropriate’.

The committee expects that important matters will be included in the primary legislation unless a strong justification is provided. **As the explanatory memorandum does not address this issue, the committee seeks the Minister's justification for specifying the criteria in regulations and not in the bill.**

*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.*

## Imported Food Warning Labels Bill 2015

Introduced into the House of Representatives on 2 March 2015

By: Mr Katter

### Background

This bill requires all imported foods to carry an imported food warning label.

### **Trespass on personal rights and liberties—level of penalties Items 6, 7 and 8**

The bill introduces a number of offences with significant pecuniary penalties (\$500,000 per offence) and there is no justification outlined in the explanatory memorandum. The committee expects that penalties will comply with the *Guide to framing Commonwealth Offences* or a strong justification be provided, or both, and **therefore seeks the Private Member's advice as to the explanation for the proposed level of penalties.**

*Pending the Private Member'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.*

## **International Aid (Promoting Gender Equality) Bill 2015**

Introduced into the Senate on 5 March 2015

By: Senator Rhiannon

### **Background**

This bill directs Commonwealth aid officials to consider the impact of any official development or humanitarian assistance in reducing gender inequality.

*The committee has no comment on this bill.*

## **Landholders' Right to Refuse (Gas and Coal) Bill 2015**

Introduced into the Senate on 4 March 2015

By: Senator Waters

A similar bill was introduced into the Senate on 9 December 2013 by Senator Waters. The committee discussed an aspect of the bill in *Alert Digest No.1 of 2014* in relation to a reversal of the burden of proof, but in light of the explanation provided made no further comment.

### **Background**

This bill provides landholders with the right to refuse gas and coal mining activities on food producing land and bans the practice of hydraulic fracturing for coal seam gas, shale gas and tight gas by constitutional corporations.

*The committee has no comment on this bill.*

## **Limitation of Liability for Maritime Claims Amendment Bill 2015**

Introduced into the House of Representatives on 26 February 2015  
Portfolio: Infrastructure and Regional Development

### **Background**

This bill amends the *Limitation of Liability for Maritime Claims Act 1989* to implement amendments to the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976 to increase the liability limits for ship owners and salvors for maritime claims relating to ship-sourced damage.

*The committee has no comment on this bill.*

## **Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015**

Introduced into the House of Representatives on 25 February 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Migration Act 1958* to:

- provide a framework for the use of reasonable force in specified circumstances by authorised officers within immigration detention facilities; and
- establish a complaints mechanism relating to the exercise of power to use reasonable force.

### **Undue trespass on personal rights and liberties**

#### **Rights unduly dependent upon insufficiently defined administrative powers**

#### **Schedule 1, item 5, proposed Division 7B**

The purpose of this bill is to empower an ‘authorised officer’ to use reasonable force in an immigration detention facility. The new powers are justified, in the explanatory memorandum, by reference to the need to provide safe and secure immigration detention facilities and a claimed increase in the number of ‘high risk detainees’ (p. 1).

Proposed subsection 197BA(1) provides that ‘an authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to: (a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or (b) maintain the good order, peace or security of an immigration detention facility.’ Proposed subsection 197BA(2) provides for a non-exhaustive list of examples of the circumstances in which reasonable force may be used, though as emphasised in the explanatory memorandum it is not intended that this limit the circumstances in which force is authorised pursuant to subsection 197BA(1).

In addition to the provisions authorising the use of reasonable force, the bill also provides that the Minister must determine, in writing, training and

qualification requirements which must be fulfilled prior to an officer being designated as an authorised officer (and thus an officer who may use reasonable force pursuant to section 197BA).

The bill also provides for a complaints mechanism in relation to the use of force under section 197BA. This mechanism allows for complaints to be made to the Secretary and requires that a complaint be in writing, signed by the complainant, and that the matter complained about be described (subsection 197BB(1) and (2)). The Secretary is required to provide appropriate assistance to a person who wishes to make a complaint (subsection 197BB(3)). The bill provides for the investigation of complaints (though the conduct of investigations is left to the Secretary's discretion). The Secretary may refer or transfer the complaint to the Ombudsman or transfer the complaint to the Commissioner of the AFP or the equivalent officer in a State or Territory police force (see sections 197BC and 197BE). The Secretary may decide not to investigate a complaint in a number of specified circumstances, including that the investigation or a further investigation is not justified in all the circumstances (see section 197BD). If the Secretary decides not to investigate the complaint or not to investigate it further, then written notice and reasons must be provided to the complainant (see subsection 197BD(2)). The complaints mechanism does 'not restrict a person from making a complaint directly to another agency, including the Ombudsman or a police force' (explanatory memorandum, p. 2).

The above provisions raise a number of issues which are of concern from a scrutiny perspective.

### ***Undue trespass on personal rights and liberties***

Clearly the use of force against persons is apt to limit a variety of important personal rights and liberties. In this respect it is noteworthy that the use of force is not limited to situations where such force is necessary to protect the life, health or safety of persons. In those situations, there is an argument that rights may need to be restricted by the use of force because important competing rights require protection. However, under the provisions of the bill use of force is also authorised to 'maintain the good order, peace or security of an immigration detention facility.'

