

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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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.

Aged Care Amendment (Independent Complaints Arrangements) Bill 2015

Introduced into the Senate on 13 August 2015

Portfolio: Social Services

Background

This bill amends the *Aged Care Act 1997* to transfer the responsibility for aged care complaints from the Secretary of the Department of Social Services to the Aged Care Commissioner. The measure is expected to commence from 1 January 2016.

The committee has no comment on this bill.

Asian Infrastructure Investment Bank Bill 2015

Introduced into the House of Representatives on 13 August 2015

Portfolio: Treasury

Background

This bill provides authority and an appropriation for the payment of Australia's capital contribution to the Asian Infrastructure Investment Bank, thereby facilitating Australia's membership of the Bank.

Delegation of legislative power

Possible trespass on personal rights and liberties

Clause 8

Clause 8 will allow regulations to confer on the bank 'such privileges and immunities as are necessary or desirable to give effect to Chapter IX of the Bank Agreement'. Chapter IX is headed 'status, immunities, privileges and exemptions' and these are described as being needed 'to enable the Bank to fulfil its purpose and carry out the functions entrusted to it' (Article 44). Chapter IX covers topics such as:

- the status of the bank as a 'juridical personality';
- immunity from judicial proceedings, immunity of assets and archives and immunities and privileges for officers and employees;
- privilege for communications; and
- freedom of assets from restrictions.

The explanatory memorandum notes that under the Bank Agreement Australia is 'obligated' to provide certain privileges to the Bank and officers and employees of the bank and provides an example in relation to:

...the exemption from application of laws relating to immigration and the registration of aliens for experts and consultants performing services for the Bank which are additional to those that would ordinarily be provided to other international organisations (see pp 7 and 8).

While there is some information available about the scope of possible immunities and privileges that might be provided by regulation under clause 8, the committee is interested in more detail about the nature of the

proposed immunities and privileges. In particular, the committee seeks advice from the Minister which addresses the question of whether these modifications to the normal operation of the law may have an adverse impact on the personal rights or liberties of individuals.

In accordance with its terms of reference, the committee also scrutinises bills to ensure that delegations of power are made appropriately. The committee prefers that important matters are included in primary legislation unless there is a comprehensive and persuasive justification for an alternative approach. **The committee therefore also seeks the Minister's advice as to the reasons why it is considered appropriate for these privileges and immunities to be set out in regulation, rather than for them to be included in the bill itself.**

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) and to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Banking Laws Amendment (Unclaimed Money) Bill 2015

Introduced into the House of Representatives on 13 August 2015

Portfolio: Treasury

Background

This bill amends the *Banking Act 1959* and the *Life Insurance Act 1995* to:

- extend the unclaimed moneys period from three years to seven years for accounts held by authorised-deposit taking institutions (ADI) and life insurance providers;
- exempt ADI accounts created for children and those that are held in a foreign currency from the unclaimed moneys provisions;
- stop ADI accounts being transferred to the Commonwealth where the account holder provides notification that the account should be treated as active after the account is assessed as unclaimed moneys at the end of the calendar year but before it is transferred to the Commonwealth;
- remove the requirement for the Australian Securities and Investment Commission to publish details of unclaimed moneys in the annual *Unclaimed Moneys Gazette*; and
- introduce secrecy provisions to prevent access to information on unclaimed moneys via the *Freedom of Information Act 1982*.

The committee has no comment on this bill.

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

Introduced into the Senate on 13 August 2015

By: Senators Leyonhjelm and Day

Background

This bill amends the *Fair Work Act 2009* to state that ‘excluded small business employers’ (employers who employ fewer than 20 full-time equivalent staff in the restaurant and catering, hospitality or retail industries) cannot be required by an existing or future modern award to pay penalty rates unless the work is in addition to ten hours of work in a day, the work is on a public holiday, or the work is on a weekend and in addition to 38 hours of work over a seven day period.

Retrospective application

Item 6, application of section 155A of the amended Act

This bill creates new section 155A, which provides that a modern award must not include a term that would require an excluded small business employer to pay penalty rates to an employee in specified industries, unless the work is in addition to ten hours of work in a 24 hour period, the work is on a public holiday, or the work is on a weekend and in addition to 38 hours of work over the relevant week. This item permits section 155A of the amended Act to apply to awards that were made prior to the commencement of the bill.

The committee is concerned about the retrospective impact of provisions if they will, or might, have a detrimental effect on any person and looks to the explanatory material accompanying the bill for a comprehensive and persuasive justification of the proposed approach.

As the explanatory memorandum merely repeats the effect of item 6 without further explanation **the committee seeks the Senators’ explanation in relation to the fairness of applying this provision to awards made before the commencement of the provision.**

Pending the Senators’ 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.

