

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.

TABLE OF CONTENTS

Commentary on bills

- Australian Immunisation Register Bill 2015 1
- Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015 3
- Maritime Legislation Amendment Bill 2015 4
- Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 5
- Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015 7

Commentary on amendments to bills

- Social Services Legislation Amendment (No. 2) Bill 2015 8
- Water Amendment Bill 2015 8
- Scrutiny of standing appropriations** 9

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 Immunisation Register Bill 2015

Introduced into the House of Representatives on 10 September 2015
Portfolio: Health

Background

This bill provides for the expansion and consolidated management of Australian immunisation registers.

Undue trespass on personal rights and liberties—privacy Broad discretionary power Subclause 22(3)

Subclause 22(3) empowers the Minister for Health (or delegate) to authorise, in writing, a person to make a record of, disclose or otherwise use protected information “for a specified purpose that the Minister is satisfied is in the public interest”. This power is in addition to subclause 22(2), which provides in detail for the uses and disclosures that are authorised for the purposes of the Privacy Act.

The explanatory memorandum does not discuss why it is necessary to supplement instances of authorised uses and disclosures by conferring a broad power on the Minister, conditioned only upon her or his satisfaction that the authorisation is in the public interest. The explanatory memorandum (at p. 15) gives an example of a situation that may be deemed to be in ‘the public interest’, that is ‘where a child protection agency requests information when investigating the welfare of a child’. If the envisaged use of the power is focused on circumstances in which the welfare of a child is at stake, it would be appropriate for the power to be more narrowly drafted to reflect this. In addition, the explanatory memorandum refers to disclosure being limited to ‘a specified person or to a specified class of persons’, but this limitation does not appear in the text of the provision.

The committee seeks the Minister’s advice as to the justification for the breadth of this power, especially given that its exercise may affect individual privacy. In particular, the committee is interested in whether consideration has been given to drafting the power more narrowly.

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 or to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principles 1(a)(i) and 1(a)(ii) of the committee's terms of reference.

Undue trespass on personal rights and liberties—reversal of onus of proof

Clauses 24 to 27

These clauses provide for a number of exceptions to an offence relating to dealings with protected information. For each of these exceptions the defendant bears an evidential burden in relation to the matters in each clause.

Although the explanatory memorandum describes the legal effect of an evidential burden, it provides no justification for the reversal of the onus. **The committee therefore seeks the Minister's advice as to the justification for the reversal of onus, particularly addressing the relevant principles set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).**

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.

Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015

Introduced into the House of Representatives on 10 September 2015

Portfolio: Health

Background

This bill provides for the consequential and transitional provisions required to support the operation of the *Australian Immunisation Register Act 2015*.

The committee has no comment on this bill.

Maritime Legislation Amendment Bill 2015

Introduced into the House of Representatives on 9 September 2015

Portfolio: Infrastructure and Regional Development

Background

This bill amends various Acts by:

- amending the definition of ‘sea near a state’ in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* in order to clarify jurisdictional boundaries of the territorial sea baseline;
- amending the definition of ‘dangerous goods’ in the *Navigation Act 2012*; and
- correcting a legislative drafting error in the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damages) Act 2008* and in the *Protection of the Sea (Civil Liability) Act 1981*.

The committee has no comment on this bill.

Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

Introduced into the House of Representatives on 10 September 2015

Portfolio: Employment

Background

This bill amends the *Social Security (Administration) Act 1999* to:

- amend penalties for failing to enter into an Employment Pathway Plan;
- suspend payments and apply penalties for failing to behave in an appropriate manner at an appointment;
- enable more immediate application of penalties for failing to participate in activities or job interviews;
- suspend payments for inadequate job search;
- remove waivers for serious penalties incurred for refusing or failing to accept a suitable job; and
- repeal redundant provisions and simplify the compliance framework by renaming all failures resulting in short-term penalties as ‘no show no pay’ failures, and by repealing connection and reconnection failure provisions.

Broad discretionary power

Inappropriate delegation of legislative power

Schedule 1, item 34, proposed subsections 42SA(5)–(7)

New subsections 42SA(5), (6) and (7) would allow the Secretary, by legislative instrument, to determine matters that the Secretary must consider when deciding whether a job seeker has acted in an inappropriate manner at an appointment (the consequences of which will be suspension of payments).

The explanatory memorandum does not explain why these matters cannot be included in the primary legislation. Further, subsection 42SA(5) empowers the Secretary to make a legislative instrument to determine what matters must be taken into account, *but does not require that such an instrument be made*.

In addition, subsection 42SA(7) makes it clear that matters additional to any prescribed by such a legislative instrument can also be taken into account by the Secretary.

The committee therefore seeks the Minister's advice as to:

- **whether consideration has been given to providing for these matters (or some limitations on this power) in the primary legislation; or**
- **whether the provision can be amended to *require* the Secretary to determine the mandatory relevant considerations for determining whether a job seeker has acted in an inappropriate manner. The committee notes that without such a legislative instrument the Secretary has a broadly framed power to determine what constitutes inappropriate behaviour at an appointment.**

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

Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015

Introduced into the House of Representatives on 10 September 2015

Portfolio: Social Services

Background

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

- remove the family assets test and the family actual means test from the youth allowance parental means test arrangements from 1 January 2016;
- align parental income test exemptions for youth allowance with existing arrangements for family tax benefit Part A from 1 January 2016;
- remove maintenance income from the youth allowance parental income test assessment from 1 January 2016, and from 1 January 2017, the treatment of child support will be a separate maintenance income test; and
- provide that youth allowance will include all family tax benefit children in the family pool for the youth parental income test from 1 July 2016.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Social Services Legislation Amendment (No. 2) Bill 2015

[Digest 6/15 – no comment]

On 7 September 2015 the Senate agreed to five Government and three Opposition amendments.

On 8 September 2015 the Minister for Indigenous Affairs (Senator Scullion) tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee welcomes the government amendments to the bill, which defer the commencement dates for two measures in light of the time taken for passage of the bill. The amendments therefore ensure that the measures do not operate retrospectively.

Water Amendment Bill 2015

[Digest 6/15 – no comment]

On 9 September 2015 the Minister for the Environment (Mr Hunt) presented a replacement explanatory memorandum.

The committee has no comment on this additional material.

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

Nil