The following two matters of concern may be raised about whether the trespass on personal rights authorised by subsection 197BA(1) may be

considered undue. The matters can be stated independently, though the significance should be considered cumulatively. It should also be noted that concerns (see below) about aspects of the bill which may be considered to make the rights unduly dependent upon insufficiently defined administrative powers and to make rights and liberties unduly dependent on non-reviewable decisions, are also relevant to a general consideration of whether the police-like powers proposed by the bill may be considered to unduly trespass on personal rights and liberties.

*Scope and extent of the powers*

The powers are framed in very broad terms. As the explanatory memorandum (at p. 20) indicates, employees of Immigration Detention Services Providers currently rely on common law powers to contain any disturbances within immigration detention facilities. Under these powers, force will only be considered to have been exercised lawfully if the exercise of force is objectively reasonable in the circumstances. Under the power proposed in subsection 197BA(1) the legality of the use of force would turn, rather, on an authorised officer's subjective personal assessment of the situation and what the officer believed, on reasonable grounds, was necessary force to either (a) protect the life, health or safety of any person in an immigration detention facility *or* (b) maintain the good order, peace or security of an immigration detention facility.

This constitutes a very significant increase in powers to employees of Immigration Detention Services Providers who are authorised officers. Indeed, the scope and extent of these powers is acknowledged in the statement of compatibility, where they are described accurately as 'police-like powers' (at p. 25). The statement of compatibility states that it is undesirable to rely on common law powers as the scope and extent of those powers is unclear (p. 23). On the other hand, it may be that this approach may encourage a cautious approach to the use of force and that this is appropriate. Certainty about the scope and extent of increased powers to use force cannot be regarded as beneficial unless the underlying case for the conferral of those powers has been established.

Although the explanatory materials do offer a general justification for the extension of police-like powers to 'authorised officers', the committee notes that a justification to confer police-like powers on persons who are not sworn police officers should include a more detailed explanation and supporting

arguments to establish the necessity and appropriateness of such powers. **The committee therefore seeks a more detailed justification for the necessity and appropriateness of these powers. In addition, the committee seeks the Minister's advice in relation to:**

- **whether there are other examples of administrative forms of detention where detaining officers are given police-like powers similar to those included in this bill; and**
- **how these powers compare to powers granted under legislation to use force to protect the life, health and safety of persons, and to maintain the order, peace or security of a prison.**

**The committee emphasises that its overriding scrutiny concern is to understand the justification for these extraordinary powers, which has not yet been adequately established by the material available.**

*Pending the Minister's reply, the committee draws Senators' attention to this matter, 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.*

*Principles to guide the exercise of force are not included in the bill*

Although subsection 197BA(2) provides a list of examples of circumstances in which reasonable force may be used by authorised officers, the list is non-exhaustive. Given the broad terms in which the primary power is conferred under subsection 197BA(1), the use of force may be authorised in a wide range of particular circumstances. Possibly in light of this, the explanatory memorandum emphasises that the Department of Immigration and Border Protection will 'have in place policies and procedures regarding the use of reasonable force in an immigration detention facility that provide safeguards to ensure:

- that use of reasonable force or restraint will be used only as a measure of last resort. Conflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable;
- reasonable force must only be used for the shortest amount of time possible;
- reasonable force must not include cruel, inhuman or degrading treatment; and

- reasonable force must not be used for the purposes of punishment (explanatory memorandum, p. 9).

The need for such policies and principles to guide the exercise of the reasonable force powers emphasises their breadth. Additionally, this need for the powers to be appropriately structured and confined by policies and procedures raises the question of why such principles should not be included in the legislation. **The committee therefore seeks the Minister’s advice as to the rationale for leaving these important matters to policy, rather than including them in the bill itself.**

*Pending the Minister’s reply, the committee draws Senators’ attention to this matter, 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.*

***Rights unduly dependent upon insufficiently defined administrative powers—conferral of ‘reasonable force’ powers on non-government employees***

An ‘authorised officer’, pursuant to section 197BA, is empowered to exercise reasonable force. Authorised officers need not, however, be police officers nor, indeed, employees of the Commonwealth (or a State or Territory) government. This raises an issue about which the committee routinely comments, namely, the appropriateness of the delegation of administrative powers. Inappropriately delegated powers—in particular where a delegation is overly broad—may be considered to make rights unduly dependent upon insufficiently defined administrative powers.

The committee has previously expressed its reticence about the conferral of coercive entry and search powers on non-government employees (see *Twelfth Report of 2006*, at p. 294). The *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011, at p. 74) explains that government employees are subject to a range of accountability mechanisms by virtue of their employment. Although the Ombudsman would have jurisdiction to investigate complaints about the use of force, not all accountability legislation would apply. For example the *Public Service Act 1999* would not be applicable, and the extent of any judicial review is unclear (this issue is discussed below).