Maritime Transport and Offshore Facilities Security Amendment (Inter-State Voyages) Bill 2015

Introduced into the House of Representatives on 12 August 2015

Portfolio: Infrastructure and Regional Development

Background

This bill amends the *Maritime Transport and Offshore Facilities Security Act 2003* to remove Australian regulated ships that are used solely for inter-State voyages from the existing regulatory regime.

The committee has no comment on this bill.

Parliamentary Expenses Amendment (Transparency and Accountability) Bill 2015

Introduced into the Senate on 13 August 2015

By: Senator Xenophon

Background

This bill amends the *Parliamentary Entitlements Act 1990* to create a new regime of transparency and accountability in relation to travel benefits claimed by members, Parliamentary office-holders and Ministers.

The committee has no comment on this bill.

Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015

Introduced into the Senate on 10 August 2015

By: Senator Wong

Background

This bill amends the *Intelligence Services Act 2001*, the *Independent National Security Legislation Monitor Act 2010*, and the *Inspector-General of Intelligence and Security Act 1986* to:

- remove current constraints on the membership of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to provide that, except for a minimum representation of one Government Member and Senator and one Opposition Member and Senator, the balance of the 11 member PJCIS can be drawn from either chamber;
- provide for the PJCIS to conduct own motion inquiries after consultation with the responsible Minister;
- authorise the Independent National Security Legislation Monitor (INSLM) to provide the PJCIS with a copy of any report on a matter referred to it by the committee;
- require the Inspector-General of Intelligence and Security to give the PJCIS a copy of any report provided to the Prime Minister or a Minister within three months;
- give the PJCIS the function of conducting pre-sunset reviews of legislation containing sunset provisions; and
- add the INSLM and the National Security Adviser to officers able to be consulted by the PJCIS.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

[Digest 4/15 – Report 5/15]

On 12 August 2015 the Minister for Justice (Mr Keenan) presented a replacement explanatory memorandum to the bill.

The committee notes that the replacement explanatory memorandum includes additional explanatory detail in relation to:

- **the imposition of a legal burden of proof on the defendant in proposed new subsection 270.7A(4) of the *Criminal Code*; and**
- **the proposed reintroduction of ‘knowingly concerned’ as an additional form of secondary criminal liability.**

The committee thanks the Minister for including this additional information. The committee also takes this opportunity to draw Senators’ attention to the comments on this bill in the committee’s *Fifth Report of 2015* (pp 322–336), including the comments relating to the retrospective effect of schedule 14.

Medical Research Future Fund Bill 2015

[Digest 6/15 – no comment]

On 12 August 2015 the Senate agreed to 20 Government amendments and the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum to the bill.

On 13 August 2015 the House of Representatives agreed to 19 Senate amendments, disagreed with one and made an identical amendment in place of that amendment. On the same day the Senate agreed to the House of Representatives identical amendment and the bill was passed.

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

Medical Research Future Fund (Consequential Amendments) Bill 2015
[Digest 6/15 – no comment]

On 12 August 2015 the Senate agreed to one Government amendment and the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum to the bill.

On 13 August 2015 the House of Representatives agreed to the Senate amendment and the bill was passed.

The committee has no comment on this amendment or the additional explanatory material.

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015
[Digest 3/15 – Reports Nos 5-7/15]

On 12 August 2015 the Senate agreed to one Government amendment and the Assistant Minister for Immigration and Border Protection (Senator Cash) tabled a supplementary explanatory memorandum.

On 13 August 2015 the House of Representatives agreed to the Senate amendment and the bill was passed.

The committee welcomes this Government amendment, which will provide that nothing in the Migration Act authorises the Minister or an officer to require a person to provide a personal identifier under section 257A in a cruel, inhuman or degrading way, or in a way that fails to treat the person with humanity and respect for human dignity.

While noting that the bill has already passed, the committee takes this opportunity to reiterate its view that it would have been preferable to also include a legislative requirement for the department to take reasonable steps to ensure that a parent or guardian be present with a minor or incapable person during the collection of personal identifiers unless there are reasonable grounds to believe that this would undermine the purpose of the legislation and possibly the best interests of the child (such as in exploitation or trafficking situations).

In addition, the committee reiterates its view that it would have been highly desirable for the bill to provide that authorisation of new methods for the collection of personal identifiers should (at a minimum) be established by regulation, rather than being left to executive discretion.

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*.

Bills introduced with standing appropriation clauses in the 44th Parliament since the previous Alert Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Asian Infrastructure Investment Bank Bill 2015 — Clause 7: special appropriation clause – for a specified purpose