The principle that coercive powers should generally only be conferred on government employees applies with even greater force to powers which authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information. The application of this basis for an exception to the general principle that coercive powers be limited to government employees appears to be of no application to the use of force for the purposes outlined in the bill.

In this context, it is submitted that the burden of justification to establish the appropriateness of the conferral of police-like powers on officers who are not government-employees should be exacting. The explanatory materials emphasise that the Minister is required to determine training and qualification requirements for authorised officers (subsection 197BA(7)), and that reasonable force can only be exercised by officers who satisfy these requirements (see subsection 197BA(6)). The explanatory memorandum states (p. 11):

It is expected that the standard of training and qualifications will be delivered by an accredited nationally registered training organisation. At this time, the qualification and training requirements that are likely to be determined by the Minister in writing for the purposes of new subsection 197BA(7) of the Migration Act include the Certificate Level II in Security Operations. This certificate course includes the units of competency, “CPPSEC2004B – Respond to security risk situations” and “CPPSEC2002A – Follow workplace safety procedures in the security industry”. These units cover the full range of knowledge and skills required for an authorised officer to use reasonable force in an immigration detention facility, including:

- identify security risk situation;
- respond to security risk situation;
- use negotiation techniques to defuse and resolve conflict;
- identify and comply with applicable legal and procedural requirements.

It is also intended that the authorised officer will be required to participate in a planned, structured, ongoing training and development programme and

submit evidence of having completed this training to the Department of Immigration and Border Protection. (see also the statement of compatibility at p. 24)

**Noting the above principle, the committee seeks further advice from the Minister about the sufficiency of these arrangements for ensuring that employees of a private company have adequate training and qualifications to exercise the police-like powers that will be conferred by this bill. In this respect, the committee notes the following issues:**

- **the extent to which the standard of training and qualifications that will be required falls short of those required of a sworn police officer is unclear;**
- **the training and qualification requirements will not be subject to Parliamentary scrutiny. Subsection 197BA(8) provides that the Minister’s determination of these requirements is not a legislative instrument. The explanatory memorandum states that this is not considered to be a substantive exemption from the *Legislative Instruments Act 2003*, though does not explain the basis for this conclusion. The explanatory memorandum also suggests that it would be inappropriate for these requirements to be included in the primary legislation or the regulations because ‘the qualifications and training change over time, as does the content of the training’ and it would therefore ‘not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect these updated training requirements’ (at p. 11). Even if these claims are accepted, the point remains that the training and qualification requirements for the exercise of police-like powers are determined by a Ministerial decision which is not subject to Parliamentary scrutiny. Given the justification for the conferral of use of force powers to non-government employees relies on the fact that such officers will be appropriately trained and qualified, the lack of parliamentary scrutiny of the training and qualification requirements is an issue of considerable concern to the committee (even if it is accepted that subsection 197BA(8) is not a substantive exemption from the *Legislative Instruments Act 2003*); and**
- **although the Minister is responsible for determining appropriate training and qualification requirements and authorised officers will be required to apply departmental policy in decision-making**

about the use reasonable force, it is notable that these forms of control over the performance of authorised officers exist alongside the employment relationship between officers and Immigration Detention Services Providers. The statement of compatibility notes that ‘clauses in the contract for the provision of detention services between the Commonwealth and the Immigration Detention Services Provider (IDSP) require the IDSP to apply rigorous governance mechanisms to all instances where reasonable force is used’ (p. 18). However, issues may arise about the alignment of policy and contractual requirements, as policy may be unilaterally changed by the government whereas contractual obligations are based on agreement between the parties to the contract. At a more practical level authorised officers may experience a conflict between adhering to government policy and instructions from their employer (‘private’ imperatives based on the employment relationship may not accommodate the public values of decision-making embodied in government policy). Such conflicts are contingent (i.e. they will not necessarily arise), but the possibility they may arise is illustrative of the general concern about the conferral of coercive powers upon non-government employees.

*Pending the Minister’s reply, the committee draws Senators’ attention to these matters, 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.*

### ***Rights and liberties unduly dependent on non-reviewable decisions***

The committee also raises two matters under principle 1(a)(iii) of the committee’s terms of reference relating to the making of rights, liberties or obligations unduly dependent upon non-reviewable decisions.

### ***The adequacy of the complaints mechanism***

The explanatory materials emphasise the statutory complaints mechanism established under section 197BB. The existence of this mechanism is part of the general justification for the conferral of the police-like powers and their conferral on persons who are neither police officers nor government employees.

The extent to which the complaints mechanism operates to make the exercise of force adequately accountable, however, needs to be considered in the context of the outcomes which may flow from a complaint being upheld. The Secretary may refer a complaint to the Ombudsman or the Commissioner of a police force for further investigation, but otherwise the bill leaves the consequences arising from the investigation of a complaint unspecified (in terms of practical remedies for complainants and disciplinary consequences for authorised officers and Immigration Detention Services Providers). **In these circumstances, the committee expresses the view that it is not clear why the complaints mechanism is aptly characterised as ‘an important accountability measure’** (statement of compatibility, p. 19).

*The availability of remedies for wrongful use of force*

*(a) Immunity from civil and criminal action*

Section 197BF provides that an authorised officer is immune from civil and criminal action if the power to use force was exercised in good faith. The statement of compatibility states that this provision ‘ensures that excessive and inappropriate force is not condoned and that authorised officers, who act in bad faith in the exercise of the new powers, will face appropriate charges’. The statement of compatibility continues, ‘in particular this would not prevent the institution of criminal proceedings against an authorised officer for the use of force which is not authorised by proposed section 197BA and is not in good faith’ (at pp 25–26).

Although it can be accepted that criminal and civil liability may attach to the unlawful exercise of force if it is exercised in bad faith, given the scope and extent of the powers conferred, the conferral of powers of officers who are not government employees, and the absence of any statutory remedies (as part of the complaints mechanism) for the wrongful use of force, it may be questioned whether immunity should be granted against prosecution and civil action merely on the basis of a requirement of ‘good faith’. In the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. Bad faith, so considered, is a very difficult allegation to prove. It is doubtful that showing that use of force was disproportionate (even grossly disproportionate) would amount to bad faith.

The committee has considered the argument that police-like powers should be afforded the same protection against criminal or civil action that police officers have, however further justification is required as authorised officers are not sworn police officers who are subject to additional lines of legal and political accountability.

For the above reasons, the committee notes that there is doubt as to whether the statutory complaints mechanism ameliorates the effect of proposed section 197BF.

**In light of the committee's comments above, the committee seeks a fuller explanation from the Minister as to the rationale for the proposed approach to the provision of immunity from civil and criminal action.**

*Pending the Minister's reply, the committee draws Senators' attention to these matters, 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.*

*(b) The availability of judicial review*

Proposed section 197BF, which provides for immunity from proceedings, is not intended to affect the High Court's jurisdiction under section 75 of the Constitution. The existence of the constitutionally entrenched minimum provision of judicial review provided for by section 75(v) of the Constitution may be thought to ameliorate the immunity from civil and criminal proceedings for the good faith use of force. Indeed the statement of compatibility emphasises that proposed 'section 197BF 'would also not prevent judicial review by the High Court under section 75(v) of the Constitution' and that 'aggrieved persons could...seek judicial review by the High Court under section 75(v) of the Constitution'.

However, it may be doubted whether judicial review under section 75(v) of the Constitution would be of practical utility for two reasons.

First, the High Court's jurisdiction is conditioned on an application being made in relation to a matter where prohibition, mandamus or injunction is sought against an *officer of the Commonwealth*. The orthodox view is that an officer of the Commonwealth is a person appointed by the Commonwealth (to

an identifiable office) who is paid by the Commonwealth for the performance of their functions and who is responsible to and removable by the Commonwealth from that office: *R v Murray and Cormie; ex parte the Commonwealth* (1916) 22 CLR 437 (for a recent application see *Broadbent v Medical Board of Queensland* (2011) 195 FCR 438). Although the High Court has raised the question of whether independent contractors may be covered by s 75(v) ‘in circumstances where some aspects of the exercise of statutory or executive authority of the Commonwealth has been ‘contracted out’’ (*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 345), this question has not been definitively decided. In these circumstances, the committee is unable to accept the assumption that the actions of an ‘authorised officer’ employed by an Immigration Detention Services Provider would necessarily be reviewable under section 75(v) of the Constitution.

Secondly, even if the High Court were to hold that its section 75(v) judicial review jurisdiction did cover the actions of these ‘authorised officers’, it is not clear in practical terms what the exercise of that jurisdiction would achieve for a victim of the use of force that exceeded an authorised officer’s powers to exercise reasonable force. As noted above, that jurisdiction provides for the issue of three named remedies: prohibition, mandamus and injunction.

**The committee therefore seeks further advice from the Minister:**

- **about the availability of judicial review (including whether review is—and if not, should be—available under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), given doubts about the availability of review under s 75(v) of the Constitution); and**
- **what judicial review remedies (under s 75(v) of the Constitution or the ADJR Act) could conceivably be sought in relation to the exercise of the use of reasonable force powers proposed by this bill and what practical utility those remedies would have for persons affected for any use of force which is not authorised by the powers.**

*Pending the Minister’s reply, the committee draws Senators’ attention to these matters, 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.*

## **Migration Amendment (Strengthening Biometrics Integrity) Bill 2015**

Introduced into the House of Representatives on 5 March 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Migration Act 1958* to:

- provide a single broad discretionary power to collect one or more personal identifiers from non-citizens and citizens at the border;
- enable flexibility as to the types of personal identifiers that may be required, the circumstances in which they may be collected, and the places where they may be collected;
- enable personal identifiers to be provided by an identification test or by another way specified by the minister or an officer;
- enable personal identifiers to be required either orally, in writing, or through an automated system;
- enable personal identifiers to be collected from minors and incapable persons without the need to obtain consent, or require the presence of a parent, guardian or independent person during the collection; and
- remove redundant provisions.

### **General comment**

#### **Broad discretionary power**

The central purpose of this bill is to significantly broaden the powers of the ‘the Minister or officer’ of the department to collect personal identifiers. Personal identifiers are currently defined in the subsection 5A(1) of the *Migration Act 1958* as:

- a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
- b) a measurement of a person’s height and weight;
- c) a photograph or other image of a person’s face and shoulders;
- d) an audio or a video recording of a person (other than a video recording under section 261AJ);
- e) an iris scan;

- f) a person's signature; and
- g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.

The collection of biometric personal identifiers is authorised under existing provision of the Migration Act:

- a) s 40 – circumstances for granting visas (applies to non-citizens);
- b) s 46 – valid visa application (applies to non-citizens);
- c) s 166 – persons entering to present certain evidence of identity etc. (applies to citizens and non-citizens);
- d) s 170 – certain persons to present evidence of identity (applies to citizens and non-citizens)
- e) s 175 – departing person to present certain evidence etc. (applies to citizens and non-citizens);
- f) s 188 – lawful non-citizen to give evidence of being so (applies to non-citizens and persons whom an officer reasonably suspects is a non-citizen);
- g) s 192 – detention of visa holders whose visas liable to cancellation (applies to non-citizens); and
- h) s 261AA – immigration detainees must provide personal identifiers (applies to non-citizens).

The key proposal in this bill, however, is to set the power for the collection of personal identifiers free from these specified circumstances and to introduce a broad discretionary power as the legal foundation for the collection of what is acknowledged to be sensitive personal information. Proposed subsection 257A(1) (item 34) provides that '[s]ubject to subsection (3), the Minister or an officer may, in writing or orally, require a person to provide one or more personal identifiers for the purposes of this Act or the regulations'.

Of concern, from a scrutiny perspective, is the enormous breadth of this discretionary power. Although proposed subsection 257A(2) does confirm that a number of specified purposes are included in the purposes referred to in subsection (1), it is clear by the terms of the provision that personal identifiers can be collected for any circumstance 'where a link to the purposes of the Migration Act or the Migration Regulations can be demonstrated' (statement

of compatibility, p. 35). Given the voluminous content of the Migration Act and regulations, this approach (of not requiring collection to be linked to limited, specified legitimate purposes) represents a fundamental change in approach to the collection of this particularly sensitive category of personal information.

There are a number of issues relevant to considering the justifiability of this change in approach:

*Breadth of discretion in this particular context*

Concern about broad discretionary powers is acute when the powers are apt to adversely affect the rights and interests of individuals in significant ways. On one level, it is correct to say that a 'person cannot be compelled to provide personal identifiers' (statement of compatibility, p. 37). However, given that significant consequences (including visa refusal, refusal to enter Australia, and immigration detention) may flow from refusal to provide a personal identifier, it is suggested that in many situations individuals will, in a practical sense, not be able to refuse collection requests. The statement of compatibility suggests (at p. 41) that the gravity of the risks of terrorism and the importance of an orderly migration system justify the conclusion that the increased collection powers are 'proportionate to the legitimate purpose of protecting the Australian community and the integrity of the Migration programme, with an acknowledged negative impact on privacy in circumstances where a certain amount of identity verification is expected weighing favourably against the significant benefits'.

Although it may be accepted that the right to privacy is not absolute and the purposes identified in the statement of compatibility are legitimate, it is suggested that this rationale does not justify the means through which this bill proposes to balance legitimate purposes against the adverse effects on personal rights. Given the sensitive nature of personal identifiers and their collection it is suggested that the purposes for which these identifiers need to be collected should be clearly specified in legislation. This approach has a significant advantage from a scrutiny perspective because it enables the Parliament to consider and evaluate the appropriateness of limitations placed on personal rights in the context of identified purposes which are claimed to justify their limitation.

In addition, although the statement of compatibility concludes that new section 257A is ‘compatible with Article 17 of the ICCPR’ this conclusion must depend on how the discretionary powers are exercised. Indeed the statement of compatibility acknowledges that the overall case for compatibility will depend on the policy and practice through which the legislation is implemented (this point is made in the context of considering the specific power in paragraph 257A(5)(b), but applies generally in relation to the how discretionary powers are implemented). The conclusion therefore is that although it may be that policy and practice guidelines will be developed such that the proposed new powers are administered in a way which is compatible with Australia’s international obligations, however, there is no guarantee that this will be so. This serves to emphasise the breadth of the power, especially in light of the voluminous Migration legislation and the sensitivity of the information being collected.

**From a scrutiny perspective, the committee therefore expresses the view that it remains unpersuaded that the purposes underlying the bill could not be achieved without the introduction of an extremely broad discretionary power. If there are broader purposes for which it is considered necessary to collect personal identifiers, it is suggested that a better approach from a scrutiny perspective is for these to be identified and appropriate, targeted amendments introduced. In light of these comments, the committee requests further advice from the Minister which gives more detailed consideration to the problem posed by the breadth of discretionary power in this context.**

*Pending the Minister’s reply, the committee draws Senators’ attention to these matters, 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.*

#### Insufficient safeguards

Proposed paragraph 257A(5)(a) provides that if a person is required to provide a personal identifier under subsection 257A(1) that those identifiers must be ‘provided by way of one or more identification tests carried out by an authorised officer or an authorised system’. The statement of compatibility explains that the Act currently provides for a ‘series of safeguards which apply to the carrying out of an identification test,’ which is a test ‘carried out

in order to obtain a personal identifier’ and that these will continue in relation to personal information gathered pursuant to paragraph 257A(5)(a). However, as the statement of compatibility further explains, ‘new paragraph 257(5)(b) provides a new power for the Minister or an officer to require that personal identifiers be provided in “another way”’ (at p. 37). The result is that this power ‘will provide the Minister or an officer with flexibility about how a person is to provide personal identifiers when required to do so, allowing the system of safeguards and legislative instruments which currently govern the collection of personal identifiers to be bypassed where an officer or the Minister authorises a different method of collection’ (p. 37). It is worth setting out the justification for this approach in full:

One element of the policy intent for paragraph 257A(5)(b), as described above, is that this flexible new power will be used to implement the use of small, mobile, hand-held electronic scanners to collect an image of a person’s fingers (maximum of four fingers), allowing quick checks against established databases of persons who have come into contact with authorities and provided fingerprints by another route, including under another provision under the Migration Act. This is a non-intrusive method, similar to methods used in several other countries around the world, yet effective in detecting imposters and persons who are of concern. Scanned finger images will be stored in the hand-held device, for only as long as is necessary to conduct the required checks, and return results to the hand-held device. Data will be transmitted via secure Commonwealth-endorsed standards. No data will be retained in the hand-held device, or in departmental systems following the scan.

Where a match occurs, only minimal information will be displayed on the hand-held device to indicate a match/no match has occurred. A unique identifying number will be visible, which will enable departmental officers to obtain biographic and other relevant details from data holdings to determine the most appropriate course of action. Each match will be assessed on a case-by-case basis.

In these minimally invasive circumstances, the bypassing of the safeguards that apply to more invasive methods of collection is reasonable. The benefits from this additional layer of checking are clear and in certain circumstances could be very significant, while the imposition on an individual’s privacy is minimal. As such this measure is compatible with Article 17 of the ICCPR.

The current policy intent is that the flexible new power in paragraph 257A(5)(b) will be used in these circumstances, which are compatible with Article 17 of the ICCPR. However, the power in paragraph 257A(5)(b) is extremely broad, but only those personal identifiers listed in subsection 5A(1) are authorised to be collected without further legislation. However,

compliance with Australia's international obligations is to be measured by what Australia does *in toto* by way of legislation, policy and practice, and the Government's view is that this is the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future. (statement of compatibility, p. 42)

**The committee makes no further comment on the general question of whether the proposed system and practices outlined for the collection of images of a person's fingers is appropriate and leaves this matter to the consideration of the Senate as a whole.**

The difficulty from a scrutiny perspective, however, is that the system, policy and practice associated with this method for the collection of personal identifiers will be left entirely to departmental policy and practice, without any legislative oversight. As the statement of compatibility accepts, the power in paragraph 257A(5)(b) to provide for 'another way' for the collection of personal identifiers, which are not subject to existing safeguards in the Act, is 'extremely broad' (p. 42). This power may be used to authorise other ways for the collection of personal identifiers which may raise different considerations and the appropriateness of which would not be subject to parliamentary scrutiny. Further, no reason is given for why it is necessary to, in effect, delegate these policy questions to the department or the Minister, other than that it is the government's view that this is 'the most appropriate way to implement the new fingerprint scanning measure and to provide appropriate flexibility into the future'.

In light of these issues, the claim in the statement of compatibility that the measure is compatible with the right to privacy needs to be understood in the context that the power authorises methods of collection which are not limited to that which is explained and justified in the explanatory material (see pp. 21, 37 and 42). **The committee therefore expresses reservations about the breadth of paragraph 257A(5)(b) and seeks further advice from the Minister as to the rationale for the proposed approach. In this regard, the committee particularly notes the lack of limits on the specification of further ways to collect personal identifiers, the lack of Parliamentary oversight of the important policy issues that the specification of further methods of collection may entail, and that the implementation of the use of 'hand-held electronic scanners to collect an image of a person's fingers' could be achieved through the use of a targeted amendment which included appropriate safeguards.**

*Pending the Minister's reply, the committee draws Senators' attention to these matters, 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.*

## **Broad discretionary power**

### **Items 52 and 53**

These items, in effect, remove certain limits that currently apply to the collection of personal identifiers from minors and incapable persons. These current limits include a requirement to obtain consent, and a requirement for a parent, guardian or independent person to be present during the collection of personal identifiers. The statement of compatibility includes a lengthy discussion on the reasons for doing so and the justifiability of the amendments. It is argued, among other things, that the policy intention is that only a small number of such persons would be required to provide personal identifiers and that this intention would be facilitated through giving officers 'clear policy guidance' (e.g., at p. 45) so that the general discretionary power of collection will be exercised appropriately. In relation to the rights of children it is also stated that the policy guidance will 'include provision for the careful engagement with children, taking into their vulnerability into account' (at p. 46).

The general concerns identified with the breadth of the discretionary power in new section 257A to collect personal identifiers are exacerbated in this context. If the proposed broad discretionary power is enacted, it is suggested that there is scope to include further legislative guidance as to the exercise of that power in the particular circumstances of minors and incapable persons. **The committee therefore seeks the Minister's advice as to whether consideration has been given to including more detail in the bill about what matters must be addressed and considered in exercising this power in the context of minors and incapable persons. In this regard, the committee notes that leaving such requirements to policy does not enable Parliament to assess whether the limitations on rights have been adequately justified.**

*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.*

## **National Vocational Education and Training Regulator Amendment Bill 2015**

Introduced into the House of Representatives on 25 February 2015

Portfolio: Education and Training

### **Background**

This bill amends the *National Vocational Education and Training Regulator Act 2011* to:

- reduce the regulatory burden through extension of registration periods from five to seven years;
- require any person advertising or representing a nationally recognised training course to clearly identify the provider responsible for the qualification in their marketing material;
- establish the capacity of the Minister to make standards in relation to quality in vocational education and training sector; and
- make minor administrative amendments to clarify the Act.

*The committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Matters) Bill 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Industry and Science

### **Background**

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) to:

- automatically grant or extend the coverage of titles under the Act to ensure security of tenure for titleholders over blocks moving from State/Northern Territory coastal waters into Commonwealth jurisdiction as a result of a change to the boundary of the coastal waters of a State or Territory;
- provide comprehensive arrangements for the valid granting of renewals of Commonwealth titles over blocks remaining in Commonwealth waters, where part of that title has moved into State/NT waters as a result of a change to the boundary of the coastal waters of a State or Territory;
- make further amendments relating to the conferral of functions on NOPSEMA in designated coastal waters under State or Northern Territory legislation, to provide clarification on the arrangements to both clearly distinguish between petroleum and greenhouse gas storage regulation and provide for satisfactory cost recovery arrangements for functions undertaken in waters landward of the territorial sea baseline; and
- make a number of technical amendments to the administrative framework to clarify and operation of the Act in relation to suspension of a condition and associated extension of the term of a title, and the consistent treatment of locations.

*The committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Miscellaneous Matters) Bill 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Industry and Science

### **Background**

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to:

- provide for the imposition of an annual titles administration levy with respect to a boundary-change petroleum exploration permit; and
- replace references to ‘OHS inspectors’ with references to ‘NOPSEMA inspectors’.

*The committee has no comment on this bill.*

## **Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) Bill 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Employment

### **Background**

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* to provide a framework to manage the exit of Commonwealth authorities and to ensure that Comcare's liabilities under the scheme are fully funded by premiums.

*The committee has no comment on this bill.*

## **Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015**

Introduced into the House of Representatives on 26 February 2015

Portfolio: Employment

### **Background**

This bill amends the *Seafarers Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993* to:

- repeal provisions that apply the Seacare scheme to any employees who are employed by a trading, financial or foreign corporation, in order to ensure that coverage of the scheme is tied to whether a ship is engaged in interstate or international trade and commerce;
- provide that the Seacare scheme applies to the employment of employees on a prescribed ship that is ‘directly and substantially’ engaged in interstate or international trade or commerce; and
- make technical amendments to ensure that where an employee’s employment is not covered by the Seacare scheme their employer will not be liable for a levy in respect of that employee.

### **Trespass on personal rights and liberties—retrospective application**

The purpose of this bill is to respond to a recent decision of the Full Court of the Federal Court which upset the ‘shared understanding’ (statement of compatibility, p. vii) that the Seacare scheme (established by the *Seafarers Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993*) does *not* apply in relation to ships engaged in purely intra-state trade. Ships engaged in purely intra-state trade were, prior to the decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182, assumed to be covered by the ‘relevant workers’ compensation and work health and safety legislation of the state in which they work’ (statement of compatibility, p. v). This bill proposes to restore the ‘shared understanding’ and to do so with retrospective effect (from the dates the *Seafarers Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993* commenced).

The statement of compatibility contains a detailed explanation of the rationale for the proposed retrospectivity of the proposed amendments. It is

acknowledged that ‘the precise quantum of entitlements available under each scheme [i.e. the Seacare scheme and the general workers’ compensation and work health and safety legislation of the state] varies’ (statement of compatibility, p. vii). However, the following arguments in favour of the approach are given emphasis:

1. all Australian workers’ compensation and work health and safety legislation gives adequate protection and support to injured employed;
2. the amendments will align employees’ actual rights with their understandings of those rights prior to the Federal Court decision in *Aucote*;
3. the approach is necessary to ensure the viability of the Seacare scheme. Here it is argued that employers who had acted on the basis that they were not covered by the Seafarers Act will not have insurance policies as required by that Act, but will have instead paid insurance premiums or purchased policies under other workers compensation laws. Without the proposed amendments, employers may be exposed to claims under the Seafarers Act for which they are not insured because they did not know they were covered by the Act; and
4. the approach also means that employers who were unaware that they were covered by the scheme will not be liable to prosecution for the offence of not having a policy of insurance under the Seafarers Act and not providing returns for the Safety Net Fund Levy. It is argued that the retrospective commencement of the amendments will prevent a person who has acted in good faith (i.e. on the basis of the shared understanding about the scope of the Seacare scheme) from being found guilty of an offence and ‘so is consistent and arguably supports the prohibition on retrospective criminal laws’ (statement of compatibility, p. ix).

**In light of the justification offered for the approach, the committee leaves the question of whether retrospective commencement in these circumstances is appropriate to the Senate as a whole.**

*The committee draws Senators’ attention to these matters, 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.*

## Succession of the Crown Bill 2015

Introduced into the House of Representatives on 5 March 2015

Portfolio: Prime Minister

### Background

This bill seeks to:

- end the system of male preference primogeniture so that in future the order of succession will be determined simply by order of birth;
- remove the statutory provisions under which anyone who marries a Roman Catholic loses their place in the line of succession; and
- limit the requirement that the Sovereign consent to the marriage of a descendant of his late Majesty King George the Second to the six persons nearest in line to the Crown and validate some marriages voided by the *Royal Marriages Act 1772* of Great Britain.

### Possible delayed commencement

#### Clause 2

The commencement provisions in clause 2 of the bill provide that the following provisions will commence on a date to be fixed by Proclamation:

- Part 2 (succession to the Crown not to depend on gender);
- Part 3 (marriage and succession to the Crown);
- Part 4 (other modifications of parts of the law of the Commonwealth, States and Territories); and
- Schedule 1 (further provisions relating to marriage and succession to the Crown).

The Office of Parliamentary Counsel Drafting Direction No. 1.3 (relating to commencement provisions) provides that ‘as a general rule, a restriction should be placed on the period within which an Act, or a provision of an Act, may be proclaimed’ (paragraph 22). Drafting Direction 1.3 also states that:

Clauses providing for commencement by Proclamation, but without the [time limit] restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government’s control (e.g.

enactment of complementary State legislation). *Commencement provisions of this kind should be explained in the Explanatory Memorandum.* (paragraph 26; emphasis added)

While the commencement of provisions in this bill may depend ‘on an event whose timing is uncertain and generally not within the Government’s control’, there is no explanation as to the rationale for this approach in the explanatory memorandum.

Nevertheless, given the nature of the changes proposed in the bill, the committee makes no comment in relation to this matter other than to reiterate its view that the rationale for providing for commencement on a date to be fixed by proclamation should be outlined in the explanatory material accompanying such bills.

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

## COMMENTARY ON AMENDMENTS TO BILLS

### **Criminal Code Amendment (Animal Protection) Bill 2015**

*[Digest 2/15 – awaiting response]*

On 3 March 2015 Senator Back tabled a correction to the explanatory memorandum in the Senate.

**The committee has no comment on this correction to the explanatory memorandum.**

### **Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Bill 2014**

*[Digest 1/15 –Report 2/15]*

On 5 March 2015 the Minister for Indigenous Affairs (Senator Scullion) tabled a replacement explanatory memorandum and the bill was read a third time.

**The committee notes that the replacement explanatory memorandum includes additional explanatory detail in relation to the abrogation of the privilege against self-incrimination. The committee thanks the Minister for including this additional information, as requested by the committee in its *Second Report of 2015* (p. 198).**

### **Enhancing Online Safety for Children Bill 2014**

*[Digest 1/15 – Report 2/15, awaiting further response]*

On 4 March 2015 the Senate agreed to two Government amendments and Assistant Minister for Social Services (Senator Fifield) tabled a supplementary explanatory memorandum. On 5 March 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

**The committee has no comment on these amendments or additional explanatory material.**

### **Tax and Superannuation Laws Amendment (2014 Measures No. 5) Bill 2014**

*[Digest 1/15 –Report 2/15]*

On 2 March 2015 the Senate agreed to four Opposition amendments. On 3 March 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

**The committee has no comment in relation to these amendments.**

## 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 44<sup>th</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 44<sup>th</sup> Parliament since the previous *Alert Digest***

Nil

### **Other relevant appropriation clauses in bills**

Nil